CIHM
Microfiche
Series
(Monographs)

ICMH
Collection de
microfiches
(monographies)

Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques

Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- [x] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [x] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [ ] Bound with other material/ Relié avec d'autres documents
- [ ] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

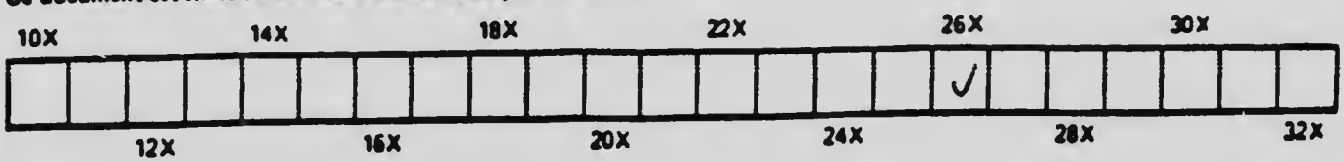
- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [x] Quality of print varies/ Qualité inégale de l'impression
- [ ] Continuous pagination/ Pagination continue
- [x] Includes index(es)/ Comprend un (des) index

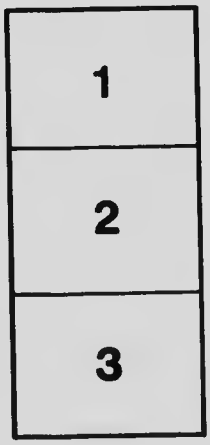
  Title on header taken from:/ Le titre de l'en-tête provient:

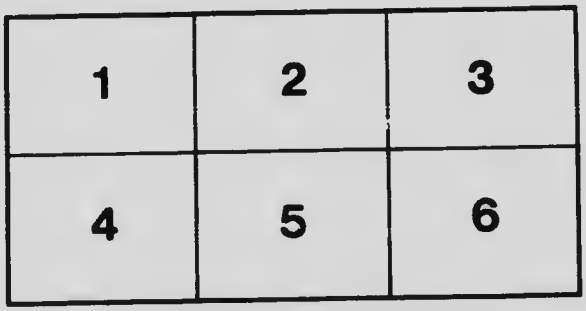
- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison

- [x] Additional comments:/ Commentaires supplémentaires: Various pagings.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

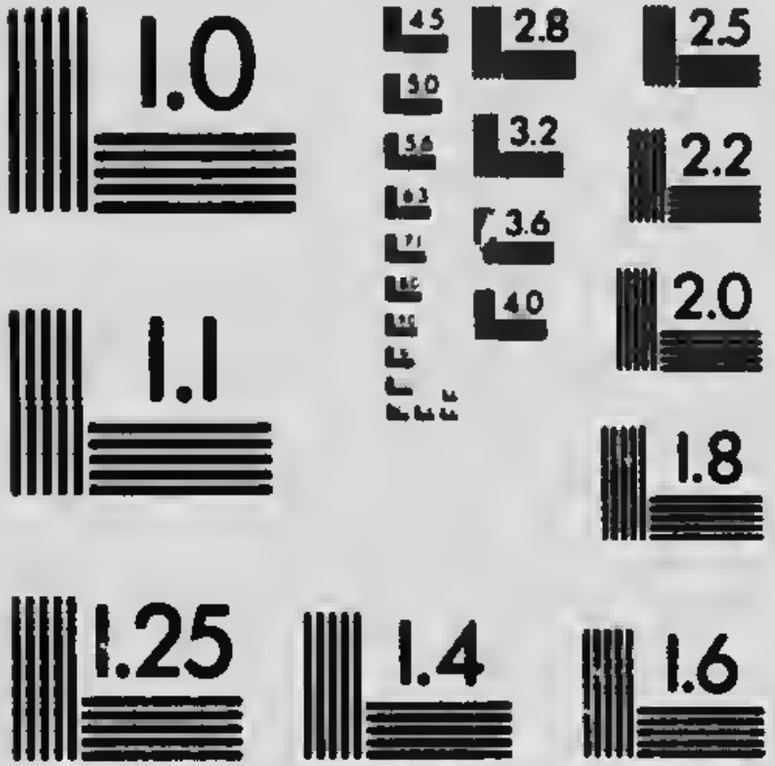






MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

CANADIAN COMPANIES

Proceedings in the Judicial Committee of the Privy Council

(December 8-17, 1915)

In the Appeals of

THE ATTORNEY-GENERAL FOR CANADA v. THE ATTORNEY-GENERAL FOR ALBERTA (1916) A.C. 588

Insurance Reference

THE BONANZA CREEK GOLD MINING COMPANY v. THE KING (1916) A.C. 566

ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR CANADA (1916) A.C. 598

Companies Reference

To which is added the judgments of the Judicial Committee in these cases and in the appeal of the John Deere Plow Company v. Wharton (1915) A.C. and an INDEX.

ALSO

A REVIEW of the said Decisions by EDWARD ROBERT CAMERON, one of His Majesty's Counsel and Registrar of the Supreme Court of Canada.

TORONTO:
THE CARSWELL COMPANY, LIMITED
LONDON:
SWEET & MAXWELL
1917

INDEX.

Alberta Legislation, p. xxiv.
Ashbury Railway Carriage Co. v. Riche, L. R. 7 H. L. 653, pp. 12, 14, 15, 197, 231, 253, 258, 262, 265, 267, 275, 276, 278, 283.
Attorney-General for Australia v. Colonial Sugar Refining Co. (1914), A. C. 237, pp. 13, 133, 287.
Attorney-General for Ontario v. Attorney-General for Canada (unreported) (McCarthy Act, 1883), pp. 37, 144-147, 165, 176, 177.
Attorney-General for Ontario v. Attorney-General for Canada (Liquor License Act), 1896, A. C. 348, pp. 54, 85, 89-100, 115, 125-126, 129, 155, 170, 238, 239.
Attorney-General for Canada v. Attorney-General for Ontario (Fisheries case) (1898), A. C. 700, p. 48.
Attorney-General for Manitoba v. Manitoba License Holders (1902), A. C. 73, pp. 51, 128-130, 165.
Attorney-General for Canada v. Attorney-General for Ontario (Queen's Counsel case) (1898), A. C. 247, p. 304.
Attorney-General for Ontario v. Attorney-General for Canada (Companies case) (1912), A. C. 571, p. 53.
Attorney-General for Canada v. Attorney-General for Alberta (Insurance Reference) (1916), A. C. 588, p. 18.
Attorney-General for Ontario v. Attorney-General for Canada (Companies Reference) (1916), A. C. 598, p. 21.
Ancillary Powers, pp. 292-294.
Bank of Toronto v. Lambe (12), A. C. 575, pp. 6, 7, 66, 77, 136, 137, 152.
Bonanza Creek Gold Mining Co. v. The King (1916), A. C. 566, pp. 8, 21, 23.
Bonanza case and Companies Reference, pp. 195-351.
    Discussions of judgments below of—
        Sir Charles Fitzpatrick, C.J., p. 229
        Davies, J., p. 236
        Idington, J., p. 242
        Duff, J., p. 250
        Anglin, J., p. 256
        Brodeur, J., p. 270
    Argument of Counsel—
        Sir Robert Finlay, pp. 195-280; reply, p. 345
        Hellmuth, K.C., pp. 280-284
        Moss, K.C., pp. 284-286
        Nesbitt, K.C., pp. 286-295
        Newcombe, K.C., pp. 295-335
        Mason, pp. 335-339
        Wegenast, p. 339-345
Brewers' and Maltsters' Association v. Attorney-General for Ontario (1897), A. C. 231, p. xix.
Bristow v. Towers, 6 Term. R. 36, pp. 62, 63, 73, 157.
British Columbia Legislation, pp. x., xiii.-xvi.
Canadian Pacific Railway Co. v. Ottawa Fire Ins. Co., 39 S. C. R. 405, pp. 50, 196, 225, 233, 330.
Capacity, vide Status.
Citizens Ins. Co. v. Parsons, 7 A. C. 96, pp. 5, 7, 41, 45, 49, 57, 61, 62, 64, 65, 66, 75, 77, 78-80, 111, 114, 118, 122, 135, 147, 151, 159, 239.
Colonial Bldg. Association v. Attorney-General for Quebec, 9 A. C. 157, pp. 5, 6, 7, 62, 152.
Companies Act (Ontario), pp. 272, 287.
" " (Dominion), pp. 286-288.
" " (English), pp. 284.
Companies—Incorporation of, pp. 306-321.
"Companies" Legislation—History, p. v.
Companies Reference *vide* Bonanza case, pp. vi., viii.
Comanche County v. Lewis, 133 U. S., p. 278.

Constitution—Distribution of power, pp. 131, 287-291, 304-308, 312, 317-320.
Direct Taxation, pp. ix., xxi., xxiv., 136, 137.
Dobie v. Temporalities Board, 7 A. C. 136, p. 278.
Federal and Provincial Powers, vide "Constitution."
Grand Trunk Railway Co. v. Attorney-General for Canada (1907), A. C., p. 154.
Hodge v. The Queen, 9 A. C. 117, p. 20, 142-145, 183-185.
Indirect Taxation, p. xxii.
Insurance Reference, p. 26-194.
Discussion of judgments below—
Sir Charles Fitzpatrick, C.J., 41
Davies, J., 44
Idington, J., 47
Duff, J., 55
Anglin, J., 57
Brodeur, J., 61
Argument of Counsel—
E. L. Newcombe, K.C., 26-70, reply 182-194.
Upjohn, K.C., 70-101
Sir Robert Finlay, 101-171
Geoffrion, K.C., 171-182
John Deere Plow Co. v. Wharton (1915), A. C. 330, pp. vii., 3, 21, 23, 40, 61, 84, 93, 125, 127, 148-153, 175, 180, 216, 220, 222.
La Compagnie Hydraulique v. Continental Heat & Light Co. (1909), A. C. 154, pp. 54, 237, 258.
License Fee, pp. xx., xxi., xxii.
Liquidator Maritime Bank v. Receiver-General (1892), A. C. 437; pp. 14, 17, 182, 287.
Manitoba Legislation, pp. xiii.-xvi.
Montreal v. Montreal Street Railway (1912), A. C. 333, pp. 114, 116.
Musgrave v. Palido (1879), A. C. 102, p. 16.
New Brunswick Legislation, p. xxiv.
New York Life v. Craven, 178 U. S. 389, p. 48.
Nova Scotia Legislation, p. xxv
Ontario Legislation, pp. xiii.-xvi.
Peace, Order and Good Government, pp. 68, 83-85, 91, 95, 96, 116, 124, 130, 133, 155.
Peace, Order and Good Government, Abandonment of Claim, 101, 132.
Powers, Ancillary, *vide* Ancillary Powers.
Powers, *vide* "Status."
Powers, Prerogative, *vide* Prerogative.
Prerogative, pp. vi., 12-17, 277, 278, 283, 284, 287, 304-321.
Provincial Objects, pp. 217-223, 236, 322, 323, 327, 343.
Provincial Statutes, *ultra vires*, p. x.
Paul v. Virginia, 8 Wall. 168, pp. 159, 160.
Quebec Legislation, p. xxiv.
Regulation of Trade and Commerce, pp. 36, 64-75, 80-83, 113-124, 128, 133, 143-147, 156-166, 181, 182.
Russell v. The Queen, 7 A. C. 829, pp. 20, 36, 37, 43, 44, 87, 89, 90, 92, 95, 97-103, 121, 126, 129, 130, 138-141, 165, 166, 170, 183.
Saskatchewan Legislation, pp. xiii.-xvi.
"Status" or Powers, pp. 6-8.
"Status" or Capacity distinguished from "rights," pp. 7, 8, 216-222, 235, 236, 241, 259-262, 272, 326.
Sutton's Hospital Case, 10 Rep. 13, *vide* Ashbury v. Riche.
Taxation *vide* Direct Taxation, Indirect Taxation.
Tennant v. The Union Bank (1894), A. C. 31, p. 190.
Toronto v. Virgo (1896), A. C. 93, pp. 38, 89, 146, 147.
Trade and Commerce *vide* Regulation of Trade and Commerce.
Union Colliery v. Bryden (1899), A. C. 580, pp. 8, 41, 56.
Ultra vires, pp. vi., x., also *vide* Companies—Incorporation of.
Uniform Taxation, p. xxiv., and Brewers' and Maltsters' Case, p. xix.

Canadian Companies.

The judgment of the Judicial Committee of the Privy Council in the *John Deere Plow Co.* v. *Wharton*, 1915, A. C. 330, and in the recent cases of *Bonanza Creek Gold Mining Co.* v. *The King* (1916), A. C. 566; *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), A. C. 588, and *Attorney-General for Ontario* v. *Attorney-General of Canada* (1916), A. C. 598, form a series of co-related decisions which mark another advance in the effort to determine the field of legislative authority with respect to companies possessed by the Parliament of Canada on the one hand and the various Provinces on the other.

Antecedent History.

At the date of confederation there was in force in Canada a Companies' Act (27-28 Vict. chapter 23), by which companies might be incorporated by letters patent under the Great Seal with power to carry on various manufacturing and commercial businesses. The Statute placed no limitation on the extent of the companies' activities. In addition in both provinces there were statutes which provided for the incorporation of companies for various local or provincial purposes. Just what were the legislative powers of the Dominion and the Provinces remained for many years a matter of uncertainty and dispute between the respective governments. The question became acute in 1906 when the Supreme Court of Canada pronounced judgment in the case of the *Canadian Pacific Railway* v. *Ottawa Fire Insurance Company* (39 S. C. R. 405), where two of the Judges held that sub-section 11 of section 92 of the British North America Act empowering a legislature to incorporate "companies for provincial objects" not only creates a limitation as to the objects of a company so incorporated, but confines its operations within the geographical area of the province creating it and the possession by the company of a license from the Dominion Government authorizing it to do business throughout Canada is of no avail for that purpose.

In May, 1910, the Governor-General in Council referred to the Supreme Court for its opinion a number of questions respecting the powers which a Provincial Legislature could confer upon companies incorporated by it. Question 3 dealt with the power of a fire insurance company to insure property outside the province of its incorporation. Questions 6 and 7 inquired as to the competency of a Provincial Legislature to require a Dominion company to obtain a provincial license and pay fees as a condition of carrying on its operations. In the month on June, of the same year, a further order was passed by the Governor-General in Council for a reference to the Supreme Court for its opinion upon the validity of certain sections of the Dominion Insurance Act which required every company, underwriter or person to obtain a Dominion license as a condition of its carrying on the business of life insurance. The provinces refused to be parties to these references and the hearing was delayed until the Judicial Committee of the Privy Council, upon an appeal, held that the Supreme Court had jurisdiction to answer the questions propounded by the Governor-General in Council. In the meantime an appeal was brought to the Judicial Committee from the Supreme Court of British Columbia in the case of the *John Deere Plow Co.* v. *Wharton*, which in a concrete form required the determination of the matters dealt with in questions 6 and 7 in the Companies' Reference. The substantial question involved was the power of the province of British Columbia to exact a license from a Dominion company before it could carry on its operations in that province. The decision in the *John Deere Plow Company* v. *Wharton* was pronounced in November, 1914. In February, 1915, the Supreme Court of Canada gave judgment in an appeal from the Exchequer Court of Canada in the case of the *Bonanza Creek Gold Mining Co.* v. *The King*, in which it was held that a mining company incorporated under the laws of the province of Ontario had no power or capacity to carry on its operations in the Yukon Territory. Thereupon steps were taken to bring on

for hearing before the Judicial Committee an appeal from the judgment in the Bonanza Creek case and also from the decisions of the Supreme Court which had been given in October, 1912, in the two references above mentioned. When the three cases came on for hearing before the Committee, it was agreed that the Insurance Reference should be first heard and that the case of *Bonanza Creek Gold Mining Co.* v. *The King* and the Companies Reference should be argued together. In pronouncing judgment in the Companies' Reference the Judicial Committee said:—

> "As to questions 6 and 7, their Lordships have endeavoured, in the case of the *John Deere Plow Company* v. *Wharton* (1915), A. C. 330, to give as must assistance as is practicable in answering these questions. These questions are, however, in some of their developments of a highly abstract character and the Board is of opinion that it is not prudent to go further than was done in the judgment in that case."

It becomes necessary, therefore, in considering the effect of the three later judgments of the Judicial Committee (the notes of argument of which are contained in this volume), that the judgment in the John Deere Plow case be also discussed.

This latter decision was adverse to the pretentions of the province and seemed to imperil a substantial source of revenue which many of the provinces had been receiving in the nature of fees for the licensing of companies. The judgments of the Judicial Committee in the three later cases which were favourable to the provinces, held that the powers and capacities of provincial companies were more extensive than had before been recognized or claimed. The short effect of the decision was that the Bonanza Company, incorporated by letters patent, had the capacity of a natural person to acquire powers and rights, and that the doctrine of *ultra vires* had no application in the absence of statutory restriction.

Up to the time of this decision it was assumed on all hands, as expressed by Mr. Justice Duff in the *Bonanza Case* (50 S. C. R. 534), that "it is not disputed that the doctrine of *ultra vires* applies to companies incorporated under the Ontario Companies Act, and it is self-evident that Lord Cairn's reasoning in *Ashbury Railway Carriage Co* v. *Riche* applies to that Act." The position taken by the appellant at the opening of the appeal in the Privy Council is expressed by Sir Robert Finlay in the following discussion (p. 196):

LORD PARKER: Are those letters patent granted pursuant to an Act of the Provincial Legislature of Ontario?

SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: It is not the exercise of the power of the Crown outside sections 91 and 92; it is something done in exercise of the power conferred by the legislature?

SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: This company is in the same position practically as a limited company under Statute?

SIR ROBERT FINLAY: It is analogous.

LORD PARKER: The capacity of the company depends upon its method of incorporation? A company created either by the common law or the Crown is in a different position to a statutory corporation in regard to capacity.

SIR ROBERT FINLAY: Yes, my Lord.

The rights of the Bonanza Company were based upon the grants made to it by the Dominion Government and not upon any inherent capacity which the company had by virtue of its letters patent from the province of Ontario. Later in the argument, the nature of the grant by letters patent, in view of the prerogative powers conferred upon the Lieutenant-Governor by the British North America Act was developed by Viscount Haldane (p. 287), and he enunciated the theory of the distribution of prerogative powers with respect to the incorporation of companies which finally became the *ratio* of the judgment of the Judicial Committee.

At p. 230 Sir Robert Finlay says:—"The importance for my argument is this, that if the foreign country has made a certain grant, even if on a careful examination of the documents relating to the company, the conclusion might be reached

that it was beyond the capacity of the company, according to its charter of incorporation in the foreign country where that grant was made, that would be perfectly effectual, because although they might have proceeded on a view which turns out on close examination to be erroneous, yet in the foreign country they have done something which necessarily by implication confers capacity."

The decision has been severely criticized by lawyers of eminence in Canada. A further consideration has much modified the first impression as to the value of the provincial victory. Indeed many now believe that the Judicial Committee has evolved a Frankenstein that may have a devastating influence upon the commercial world. They hold that the result of these judgments is to declare that the doctrine of *ultra vires* no longer applies to what we have heretofore deemed to be statutory companies; that shareholders no longer have the assurance that their directors have no power to commit them to enterprises not within the declared objects mentioned in the letters patent and that the only remedy is by *scire facias* at the instance of the Crown. Other lawyers on the contrary hold that a company incorporated under any of our Canadian Letters Patent Acts is partly a prerogative company and partly a statutory company, inasmuch as certain of the powers of the company are conferred by the Statute and are such as the Crown without statutory authority could not confer, and therefore, as expresed by a prominent lawyer, "the doctrine of *ultra vires* applies to any act which is not within the scope of the powers with which companies incorporated by letters patent are vested by virtue of the Statute, but does not apply to acts which are beyond or outside the powers which such companies are deemed to possess by virtue of their incorporation by act of the sovereign through the designated official and not by or under the Statute."

Uniformity of Legislation Desirable.

Section 94 of the British North America Act provides that the Parliament of Canada may make provision for the uniformity of the laws relating to property and civil rights, but subject only to the approval of the legislature of any province affected thereby. It is alleged that the revenue derived from the fees imposed upon companies by the Provinces is largely the occasion for the legislation which has been the subject of so much litigation. If this is so, the dispute would appear to be one which might be readily adjusted. It is certainly eminently desirable in the interest of the commercial world that the Dominion and the Provinces should agree upon some uniform legislation with respect to the incorporation of companies and the powers which companies should have and exercise throughout Canada.

The Canadian Bar Association about a year ago appointed a committee to draft some uniform companies' legislation which could be recommended to the legislatures of all the provinces of Canada, but so far as I know it has not made any report. In the meantime, however, the three provinces of Alberta, Ontario and Manitoba have amended their companies legislation by providing that every company heretofore and hereafter created . . . should, unless otherwise declared in the Act or instrument creating it, have and be deemed from its creation to have had the general capacity which the common law ordinarily attaches to companies created by charter, and in the Bill which has been recently introduced in the Parliament of Canada to consolidate the Companies Act, it is provided by section 15 (*a*) :—

> "That such company shall, unless otherwise expressly declared in the Act or instrument creating it, or in the memorandum of association thereof, have, and be deemed to have had from its creation, the capacity of a natural person to accept powers and rights outside of the Dominion of Canada, and to exercise its powers beyond the boundaries of Canada to the extent to which the laws in force where such powers are sought to be expressed permit, and shall, unless otherwise expressly declared in the Act or instrument creating it, or in the memorandum of association thereof, have, and be deemed to have had from its creation, the general capacity which the common law ordinarily attaches to corporations incorporated by royal charter under the great seal."

Under these circumstances any light which can be thrown upon the elucidation of this most vexed and difficult problem, must be welcomed. No apology therefore is needed for the publication of this volume containing the full notes of the eight days' argument of these appeals before the Judicial Committee. The index at the end of the volume will facilitate a reference to the various phases of the matters under discussion.

JOHN DEERE PLOW CO. v. WHARTON.

Notwithstanding the decision in this case, many important questions still remain to be determined where there is involved the extent to which provincial legislation must now be held to be invalid. The Notes of Proceedings in the John Deere Plow case have already been printed by Messrs. Chas. Russell & Co., solicitors in England for the Government of Canada. Litigation is now pending in the Courts of a number of provinces with respect to the validity of provincial legislation which provides for the licensing and registration of Dominion companies. Without expressing any opinion on the controversial matters involved in these decisions, I have, however, thought that a useful purpose would be served by reproducing the main sections of the companies legislation in British Columbia which were under consideration in the John Deere Plow case and place in juxtaposition the legislation of the different provinces on the same subject matter, and by adding the observations made by counsel and some of the members of the Judicial Committee upon the various sections. In this way it will be possible to consider how far the criticisms of their Lordships of the Judicial Committee, expressed as they are in general terms in this judgment, are applicable to the legislation now in force in the different provinces of Canada.

To appreciate the effect of this judgment, it is necessary to clearly understand the issues which were raised between the parties. The action was begun by writ issued 16th May, 1913. The plaintiff claimed (*a*) That the defendant company was not licensed to carry on business in British Columbia as required by Part VI. of the Companies Act. (*b*) That the defendants had been carrying on business in British Columbia which was illegal and contrary to the provisions of Part VI. (*c*) That the defendants were liable to penalties for carrying on business without complying with Part VI. (*d*) That the defendants, unless restrained, intended to carry on business contrary to the provisions of Part VI.; for all of which the plaintiff claimed an injunction restraining the defendants from carrying on business contrary to the provisions of Part VI. The defence, amongst other things, alleged (*a*) that the defendants applied to the Registrar for a license under Part VI. and tendered payment of the fees required by the same, but the Registrar refused to license the company. (*b*) The defendants pleaded that the provisions of Part VI., as far as they prevented the defendants from carrying on business in the province of British Columbia, in accordance with its letters patent and the Companies' Act of Canada, was *ultra vires* of the legislature of the province of British Columbia.

On these pleadings the Supreme Court of British Columbia ordered the defendants to be restrained from carrying on business in British Columbia until it had been licensed pursuant to Part VI. of the Companies' Act.

It will be seen, therefore, that the demand of the plaintiff for an injunction could not be granted if there was any substantial provision in the Statute attacked which was *ultra vires*. In other words, although the majority of the provisions of the part might be quite within the legislative powers of the province, if there was in fact one clause which was *ultra vires*, the plaintiff could not succeed. This is clearly put by Lord Sumner in the course of the argument at page 120 of the Notes of Proceedings. He says, quoting from the statement of claim: "the defendant intends, unless restrained from so doing, to continue carrying on business contrary to the provisions of the said Part VI., etc. Therefore the plaintiff claims an injunction. It is threatening and intending to violate Part VI., which is alleged to be valid. That is the ground for the injunction. Supposing it turns out that Part VI. is in some material respect invalid, would any Court grant an injunction to restrain the company from disregarding an enactment which contains invalid provisions?"

Ultra Vires.

The effect of the judgment of the Judicial Committee is not therefore to declare that all the provisions of Part VI. are *ultra vires*. For example, a clause fixing a license fee might be perfectly valid as being "direct taxation within the province in order to the raising of a revenue for provincial purposes" (92,2) or might fall under "shop, saloon, tavern, auctioneer or other license in order to the raising of a revenue for provincial, local or municipal purposes" (92,9) if it stood alone. Yet, where coupled with certain conditions, it might be invalid. This is made quite clear in the argument at p. 121:—

"Lord Moulton: It is whether they had the right to require a license on those terms. It is not "require a license," it is require a license on those terms. That is the legislation. Supposing a license had to be obtained at £5 a year, that might be perfectly right: it might have been pure taxation or for taxation. So you cannot say "a license;" you must say a "license in those terms."

Sir Robert Finlay: Surely if there is power to require licenses there are powers to impose conditions on the grant of the incense.

Lord Moulton: There may be conditions which it is lawful to impose, but because there are conditions which it is lawful to impose, it does not follow that you may impose any unlawful conditions.

Sir Robert Finlay: I should not argue for that, my Lord, as stated.

Lord Moulton: If you say, you must get a license, and impose unlawful conditions, it would be *ultra vires* altogether."

Direct Taxation.

It is clear that it was not seriously argued by Sir Robert Finlay that the legislation could be supported as direct taxation for provincial purposes, under 92 (2), or as a license within 92 (9). This question came up incidentally at various stages. At p. 77 of the Notes of Proceedings we have the following:—

Mr. Newcombe: " . . . Therefore the question is, and I submit it is the real question in this case, whether the locals have power to impose the sort of license upon a Dominion company which is defined by this local Act and the various clauses of it bearing upon the subject to which reference has been made. If so, it must come under item 9 of section 92: shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes."

Lord Moulton: Nobody suggests that this license is a mode of taxation.

The Lord Chancellor: Nobody has said that, I think.

Mr. Newcombe: No. Well, I say it is not taxation—it does not come within that.

Lord Moulton: I think not.

Lord Sumner: It is relied on in the case of the respondents.

Lord Moulton: Do you rely on it, Sir Robert Finlay?

Sir Robert Finlay: I do; it is not the main contention, but it is insisted upon in some of the judgments on the Reference bearing on this point, to which I shall refer.

The Lord Chancellor: It is really difficult to say that it is in order for raising revenue that this is done.

Sir Robert Finlay: That is one purpose; there may be also much more important purposes—the protection of those engaged in trade with such companies in the province.

Lord Moulton: But, Sir Robert, just consider what would be the punishment. Supposing they did not take a license, no doubt, they could be sued and be made to pay, but, if you fine them because they have not paid a license duty, it does not appear to me that that was really for the purpose of revenue.

Sir Robert Finlay: The most effective mode of securing that the license fee is paid is to say that any contract you make for carrying on trade without a license is not enforceable.

Lord Moulton: I do not know whether you have gravity enough to suggest this.

SIR ROBERT FINLAY: Well, my Lord, I will consider it by the light of what your Lordship has said."

And later on, Sir Robert Finlay has the following to say on the same subject (p. 133):—

SIR ROBERT FINLAY: My Lords, before saying a few words on one or two cases on which I have not yet commented, I desire very shortly to go through section 92 for the purpose of calling your Lordships' attention to the relevant heads there. Now, section 92 gives exclusive jurisdiction to the matters enumerated. The second is "direct taxation within the province in order to the raising of a revenue for provincial purposes." I apprehend that it cannot be denied that there is power in the province to impose taxation in the way of fees for licenses,—that they may insist on licenses, in any case, and it could not be disputed, if this were a case of raising revenue by means of licenses, that would be within the jurisdiction of the provinces.

LORD MOULTON: He would have the right to pay.

SIR ROBERT FINLAY: Yes, my Lord; and if he refused, he might be prevented from trading.

LORD MOULTON: I do not know that.

SIR ROBERT FINLAY: But that is vital to my case.

LORD MOULTON: A debt?

SIR ROBERT FINLAY: Yes, and he might be forbidden from carrying on trade.

THE LORD CHANCELLOR: Possibly.

SIR ROBERT FINLAY: That, from my point of view, is vital unless I establish that point, I have not fulfilled the purpose for which I referred to this.

THE LORD CHANCELLOR: Assume that nobody has said that this is a provision introduced for the purpose of raising taxation.

SIR ROBERT FINLAY: Not merely; it was one of the objects.

LORD MOULTON: I know no case of taxation that is enforced by anything like that; I should suspect a provision which purported to be taxation and made a man an outlaw unless he paid.

SIR ROBERT FINLAY: It is the commonest thing in the world to say that a man shall not carry on a certain trade without a license, and, if he does, he is liable to a penalty.

Taxation by way of license will be found further considered *post* p. xix. in connection with the Brewers' and Maltsters' Case.

PROVINCIAL STATUTES CLAIMED TO BE ULTRA VIRES.

We now proceed to reproduce the Statutes of British Columbia which were attacked in the *John Deere Plow Co.* v. *Wharton*, and the corresponding sections in the other provinces.

BRITISH COLUMBIA.

R. S. B. C. c. 39, s. 18: "A company or society may not be incorporated nor may an extra-provincial company be licensed or registered by a name identical with that by which a company or society or firm in existence is carrying on business or has been incorporated, licensed or registered, or so nearly resembling that name as in the opinion of the Registrar to be calculated to deceive, or by a name, of which the Registrar shall for any other reason disapprove."

No similar provision is to be found in the Statutes of any of the other provinces of Canada. The absence of this clause is deemed of great significance by Mr. Justice Cameron of the Court of Appeal for Manitoba. In the reasons for his judgment given in the case of *Davidson* v. *The Great West Saddlery Co.*, where the provincial legislation was upheld, he expresses the opinion that without section 18 the Lord Chancellor in giving judgment in the *John Deere Plow Co.* v. *Wharton*, would not have used the language he did in criticising section 168 of the British Columbia Statute (*post* p. xvii.) Mr. Justice Perdue in the same case considers that the wide powers vested in the Lieut.-Governor-in Council by section 112 of the Manitoba Statute by implication goes as far as section 18. Section 112 says: "a corporation (including the

extra-provincial companies) may apply to the lieutenant-Governor-in-Council for a license to carry on its business, etc., in Manitoba, and upon the granting of such license such corporation may . . . carry on in Manitoba . . . its business subject . . . to such limitations and conditions as may be specified in the license." In Ontario it is provided (chapter 179, section 9) that "no limitations or conditions shall be included in such license which would limit the rights of a corporation . . . to carry on in Ontario . . . its business or to exercise in Ontario all such parts of its powers as by its Act or charter of incorporation it may be authorized to carry on and exercise therein."

In Saskatchewan there is a provision very similar to that in Manitoba. 1915. Statutes, chapter 14, section 25, says: "Every company may upon complying with the provisions of the Act and the regulations receive a license from the Registrar to carry on its business and exercise its powers in Saskatchewan. And by section 27 power is given to the Lieutenant-Governor to prescribe and alter regulations for the registration of companies and may fix the fees."

In the judgment pronounced by the Judicial Committee in the *John Deere Plow Co.* v. *Wharton*, the Lord Chancellor sets out what he calls the relevant provisions of the British Columbia Act, and amongst them is section 18. This section must be read in connection with section 139, which requires every extra-provincial company to be registered, to appreciate the significance of two paragraphs of the judgment, namely, that on p. 341, which says, that the provisions of the British Columbia Act which compelled the appellant company to be registered in the province as a condition of exercising its powers were *ultra vires* and the subsequent paragraph on p. 343 which says it was competent to the legislature to pass a law applying to companies without distinction and requiring those that were not incorporated within the province to register for certain limited purposes such as furnishing of information. The important bearing which section 18 had on the conclusion arrived at by the Committee is shewn by the following citations from the argument of counsel.

P. 18. THE LORD CHANCELLOR: All they say, surely, is this: You ask to be registered. We will register you. You must change your name. In that way you will get the status of a provincial company and be able to trade freely. You say: "I do not desire to be registered." As these are terms, the question is whether you cannot trade freely without being registered. They say, No. They will not give you a position in their Courts, and, in the other case, a shareholder is challenging the legality of your trading altogether as being *ultra vires*.

LORD MOULTON: Why do you trouble about their reasons? It seems to me that that is a great concession to them. They claim the right—if they think proper, not for a limited set of reasons, but if they think proper, they have a right to say: "You cannot come to our Courts, you cannot trade in our area." Why do not you argue it in that way? Their particular reason does not make their act more, or less, legal.

LORD SUMNER: It is enough for you to rest yourself on the broad principle that you are a trading company and that this is an act which purports to discriminate between traders and traders; persons come into British Columbia and trade, and recover their debts without being told that they cannot have the benefit of the laws; you who are an incorporated trader are told you must submit to a formality before you can trade and before you can recover judgment against your debtor? It might be a question whether an Act passed to cover all traders corporate and incorporate was within the powers or not; you start with the proposition: I am discriminated against?

On p. 118 of the Notes of Proceedings, referring to the above-mentioned sub-section 1 of section 18, we find the following:

LORD MOULTON: That is a denial of corporate rights, because it is only incorporated under a name; and the consequence is that it is a denial of corporate rights.

Page 129. SIR ROBERT FINLAY: I submit that the local legislature must have the power of preventing confusion between companies carrying on the same business, between persons carrying on the same business, and that for the purpose of preventing that, it is a perfectly reasonable thing, and one within

their unquestioned jurisdiction, to say, in the first place, we require a license; and in the second place, we will not grant a license to an extra-provincial company which carries on business under a name the same as that of a company already occupying the field.

LORD SUMNER: Well, even if that would justify legislation and it said: (*a*) All extra-provincial companies must register themselves and take out a license; (*b*) They must have a distinctive name so as to prevent fraud and confusion, how would that justify section 152, which limits the extra-provincial company to carrying on business and enjoying the same powers and privileges as if incorporated in the province, provided it acts subject to the terms of the license, because the terms of the license may go much beyond the prevention of confusion.

SIR ROBERT FINLAY: Of course, if a case were made out of unreasonable terms being imposed, it would be another matter.

LORD SUMNER: But this is a legislation, which on the face of it, in section 152, says the Registrar is the sole judge, he may impose terms, and he, subject to an appeal to the Lieutenant-Governor, shall be the sole judge of what is reasonable or not, and, section 149, when you get to the Lieutenant-Governor, he can annul a license for any good cause of which he alone is the judge.

THE LORD CHANCELLOR: You can only succeed if you maintain the validity of that Statute.

LORD SUMNER: Yes.

SIR ROBERT FINLAY: With great deference, this is a concrete case. On the reference, if the reference ever comes before your Lordships, your Lordships will have the whole Statute before you.

THE LORD CHANCELLOR: Your defence is based, is it not, on that Statute?

SIR ROBERT FINLAY: On the necessity of a license, certainly.

LORD SUMNER: A license of that character. The shareholder says, they threaten and intend to trade without a license which will comply with Part VI. Among other things, it must be a license under which the Registrar will see what terms are to be inserted and, on appeal to the Lieutenant-Governor—or otherwise. It is a license that he may revoke for any other good cause, that is, any good cause in the world. Then the shareholder says, they threaten and intend to disregard the requirements of that section. You have to justify the whole part of the Act.

SIR ROBERT FINLAY: I submit not.

LORD SUMNER: If he had said, they threaten and intend to trade in the name of another company already here, and thereby to cause confusion and subject themselves to penalties, actions for fraud, and holding out, and so forth, it might be a different thing, but he says baldly: They propose to disregard Part VI.: therefore enjoin them.

SIR ROBERT FINLAY: I have already made the submission. I do put it that the statement of claim merely alleges that they disregard Part VI. in insisting on trading without a license.

LORD MOULTON: I agree it may be, that for one of the reasons put by Lord Sumner, they did not apply for a license, because of that.

SIR ROBERT FINLAY: They did apply and then the Registrar said: I cannot register a company which bears the same name with another company already there.

LORD SUMNER: You must stand on one foot or the other. If the ground on which the license was refused was: You will not take another name, the answer appears to be: We are incorporated under this name; it is an integral part of incorporation to have a name; your legislation which requires us to take another name than that which we are incorporated under, derogates from our status as a Dominion incorporated company. Conversely, if it is said: I do not rely on the specific facts—because you did not take out a license within Part VI.—the answer may be: No, we did not, because, among other things, the attempt to get the license submitted us absolutely to the discretion of the Registrar, and the taking out of the license, if we had got it, would have limited us and our trading to compliance with the terms that he might insert, and only on those

terms could we stand in line with the provincial companies trading in competition with us. On the second ground, it seems to me, you have to justify the whole of Part VI., so far as it relates to licenses.

SIR ROBERT FINLAY: It is not an arbitrary power conferred on the Registrar. I must take your Lordships through the provisions of the Act presently. I must come to that, but it is not an arbitrary power conferred.

LORD SUMNER: Of course, it is intended that he should exercise his power as a conscientious official and no doubt he will do so.

SIR ROBERT FINLAY: And in reference to the provisions of the Act, I submit there is nothing in that section which goes beyond the power of the legislature, and I do most strongly put it to your Lordships that the provinces would have the greatest possible reason to complain if it were laid down that the Dominion Parliament, by creating a company with the same name as a company already in possession of the field in the province, could compel the province to admit that company to trade without some addition which enabled people to distinguish the one from the other I do put it that that is a matter of local concern; it affects "property and civil rights."

LORD SUMNER: I could understand a regulation which says, you can take out your license, but as there is already a certain "Plow company" you must always put on your advertisements "no connection with a Plow company already incorporated"—I could understand that.

SIR ROBERT FINLAY: That would not do, for this reason:

LORD SUMNER: But this seems to imply a "new birth."

SIR ROBERT FINLAY: No, it is merely getting some distinctive addition. No connection with the company of the same name which carries on business at such and such an address, is too long; you want something in the name.

Page 141. LORD SUMNER: Apart from trading these letters patent provide that the company is incorporated with all the rights and powers given by the Canadian Companies Act. Although I have not actually found the section, I have no doubt that provides that an incorporated company has the power and right of suing and being sued in its corporate name. When we look at section 141 of Part VI. of the British Columbia Act it is provided that "an extra-provincial company licensed or registered under this or some former Act may sue and be sued in its corporate name." I suppose that has the effect, unless it is licensed or registered, it cannot sue or be sued even in its corporate name, and, if the condition of registration is that it should change its corporate name, then it can only sue or be sued, even though licensed and registered, by its new corporate name. Surely, an interference like that with the right of suing and being sued, which is incidental to its incorporation, is a derogation of status by provincial legislation. You see the distinction between the trading point; it is one thing to say: we shut the door, but it seems a different thing to say: though you are incorporated in your Canadian name, you shall not enter our Courts, unless you add on a registration, or, if so required, change your name.

We may now consider the other sections of the British Columbia Act and corresponding legislation in the other provinces.

British Columbia.

R. S. B. C., chapter 39.

Section 139. "Every extra-provincial company having gain for its purpose and object within the scope of this Act, is hereby required to be licensed or registered under this or some former Act, and no company, firm, broker or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the province until such extra-provincial company shall have been licensed or registered as aforesaid."

Ontario.

R. S. O. 1914, chapter 179, section 7, sub-section 1.

No extra-provincial corporation coming within class 7 or 8 or 9 shall carry on within Ontario any of its business unless and until a license under this Act

so to do has been granted to it, and unless such license is in force; and no company, firm, broker, agent or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial corporation, carry on any of its business in Ontario unless and until such corporation has received such license and unless such license is in force.

Manitoba.

R. S. M. chapter 35, section 118.

No corporation coming within classes V. and VI. shall carry on within Manitoba any of its business unless and until a license under this part so to do has been granted to it, and unless such license is in force, and no company, firm, broker, agent or other person shall, as the representative or agent of or acting in any other capacity for any such corporation, carry on any of its business in Manitoba unless and until such corporation has received such license and unless such license is in force:

Saskatchewan.

Statutes 1915, chapter 14.

Section 23. Any company, whether incorporated under the provisions of this Act or otherwise, having gain for its object, or part of its object, and carrying on business in Saskatchewan, shall be registered under this Act.

Section 24. (1) Any company may become registered in Saskatchewan for any lawful purpose on compliance with the provisions of this Act and on payment to the Registrar of the fees prescribed in the regulations

Section 139 of the British Columbia Act is criticized in the judgment of the Judicial Committee in view of the conditions attached to the license or registration by other sections. This has been pointed out with respect to section 18. Other conditions are contained in sections 152 and 153, which may now be set out along with the corresponding sections in other provinces.

British Columbia.

Section 152. Any extra-provincial company may obtain a license from the Registrar authorizing it to carry on business within the province on compliance with the provisions of this Act, and on payment to the Registrar in respect of the several matters mentioned in table B in the first schedule hereto the several fees therein specified.

Section 153. Before the issue of a license to any such extra-provincial company the company shall file:

(*d*) A duly executed power of attorney under its common seal empowering some person therein named, and residing in the city or place where the head office of the company in the province is situate, to act as its attorney and to sue and be sued, plead or be impleaded, in any Court, and generally on behalf of such company and within the province, to accept service of process and to receive all lawful notices, to issue and transfer shares or stock, and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney and of the company to give to its attorney.

Ontario.

R. S. O., chapter 179 (1914).

Section 5. A corporation coming within class 7 or 8 shall, upon complying with the provisions of this Act and the regulations, receive a license to carry on its business and exercise its powers in Ontario.

Section 9. (1) An extra-provincial corporation coming within class 7 or 8 or 9 may apply to the Lieutenant-Governor-in-Council for a license to carry on its business or part thereof and to exercise its powers or part thereof in Ontario. (2) No limitation or conditions shall be included in any such license which would limit the rights of a corporation coming within class 7 or class 8, to carry on in Ontario all such parts of its business and to exercise in Ontario all such parts of its powers as by its act or charter of incorporation it may be authorized to carry on and exercise therein.

Section 10. The Lieutenant-Governor-in-Council may make regulations which shall be published in the Ontario Gazette respecting:

(*a*) The evidence required, upon the application for a license as to the creation of the corporation, its powers and objects and its existence as a valid and subsisting corporation.

(*b*) The appointment and continuance by the corporation of a person or company as its representative in Ontario on whom service of process, notices or other proceedings may be made, and the powers to be conferred on such representative;

(*c*) The forms of licenses, powers of attorney, applications, notices, statements, returns and other documents relating to applications and other proceedings under this Act.

(2) The Lieutenant-Governor may make orders as to particular cases where the general regulations may not be applicable or where they would cause unnecessary inconvenience or delay.

Section 11. Upon the application for a license the applicant shall establish to the satisfaction of the Minister or such other officer as may be charged by him, to report thereon that the provisions of this Act and the regulations have been complied with, and the Minister, Deputy Minister or such other officer may, for that or for any other purpose under this Act take evidence under oath.

Section 19. There shall be paid to His Majesty, for the public uses of Ontario, for every license under this Act such fees as may be prescribed by the Lieutenant-Governor-in-Council.

Manitoba.

R. S. M. chapter 35, section 108 *et seq.*

These sections deal with extra-provincial corporations. Dominion companies form class (V.) and are dealt with by section 108 which includes corporations that are required to take out a license. Section 109 provides that a corporation coming within class (V.) shall upon complying with the provisions of this part of the Act and the regulations made thereunder, receive a license and carry on its business and exercise its powers in Manitoba. This is similar to the first part of section 152 of the British Columbia Act. Section 114 provides the formalities for obtaining a license and contains a provision analogous to section 153 (d) of the British Columbia Act, respecting a power of attorney.

Saskatchewan.

Statutes of Sask. (1915), chapter 14.

Section 25. Every company may, upon complying with the provisions of this Act and the regulations, receive a license from the Registrar to carry on its business and exercise its powers in Saskatchewan.

Section 26. Every incorporated company shall, before registration, file with the Registrar a certified copy of its charter and by-laws, and a statutory declaration of the president, vice-president, secretary or manager, that it is still in existence and legally authorized to transact business under its charter.

The only specific reference in the judgment of the Judicial Committee to the above sections of the British Columbia Act are contained on page 343, where it is said:

> "It might have been competent to that legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information. It might also have been competent to enact that any company which had no office and assets within the province should, under a statute of general application regulating procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under s. 92 to the Provincial Legislature."

The sections however are very fully discussed in the argument of counsel from which the following citations are made.

MR. WEGENAST: Your Lordships will notice what the company must file, referring back to section 153. (*d*) Refers to a power of attorney giving an attorney in the province powers which I may briefly say amount to the power to commit the company absolutely in any legal proceedings.

LORD MOULTON: I think that is very important indeed. (*d*)

MR. WEGENAST: They must have an agent in the province who has absolute power to commit the company in any legal action Then (*e*) Notice of the place where the head office without the province is situate. (*f*) Notice of the city, town, district or county in the province where the head office of the company is proposed to be situate. That is, the company must establish a head office in the province. Then the amount of the capital of the company and the number of shares. Then I should like to refer your Lordships to section 166, which imposes certain disabilities and penalties.

LORD MOULTON: This man has power to issue and transfer shares of stock.

MR. WEGENAST: The power is of the most far-reaching character one can imagine, but in the case of licensed companies at all events, and that is one of the small distinctions between licensed and registered companies—it must be in connection with legal proceedings. I think there cannot be read into the power of attorney which the Department requires a power to commit the company to contracts, for instance, it is only when it has reached a stage of legal proceedings that the attorney's power becomes so broad.

LORD SUMNER: For example, an action for specific performance could lie within the province, but if judgment went against the company the attorney would have power under his power of attorney to transfer shares in execution of the judgment something of that kind?

MR. WEGENAST: Yes, I should think it would be something like that.

LORD SUMNER: This shows how very sweeping it is to attempt to regulate the companies, but it may be that it is within the powers. The point is, the obligation to take out a license, which may be refused, after all imposes stringent liabilities upon the company.

THE LORD CHANCELLOR: To interfere with its capacity to trade?

LORD MOULTON: Will you follow this: "and, generally, on behalf of such company and within the province, to accept service of process and to receive all lawful notices, to issue and transfer shares of stock, and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the powers of attorney and of the company"—that is, I suppose, within the scope of the company—"to give to its attorney." Does that mean it must give every power it can delegate to this attorney?

MR. WEGENAST: No, only such powers—I am paraphrasing this—as relate to legal actions.

LORD SUMNER: Suing and being sued?

MR. WEGENAST: Yes.

LORD MOULTON: Where do you get that, because it says "to issue and transfer shares or stock?

MR. WEGENAST: I am afraid that must be a recent amendment and I did not know about that until now.

LORD MOULTON: "And to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney." Then come the words "and of the company." I suppose that means within the power of the company to give to its attorney.

MR. WEGENAST: I should be very glad to argue that it is so broad, but is it not qualified by the words: "to act as its attorney and to sue and be sued, plead or be impleaded, in any Court, and generally, on behalf of such company and within the province"—

LORD MOULTON: "And to accept service of process and to receive all lawful notices, to issue and transfer shares or stock and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the

power of attorney." It seems to mean within the scope of the power of the company to give to its attorney.

MR. WEGENAST: I have drawn a great many of these powers, but I had not apprehended that it was so broad.

LORD SUMNER: It may be stronger than you appreciate and carries your point on that a little bit further.

MR. WEGENAST: Yes, my Lord.

PENALTY CLAUSES.

British Columbia.

Section 167. If any extra-provincial company, other than an insurance company, shall, without being licensed or registered pursuant to this or some former Act, carry on in the province any part of its business, such extra-provincial company shall be liable to a penalty of fifty dollars for every day upon which it so carries on business.

Section 168. So long as any extra-provincial company remains unlicensed or unregistered under this or some former Act, it shall not be capable of maintaining any action, suit, or other proceeding in any Court in the province in respect of any contract made in whole or in part within the province in the course of or in connection with its business, contrary to the requirements of this part of the Act.

Ontario.

16. If any extra-provincial corporation coming within class 7 or 8 or 9, contrary to the provisions of section 7, carries on in Ontario any part of its business, such corporation shall incur a penalty of $50 for every day upon which it so carries on business; and so long as it remains unlicensed it shall not be capable of maintaining any action or other proceeding in any Court in Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of said section 7.

Manitoba.

122. If any corporation coming within class V. or VI. shall, contrary to the provisions of section 118, carry on in Manitoba any part of its business, such corporation shall incur a penalty of fifty dollars for every day upon which it so carries on business, and so long as it remains unlicensed under this part, it shall not be capable of maintaining any action, suit or other proceeding in any Court in Manitoba in respect of any contract made in whole or in part within Manitoba in the course of or in connection with business carried on contrary to the provisions of said section 118.

Saskatchewan.

(2) Any unregistered company carrying on business, and any company, firm, broker or other person carrying on business as a representative, or on behalf of such unregistered company, shall be liable on summary conviction to a penalty not exceeding fifty dollars for ever day on which such business is carried on in contravention of this section, and proof of compliance with the provisions of this section shall be at all times upon the accused.

The reference to these penalty clauses in the judgment is as follows (p. 341):

"It follows from these premises that those provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights or taxation, or the administration of justice. It is in reality whether the province can

interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative."

The following taken from the argument of counsel, deals with the penalty sections, page 142:—

SIR ROBERT FINLAY: To return to the point your Lordship put to me with regard to suing, the importance of which I recognize, I submit that section 92 (14) shows that it is absolutely within the jurisdiction of the Provincial Legislature.

LORD SUMNER: It is "civil rights"?

SIR ROBERT FINLAY: It falls under "property and civil rights."

LORD SUMNER: It is, clearly, "civil rights"?

SIR ROBERT FINLAY: "Property and civil rights" is (13) but it falls under (14), the administration of justice, establishing Courts, and including procedure in civil matters in those Courts.

LORD MOULTON: Do you mean to say they could pass an Act saying that no other than those born in British Columbia could sue in the Courts?

SIR ROBERT FINLAY: That is a matter that would require consideration.

LORD MOULTON: It is very near this.

SIR ROBERT FINLAY: With great deference not, because your Lordships will see that they must have power to prevent confusion of names, and they must have power, under their faculties, with regard to the administration of justice and procedure, to say in what cases, and under what conditions, a company, or a person, shall be allowed to sue.

LORD MOULTON: It is the administration of justice, not the refusal of justice. It comes to exactly what I say; for instance that nobody but those who are born in British Columbia shall sue in the British Columbian Courts.

LORD SUMNER: Of course the Statute of Frauds is "procedure" and I suppose no one questions that legislation of that kind would *prima facie* be within (14). I do not think it quite follows that it is "procedure" to say: "You shall not come into Court at all," when that is for the purpose of compelling compliance either with a revenue section or with a regulation of companies section. No doubt it takes the form of "procedure" because you avail yourself of that section by plea, but whether one would normally describe it as "procedure" to say that a person who has not complied with some public duty, for example, if you had an express section "that no undischarged bankrupt shall bring an action for debt"—which is the substance of the thing—you could hardly call that "procedure." That goes to substantive right."

It will be perceived that in Saskatchewan there is no provision similar to that in British Columbia, Ontario and Manitoba, wihch prevents unlicensed extra-provincial companies obtaining the benefit of the judicial tribunals, and in that province it is now contended that the new legislation respecting companies contained in the Statute of 1915, chapter 14, avoids all the objectionable features in the British Columbia Act, and that the requirement of a fee from a foreign company is justified under the provisions of the British North America Act, viz., 92 (2), which provides for "direct taxation within the province in order to the raising of a revenue for provincial purposes," and 92 (9) which provides for "shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes".

The validity of the legislation has been upheld in the Provincial Court in *Harmer* v. *McDonald*, reported in 35 W. L. R. 153, and an appeal is now pending from the decision of the lower Court to the Supreme Court of Canada.

During the argument of the insurance reference in the Privy Council the following mention is made to the judgment in the *John Deere Plow Co.* v. *Wharton Case*.

P. 125. SIR ROBERT FINLAY: My Lord, I am going to rely very much on what your Lordship said in the John Deere Plow case on this point. I think what was really decided there was this, that where the Dominion Parliament has the power

of incorporating a company, the province cannot by imposing a term on a Dominion company as such in any way hamper the action.

VISCOUNT HALDANE: That is what we said.

SIR ROBERT FINLAY: That is the decision.

VISCOUNT HALDANE: That is all the decision?

SIR ROBERT FINLAY: That is all the decision.

VISCOUNT HALDANE: We did refer to the "regulation of trade and commerce" as ancillary to the power to legislate which existed because section 92 did not apply there; what we said you will see when you come to the judgment.

SIR ROBERT FINLAY: I will deal fully with that case.

VISCOUNT HALDANE: I think we said incorporating companies was one thing; regulating when incorporated was another; and being Dominion companies it seemed appropriate to use the head of "regulation of trade and commerc" as giving power to regulate Dominion companies.

SIR ROBERT FINLAY: There are observations relating to the field of which the question there formed part, but the real point was it was held illegal for a province to impose a restriction upon a Dominion company as such.

VISCOUNT HALDANE: That was it, and so far as the "regulation of trade and commerce" came in it related not to any particular trade but to this, that there were Dominion companies operating and it seemed proper to call in aid the power in laying down the conditions that regulated.

P. 126. VISCOUNT HALDANE: Here comes in the importance of the John Deere Plow case. If that had not been the principle then though the Provincial Legislature could not have incorporated a company with general objects, it might, under the power to legislate under "property and civil rights" have interfered with the operations of Dominion companies. We said in the John Deere Plow case that the importance of "regulation of trade and commerce" was that it enabled the Dominion Parliament to legislate exclusively in respect of general companies which belonged to the Dominion because the province had no jurisdiction over them under the "regulation of trade and commerce."

SIR ROBERT FINLAY: I think that the actual decision is confined to the narrower point, that the Provincial Legislature could not by any enactment directed distinctively against Dominion companies put any fetter upon their exercise within the province of the Dominion right.

VISCOUNT HALDANE: Could that have been so but for the aid of head 2 of section 91? I am taking this very principle here. Under "peace, order and good government," the province might have interfered with "civil rights" if you only incorporated a company under the "peace, order and good government" words, the provinces might have interfered under the guise of "civil rights."

P. 127. SIR ROBERT FINLAY: Then your Lordships treated that company as properly incorporated and then said it cannot be legal for the Provincial Parliament to do anything except to subject the Dominion Parliament in the province to the law that applies to all companies; any laws directed against Dominion Parliament companies specifically—such as requiring them to take out a license—are *ultra vires*.

VISCOUNT HALDANE: I want to know why we said that—I am confining myself simply to the language used in the judgment; unless it was that the Dominion had exclusive power to legislate and make the legislation in question under head two.

SIR ROBERT FINLAY: I am trenching upon what will come up in the subsequent cases, but I am only submitting, I do not think it could be said that the power of incorporating companies fell under the "regulation of trade and commerce." That's my submission to your Lordships.

VISCOUNT HALDANE: We never said that, but we said the restriction of provincial power to interfere may be affected.

Brewers' and Maltsters' Association v. *The Attorney-General for Ontario* (1897), A. C. 231.

The fact that this case is relied on strongly as supporting the "Companies" legislation of the different provinces justifies giving some further consideration to

this decision beyond what appears in the official report. The case arose out of a reference by the Lieutenant-Governor of Ontario to the Court of Appeal of that province in which the Court was required to answer three questions. The answers and reasons of the Judges of the Court of Appeal do not appear in the published reports, but are to be found in the formal judgment copied in the minutes of the Court. It is as follows:

In the Court of Appeal for Ontario.

Tuesday the fourteenth day of January, 1896.

In the matter of a Stated Case, under 53 Victoria, chapter 13, being "An Act for expediting the decision of Constitutional and other Provincial Questions."

In the matter of "Brewers' and Distillers' Licenses in the Province of Ontario,"

This is to certify that the following questions:

1. Is sub-section 2 of section 51 of the Liquor License Act, Revised Statutes of Ontario, chapter 194, requiring every brewer, distiller or other person duly licensed by the Government of Canada as mentioned in sub-section 1, to first obtain a license under the Act to sell by wholesale the liquor manufactured by him when sold for consumption within the province, a valid enactment?

2. Has the Legislature of Ontario power either in order to raise a revenue for provincial purposes or for any other object within provincial jurisdiction, to require brewers, distillers and other persons duly licensed by the Government of Canada for the manufacture and sale of fermented spirituous or other liquors to take out licenses to sell the liquors manufactured by them and to pay a license fee therefor?

3. If so, must one and the same fee be exacted from all such brewers, distillers and persons?

submitted to this Court under the above-named Act having come on for argument on Thursday, the seventh day of November last past, in presence of counsel, as well for the Attorney-General of Ontario as for the Brewers' and Distillers' Association, who appeared pursuant to the direction of the Court in that behalf, this Court was pleased to direct that the questions submitted should stand over for judgment, and the same having come on this day for judgment,

This Court was pleased to answer questions Nos. 1 and 2 in the affirmative.

And question No. 3 in the negative.

(Sgd.) A. GRANT.

The following (unreported) reasons for judgment were given:—

Hagarty, C.J.O.—I think that the questions submitted are covered by our decision in *Regina* v. *Halliday*, 21 A. R. 42, and I have nothing to add to what is there stated.

Burton, J.A.—When this case was argued I had not had an opportunity of considering the judgment of this Court in the Halliday case, 21 App. R. 42, and I desired also to consider how far I was bound by that decision in answering questions submitted by the Lieutenant-Governor in Council under the 53 Vict. chapter 13, and I desired, therefore, that the case should stand over for a short time. I have now considered the questions submitted and am of the opinion that the two first should be answered in the affirmative and the third in the negative.

As to the reasons for this decision, I cannot profitably add to those given by my brother Osler in Halliday's case as to the first two questions, and as to the third, it being once conceded that the power to license exists, there can be nothing unreasonable in making the license fee larger or smaller having relation to the extent of the business.

Osler, J.A.—If we are sitting as a Court our decision in *Regina* v. *Halliday*, 21 A. R. 42, answers the first and second questions. As to the third, without cavilling at its form and reserving my right to form a different opinion after argument should the point hereafter arise in a real litigation, it must be answered for the present in the negative, assuming the Act to be *intra vires*, the legislature being supreme in its own province.

If we are not sitting as a Court, I refer to the judgment in the above case as substantially answering the first and second questions.

Maclennan, J.A.—I am of opinion that the first two of these questions should be answered in the affirmative, and the third in the negative.

We had the question of the validity of sub-section 2 of the said section 51 under consideration in the case of *Regina* v *Halliday*, 21 A. R. 42, and we then determined that it was valid, and that decision is binding upon us in the present case.

The third question was not in terms decided in the Halliday case; but I think it is involved in that decision, for the power to require a license to be taken must include the power to determine the fee to be exacted in each particular case, and to make it, for example, bear some proportion to the extent of the licensee's business.

Section 51, sub-sections 1 and 2, read as follows:—

"51. (1) Sections 49 and 50 shall not prevent any brewer, distiller, or other person duly licensed by the Government of Canada for the manufacture of fermented, spirituous, or other liquors, from keeping, having, or selling any liquor manufactured by him in any building wherein such manufacture is carried on, provided such building forms no part of and does not communicate by any entrance with any shop or premises wherein any article authorized to be manufactured under such license is sold by retail, or wherein is kept any broken package of such articles.

"(2) Every such brewer, distiller, or other person shall also first obtain a license to sell by wholesale under this Act the liquor so manufactured by him, when sold for consumption within this province, under which license the said liquor may be sold by sample, or in original packages, in any municipality as well as in that in which it is manufactured; but no such sales shall be in quantities less than those prescribed in sub-section 4 of section 2 of this Act."

Brewers' and Maltsters' Case Argument.

Edward Blake, K.C., appeared for the appellants before the Judicial Committee. The following is extracted from his argument in which he attacked the validity of the provincial legislation in question:—

"Mr. Blake: I was first of all about to invite your Lordships to affirm the proposition that this which we have to do with just now, this section 51, has regard solely to a provision for raising revenue for provincial purposes. 1st, For each wholesale license, $100. There is no attempt at discretion, the object is revenue. The first and second questions are identical, putting the same proposition in other terms. Then the contentions of the appellants are shown in the reasons which are given at the foot of the 4th and in the 5th page of the appellant's case; 'because the license referred to in the first question, being issuable of right to every brewer who applies, but so issuable only on payment of the duty, is a license not for regulation, but for revenue.' Then the second is, 'because such license is a machinery for laying a duty or tax which in the case in hand is an indirect tax, being (to adopt the language used in decisions of the Board) a duty which enters at once into the price of the taxed commodity; and a tax on a commodity which the brewer deals in and can sell at an enhanced price to his customers. It is therefore not within the second enumeration of clause 92 of the British North America Act while the use of the machinery of license does not validate the tax, because it is not within the ninth enumeration of the said clause.' As I was saying, I cannot conceive that it is arguable that if this is a direct tax it is vitiated from the circumstance that the machinery of license is used in order to its imposition. It seems to me to be just the same thing as if they decided that every brewer shall be taxed, and therefore I do not argue that having used the machinery of license if it is a direct tax it still must go if I was able to shew that it was not within 9. Therefore I have to grapple with the question, is it or is it not a direct tax, for if it is, notwithstanding the form would seem to indicate that it was 9 that we are resorting to, there is in my opinion legislative power to impose direct taxation, direct either by the machinery of license or by the machinery of saying every brewer shall pay. If, however, it not be within number 2, which is in other words, if it not be direct taxation, then the question of course will be

whether it is under 9. LORD HERSCHELL: That though it is a tax imposed upon the person as a condition of his carrying on business, it cannot be a direct tax, because he would put the payment ultimately upon his customer. That is your argument. MR. BLAKE: Yes, my Lord. LORD HERSCHELL: What strikes me is that the fact that it is a duty equal in amount imposed upon every trader in a particular trade, whether his business is large or small, is against the view that the legislature intended or contemplated that it would fall on the consumer, which is an equally important test of whether it is direct or indirect taxation—the point that I put to you as to the equality of the tax for every trader great or small without reference to the amount of business he does—does not that point to the legislature intending it to be a tax on him and not a tax on the consumer inasmuch as it is obvious that it is impossible in all cases alike it should pass on to the consumer. LORD MORRIS: Does your argument go to the length that a tax on a privilege to carry on any business cannot be a direct tax? MR. BLAKE: I think, speaking generally, I would say that. LORD MORRIS: What do you say as to Lambe's case which you have been citing? Does not that say that to carry on the business of a banker—MR. BLAKE: No, it is not to carry on the business of a banker; it imposes that direct tax on the banker. It is not a license tax at all. LORD MORRIS: It imposes upon him a tax. It is only a question of words. LORD HERSCHELL: What does it matter whether it takes the form of a license or not. The amount falls on the trader. LORD MORRIS: I did not use the word 'license' designedly. I said for the privilege of carrying on the business. LORD HERSCHELL: He can only carry on business on these terms of making the payment. MR. BLAKE: I accept, as I am bound to accept, Lambe's case and the line of argument. LORD HERSCHELL: I do not quite understand how you distinguish Lambe's case, because you say that when a tax is imposed which in ordinary course is a trade tax, it being one of the burdens of trade, a trader would seek to recoup himself in his trade dealings. That is a proposition I understand, but then that seems to me to be decided against by Lambe's case. The distinction is very fine between calling it a license and calling it a condition which must be complied with if the banker carries on business. LORD MORRIS: They pay for the privilege of carrying on business. LORD WATSON: The Act says that the bankers are not to carry on business without paying that license duty. MR. BLAKE: I daresay there may be no legal distinction between the enactment and what you pay, but that was not the form of the enactment in this case. LORD HERSCHELL: Apart from the license clause No. 9, and looking at it in connection with No. 2, it could not make any difference here if there was an enactment. 'Every person dealing with so and so shall pay so much.' MR. BLAKE: I opined that I could not argue the contrary. I do not see that I can. I think if this be held to be direct within No. 2 the form of the enactment is adequate. LORD HERSCHELL: Supposing, instead of saying that they shall take out a license and pay so much, it had been 'every wholesale brewer shall pay every year to the Provincial Government 150 dollars,' what would have been the distinction between that case and the bank case?"

The following discussion took place with respect to section 92 (9):—

MR. BLAKE: If the meaning of this section is to permit [illegible] in cases indirect taxation by the examples which are given, and if yo[illegible] Lo[illegible]ps hold that "other" is universal—that it is licenses for anything wh[illegible]ever, your Lordships would give a construction to sub-section 9, which give a general power of indirect taxation.

LORD HERSCHELL: How do you cut down the words "other licenses." This is another license. How do you cut it down so as to exclude a brewer for example?

LORD HERSCHELL: In the case I was putting it is true you may have something *ejusdem generis*, but I take a brewer as *ejusdem generis* with an auctioneer in the sense that they are both carrying on a calling. Supposing that ordinarily this would be indirect taxation and not direct taxation and then the legislation has said "We will impose a direct tax and require a man who carries on a calling to take out a license which they may impose for the purpose of raising revenue, why may not it be so?

MR. BLAKE: On this proposition the power of the local legislature to impose this taxation are special and restricted powers. They have a wide general power of direct taxation. They are given in addition to that for certain purposes for provincial, local and municipal purposes—a certain power of indirect taxation by means of licenses.

LORD HERSCHELL: I will assume for a moment that you are right in saying that these are indirect.

MR. BLAKE: Yes, what I hold is that if your Lordship interprets the word "other" in these circumstances in an unlimited sense you do practically give an unlimited power of indirect taxation.

LORD HERSCHELL: Surely not. If you limit the license to people carrying on a particular calling it is not an unlimited form of indirect taxation.

LORD WATSON: But having the power of taxation and taking any article in sub-section 9, one material observation that occurs is this, that if it really be taxation by a license, the legislature have not said that it shall be direct taxation. The words "direct taxation" are omitted from sub-section 9.

MR. BLAKE: Certainly.

LORD WATSON: And still it may not necessarily conflict with anything given to the Dominion Legislature who have the power both of direct and indirect taxation under section 91, because under section 92 the only power given is a power whether it be direct under sub-section 2, or either indirect or direct under sub-section 9, which is qualified in the case of the Provincial Parliament with this that the revenue to be raised is to be for provincial, local or municipal purposes, while the Dominion of Canada, as far as I am aware, has no power to raise any revenue for any such purposes.

MR. BLAKE: I submit they did not intend to include in that way, added to those four examples, a general and unrestricted power of taxing all callings, including all dealers in commodities.

LORD HERSCHELL: I do not see why not. I do not see why we should not say that the legislature intended it. It is taxing for revenue purposes. It is not a regulation of trade. They want to raise a revenue and if they think there are some other people carrying on trades or callings who may be called upon to assist the revenue by paying a tax, what is there in the nature of things to limit them to a man who has got a shop, saloon or tavern, or a man who has got a calling as an auctioneer?

LORD WATSON: Taking the case of taxation by a license of an ordinary shop (that means a shop-keeper) whether it be for the sale of spirits or beer or drapery or boots or clothes or anything else, it is, according to your argument, indirect taxation, but then it is within the meaning of sub-section 9—undoubtedly, because licenses are named in sub-section 9—it is within the meaning of sub-section 9 taxation by license, and, if so, it is absolutely immaterial to my mind whether it is direct or indirect.

LORD MORRIS: I can understand them putting it in this way, that having paid his way with the Dominion he ought to be allowed to exercise that trade in everyone of the provinces of the Confederation without doing anything more or being put to any disability. But if you say that, would not every word of that apply to the bank case?

MR. BLAKE: Of course, if this be direct taxation, your Lordship's observations would apply.

LORD HERSCHELL: So it would be if it be a license within sub-section 9.

MR. BLAKE: Yes, but I am endeavoring to argue that the words in sub-section 9 ought to be given such a more limited construction as accords with the minor subjects of the tax which are specified and as does not grant a power of indirect taxation which would not merely conflict generally or affect or impair generally the power of indirect taxation of the Dominion by tending to exhaust the subject, but would also specify and in this case affect a subject which has been dealt with under a competent exercise of its powers by the Dominion fully and exhaustively.

OTHER PROVINCIAL LEGISLATION.

It remains only to state shortly the legislation in the other provinces.

ALBERTA.

In this province the incorporation and licensing of companies was governed prior to 1915 by two Ordinances of the former North-West Territories. Chapter 61 was the Companies' Ordinance and chapter 63 was the Foreign Companies' Ordinance. The latter legislation contains sections similar to those of British Columbia under review in the John Deere Plow Company case and the Companies' Ordinance, section 20, had a provision similar to section 18 of the B. C. Statute. After the decision of the Privy Council the legislature of Alberta, in 1915, amended the Foreign Companies' Ordinance and provided by chapter 2, section 16, that the words "foreign company" in that Ordinance should not include a company incorporated by the Parliament of Canada.

QUEBEC.

The R. S. Q. Art. 1345 recites that in order to provide for the exigencies of the public service, every one of the following companies, corporations, etc., doing business in that province in his or its own name or through an agent:

(1) Every incorporated company carrying on any undertaking, trade or business;

(2) Each of the following companies whether incorporated or not, viz.: banks, insurance, loan companies, etc., etc.,

shall annually pay the several taxes mentioned and specified in Art. 1347. The last mentioned article provides for a uniform tax to be paid by all companies of the same class.

Art. 1350 provides for an annual statement from each company.

Art. 1351 provides for a penalty in case of default to comply with Art. 1350 of $10 a day.

Art. 1354 provides that the annual tax may be recovered by action.

The validity of a taxing statute such as this was upheld in the case of the *Bank of Toronto* v. *Lambe* (12), A. C. 575. The Act contains no provisions similar to those of British Columbia, which were under consideration in the John Deere Plow Company case.

NEW BRUNSWICK.

Chapter 7 of the Statutes of New Brunswick, 1915, is an Act respecting the imposition of taxes on certain incorporated companies. By the first 15 sections of the Act taxes are imposed upon banks, insurance and other specially designated corporations, whilst section 16 places a uniform annual tax upon all other extra-provincial corporations carrying on business in the province. There is no tax imposed upon provincial companies doing the same class of business as these extra-provincial companies. That provincial legislation need not be uniform as between different banks, but may depend upon the amount of paid-up capital or place of business, has been upheld in the case of *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, and the view of the Court of Appeal of Ontario in the Brewers' and Maltsters' case has been noted, *ante* p. xx., but it still remains undetermined whether a provincial tax which discriminates in favour of a provincial company and against a Dominion company of the same class is an interference with the status of the Dominion company within the meaning of the judgment in the *John Deere Plow Co.* v. *Wharton*, where the Committee says, with respect to the facts of that case, as follows:—

"The question is not one of enactment of laws affecting the general public in the province and relating to civil rights or taxation or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion."

Section 21 prohibits an extra-provincial company from carrying on business until the tax has been paid, and section 23 prohibits for the same default the extra-provincial company from maintaining any action or suit in the provincial courts. In this connection compare the penalty clauses in other provinces, discussed *ante*, p. xvi.

Nova Scotia.

The Statute Law of Nova Scotia respecting extra-provincial corporations is to be found in the Statutes of 1912, chapter 15. There is no provision here similar to section 18 of the B. C. Act, *ante*, p. x.

Section 21 provides that all companies shall obtain a certificate of registration before proceeding to carry on business. Its terms are substantially those of section 139 of the B. C. Act, *ante*, p. xiii. Such certificate cannot issue until the registration fee is paid. This fee is fixed by section 28, and no distinction is made between provincial and Dominion companies.

Section 25 provides that every corporation whether local or foreign, holding a certificate of registration, shall appoint and have a recognized agent resident within the province, service upon whom of process shall be deemed sufficient service on the corporation, and for default the company is liable to a penalty of $100. Certain annual and other statements are required to be filed by all registered companies, but there is no provision for a power of attorney with the large powers given by section 153 (*d*) of the B. C. Act. *Ante*, pp. xiv., xv.

Section 30 prevents any corporation not having a certificate of registration from bringing process in any of the Nova Scotia Courts. *Ante*, pp. xvi., xvii., xviii.

Section 34 provides that all fees paid to the Registrar shall form part of the general revenue of the province.

(1915) A. C. 330.

[PRIVY COUNCIL.]

JOHN DEERE PLOW COMPANY, LIMITED . . . . . APPELLANTS;

AND

THEODORE F. WHARTON . . . . . RESPONDENT.

AND CONNECTED APPEAL CONSOLIDATED.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA . . . . . INTERVENANTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Canada — Legislative Authority — Company incorporated by Dominion Parliament — Restriction of Corporate Rights in Province — Ultra vires — Companies Act of Canada (R. S. Can., 1906, c. 79)—Companies Act of British Columbia (R. S. B. C., 1911, c. 39), Part VI.—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91 and 92.

The authority of the Parliament of Canada to legislate for "the regulation of trade and commerce" conferred by s. 91, enumeration 2, of the British North America Act, 1867, enables that Parliament to prescribe the extent and limits of the powers of companies, the objects of which extend to the entire Dominion; the status and powers of a Dominion company as such cannot be destroyed by a provincial legislature.

Part VI. of the Companies Act of British Columbia (R. S. B. C., 1911, c. 39), which in effect provides that companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the province or maintaining proceedings in its Courts, is therefore ultra vires the provincial legislature under the British North America Act, 1867.

* *Present:* VISCOUNT HALDANE, L.C., LORD MOULTON, LORD SUMNER, SIR CHARLES FITZPATRICK, and SIR JOSHUA WILLIAMS.

CONSOLIDATED APPEALS by special leave from two judgments of the Supreme Court of British Columbia (May 26 and 28, 1913).

The appellants were a company incorporated by letters patent under the authority of the Companies Act of Canada (R. S. Can., 1906, c. 79), and were empowered by their charter to carry on throughout the Dominion the business of dealers in agricultural implements

The first appeal was in an action brought against the appellants by the respondent Wharton, as a shareholder in the company, claiming an injunction to restrain the appellants from carrying on business within the province without being licensed or registered as provided by the Companies Act of British Columbia (R. S. B. C., 1911, c. 39).

The second appeal was in an action brought by the appellants to recover the price of goods sold and delivered by them to G. W. Duck, the respondent in that appeal, who pleaded that the action was not maintainable since the appellants were not so licensed or registered.

The question for determination in the actions and in the consolidated appeals was whether Part VI. of the Companies Act of British Columbia was ultra vires the legislative authority of the province under the British North America Act, 1867.

The relevant provisions of the Companies Act of Canada and of the Companies Act of British Columbia, are summarized in the judgment of their Lordships.

The effect of Part VI. of the provincial Act is, inter alia, to require that every company incorporated otherwise than under the law of the province should be licensed or registered under the provincial law, and that until it is so licensed or registered it should not be capable of carrying on business in the province or of maintaining proceedings in the provincial Courts in respect of any contract made

within the province. The appellants had applied for a license, but their application was refused by the registrar on the ground that there was another company of the same name upon the register, in which case s. 18 of the above-mentioned provincial Act (as amended by s. 6 of c. 3 of the Acts of British Columbia for 1912) prohibits the grant of a license.

Both actions were tried by Gregory, J., who granted an injunction in the first action and dismissed the second upon the preliminary point of law raised by the pleadings. The learned judge considered himself bound by previous decisions of the Supreme Court of British Columbia, including that in *Waterous Engine Works* v. *Okanagan Lumber Co.*, (1908) 14 B. C. Rep. 238.

F. W. Wegenast, for the appellants; *Newcombe, K.C.*, and *Raymond Asquith*, for the Attorney-General for Canada. The appellants are a trading company duly incorporated under the authority of the Parliament of Canada and authorized by its charter to trade throughout the entire Dominion. The powers and privileges conferred upon them by s. 29 of the Companies Act of Canada as the effect of that incorporation cannot be controlled or limited by the provincial legislature. The Parliament of Canada has exclusive powers as to the incorporation of companies with Dominion objects having regard to its legislative authority as to "the regulation of trade and commerce" under s. 91, enumeration 2, of the British North America Act, 1867. Even if the authority of the Parliament of Canada to incorporate the appellant company does not rest upon the specific power under s. 91, enumeration 2, it has authority under its general power over all matters not assigned exclusively to the provincial legislatures; the authority of a provincial legislature as to the incorporation of companies under s. 92, enumeration 11, is expressly confined to companies with provincial objects. The effect of the legislation complained of is to control and interfere with the corporate rights and privileges of the appellants and not merely to regulate the manner in which their business is to be carried on in the province; it cannot therefore be justified under the general powers of the provincial legislature as to "property and civil rights in the province" (s. 92, enumeration 13), or any of the other general powers given by that section: *Citizens Insurance Co.* v. *Parsons*, (1881) 7 App. Cas. 96; *Dobie* v. *Temporalities Board*, (1881) 7 App. Cas. 136; *Colonial Building and Investment Association* v. *Attorney-General of Quebec*, (1883) 9 App. Cas. 157; *Bank of Toronto* v. *Lambe*, (1887) 12 App. Cas. 575; *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A. C. 348. The authority of the Parliament of Canada in the matter is exclusive at any rate since the subject of the incorporation of companies is of sufficiently wide importance: *Brewers and Maltsters Association* v. *Attorney-General for Ontario*, [1897] A. C. 231. The decisions of the Supreme Court of British Columbia followed by the learned Judge below must be considered as overruled by the decision of the Judicial Committee in *Compagnie Hydraulique* v. *Continental Heat and Light Co.*, [1909] A. C. 194; that decision is conclusive in the appellants' favour. The legislation in question is not authorized by s. 92, enumeration 9, since the license in this case was not imposed for the purpose of raising revenue, and it is not within the genus of the licenses there referred to. [The Companies Act of British Columbia (R. S. B. C., 1907, c. 39), ss. 2, 18, 139, 152, 153, 157, 166 to 168, 170, and 173; the Companies Act of Canada (R. S. Can., 1906, c. 79), ss. 5, 10, 12, and 30; the Interpretation Act (R. S. Can., 1906, c. 1), s. 30; *Cunningham* v. *Tomey Homma*, [1903] A. C. 151; and *Union Colliery Co.* v. *Bryden*, [1899] A. C. 580, were also referred to.]

Lafleur, K.C., for the respondents; *Sir R. Finlay, K.C.*, and *Geoffrey Lawrence*, for the Attorney-General for British Columbia. The legislation in the appeals is authorized by s. 92, enumeration 13, of the British North America Act, 1867, that enumeration being "property and civil rights in the province"; also by s. 92, enumeration 16, which refers to "all matters of a merely local or private nature." While the Parliament of Canada can incorporate a company to carry on business throughout the Dominion, the company's operations in each province must be subject to regulation by the laws of that province in all matters falling within those two enumerated objects: *Colonial Building and Investment Association* v. *Attorney-General of Quebec*, 9 App. Cas. 157. The decision in *Union Colliery Co.*

v. *Bryden*, [1899] A. C. 580, is distinguishable as the legislation there in question was not genuine coal regulation at all. The Dominion power as to the incorporation of companies does not fall within "the regulation of trade and commerce," but is conferred by the general power contained in s. 91 to make laws for the peace, order, and good government of Canada, and it consequently does not override the powers of the province under s. 92. The express power given in s. 91, enumeration 15, to incorporate banks shows that incorporation is not included in the powers as to the regulation of trade and commerce. In any case the power under s. 91, enumeration 2, does not extend to the regulation of trade of a purely local character: *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96. The legislation questioned in *Dobie* v. *Temporalities Board*, 7 App. Cas. 136, went beyond the local limits of the authority, and the decision in *Union Colliery Co.* v. *Bryden*, [1899] A. C. 580, is distinguishable as the judgment shows that the legislation was not a genuine mining regulation. The decision in *Compagnie Hydraulique* v. *Continental Heat and Light Co.*, [1909] A. C. 194, rests upon the fact that the company was given power to operate works without restriction as to the works being in one province; clauses to this effect appear in the record though not in the report. Sir Arthur Wilson did not intend to lay down the broad unqualified proposition appearing at the end of the judgment; if he did it was overruled by the judgment in *City of Montreal* v. *Montreal Street Railways Co.*, [1912] A. C. 333. The provincial legislature had power to impose the licenses under s. 92, enumerations 2 and 9; *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; *Brewers and Maltsters Case*, [1897] A. C. 231. [The opinions delivered in the Supreme Court of Canada in *In re Companies*, (1913) 48 Can. S. C. R. 331, were referred to.]

Wegenast replied.

[Viscount Haldane, L.C. The Attorneys-General as intervenants in private litigation are only entitled to present their views to the Committee and have not a right of reply.]

The judgment of their Lordships was delivered by

Viscount Haldane, L.C. These are consolidated appeals from judgments of the Supreme Court of British Columbia. The Attorney-General for the Dominion and the Attorney-General for the province have intervened.

By the first of the judgments the appellant Company was restrained at the suit of the respondent Wharton from carrying on business in the province until the company should have become licensed under Part VI. of the British Columbia Companies Act. By the second judgment the appellants' action against the respondent Duck for goods sold and delivered was dismissed. The real question in both cases is one of importance. It concerns the distribution between the Dominion and the provincial Legislatures of powers as regards incorporated companies.

The appellants are a company incorporated in 1907 by letters patent issued by the Secretary of State for Canada under the Companies Act of the Dominion. The letters patent purported to authorize it to carry on throughout Canada the business of a dealer in agricultural implements. It has been held by the Court below that certain provisions of the British Columbia Companies Act have been validly enacted by the provincial Legislature. These provisions prohibit companies which have not been incorporated under the law of the province from taking proceedings in the Courts of the province in respect of contracts made within the province in the course of their business, unless licensed under the provincial Companies Act. They also impose penalties on a company and its agents if, not having obtained a license, [illegible] or they carry on the company's business in the province. The appellant w[illegible] refused a license by the registrar. It was said that there was already a company registered in the province under the same name, and s. 18 of the provincial statute prohibits the grant of a license in such a case. The question which has to be determined is whether the legislation of the province which imposed these prohibitions was valid under the British North America Act.

The Companies Act of the Dominion provides by s. 5 that the Secretary of State may, by letters patent, grant a charter to any number of persons not less than five, constituting them and others who have become subscribers to a memor-

andum of agreement a body corporate and politic for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, with certain exceptions which do not affect the present case. The Interpretation Act of 1906, by s. 30, provides, among other things, that words making any association or number of persons a corporation shall vest in such corporation power to sue and be sued, to contract by their corporate name, and to acquire and hold personal property for the purposes for which the corporation is created, and shall exempt individual members of the corporation from personal liability for its debts, obligations, or acts, if they do not violate the provisions of the Act incorporr ; them.

Section 10 of the Companies Act makes it a condition of the issue of the letters patent that the applicants shall satisfy the Secretary of State that the proposed name of the company is not the name of another known incorporated or unincorporated company, or one likely to be confounded with any such name, and s. 12 gives him large powers of interference as regards the corporate name. Section 29 provides that on incorporation the company is to be vested with, among other things, all the powers, privileges, and immunities requisite or incidental to the carrying on of its undertaking, as if it were incorporated by Act of Parliament. Section 30 enacts that the company shall have an office in the city or town in which its chief place of business in Canada is situate, which shall be the legal domicil of the company in Canada, and that the company may establish such other offices and agencies elsew ere as it deems expedient. By s. 32 it is provided that the contract of an agent of the company made within his authority is to be binding on the company and that no person acting as such agent shall be thereby subjected to individual liability.

Turning to the relevant provisions of the British Columbia Companies Act, these may be summarized as follows: An extra-provincial company means a duly incorporated company other than a company incorporated under the laws of the province or the former Colonies of British Columbia and Vancouver Island (s. 2). Every such extra-provincial company having gain for its object must be licensed or registered under the law of the province, and no agent is to carry on its business within the province until this has been done (s. 139). Such license or registration enables it to sue and to hold land in the province (s. 141). An extra-provincial company, if duly incorporated by the laws of, among other authorities, the Dominion, and if duly authorized by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the provincial Legislature extends, may obtain from the registrar a license to carry on business within the province on complying with the provisions of the Act and paying the proper fees (s. 152). If such a company carries on business without a license, it is liable to penalties (s. 167), and the agents who act for it are similarly made liable, and the company cannot sue in the Courts of the province in respect of contracts made within the province (s. 168). The registrar may refuse a license when the name of the company is identical with or resembling that by which a company, society, or firm in existence is carrying on business, or has been incorporated, licensed, or registered, or when the registrar is of opinion that the name is calculated to deceive, or disapproves of it for any other reason (s. 18).

The charter of the appellant company was granted under the seal of the Secretary of State of the Dominion in 1907. It purported, as already stated, to confer power to carry on throughout the Dominion of Canada and elsewhere the business of a dealer in agricultural implements and cognate business, and to acquire real and personal property. It is not in dispute that it was an extra-provincial company having gain for its object. The chief place of business was to be Winnipeg. The registrar refused, as has been mentioned, to grant a license under the provincial Act to the appellant company. The power of the registrar is not challenged, if the sections of the provincial statute under which he proceeded were validly enacted.

What their Lordships have to decide is whether it was competent to the province to legislate so as to interfere with the carrying on of the business in the province of a Dominion company under the circumstances stated.

The distribution of powers under the British North America Act, the interpretation of which is raised by this appeal, has been often discussed before the Judicial Committee and the tribunals of Canada, and certain principles are now well settled. The general power conferred on the Dominion by s. 91 to make laws for the peace, order and good government of Canada extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the legislatures of the provinces. But if the subject-matter falls within any of the heads of s. 92, it becomes necessary to see whether it also falls within any of the enumerated heads of s. 91, for if so, by the concluding words of that section it is excluded from the powers conferred by s. 92.

Before proceeding to consider the question whether the provisions already referred to of the British Columbia Companies Act, imposing restrictions on the operations of a Dominion company which has failed to obtain a provincial license, are valid, it is necessary to realize the relation to each other of ss. 91 and 92 and the character of the expressions used in them. The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them the remark applies which was made by this Board about the Australian Commonwealth Act in a recent case (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.*, [1914] A. C. 254, that if there is at points obscurity in language this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision.

The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, at p. 109, to the effect that in discharging the difficult duty of arriving 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 them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words "civil rights," in particular cases. An abstract logical definition of their scope is not only, having regard to the context of ss. 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases. But it may well be impossible to give abstract answers to general questions

as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context.

Turning to the appeal before them, the first observation which their Lordships desire to make is that the power of the provincial legislature to make laws in relation to matters coming within the class of subjects forming No. 11 of s. 92, the incorporation of companies with provincial objects, cannot extend to a company such as the appellant company, the objects of which are not provincial. Nor is this defect of power aided by the power given by No. 13, Property and Civil Rights. Unless these two heads are read disjunctively the limitation in No. 11 would be nugatory. The expression "civil rights in the province" is a very wide one, extending, if interpreted literally, to much of the field of the other heads of s. 92 and also to much of the field of s. 91. But the expression cannot be so interpreted, and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words. If this be so, then the power of legislating with reference to the incorporation of companies with other than provincial objects must belong exclusively to the Dominion Parliament, for the matter is one not coming within the classes of subjects assigned exclusively to the "legislatures of the provinces," within the meaning of the initial words of s. 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression "the peace, order, and good government of Canada."

Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons*, 7 App. Case. 96, at pp. 112, 113, on head 2 of s. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head must, like the expression "Property and Civil Rights in the Province," in s. 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exerciseable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. Their Lordships are therefore of opinion that the Parliament of Canada had power to enact the sections relied on in this case in the Dominion Companies Act and the Interpretation Act. They do not desire to be understood as suggesting that because the status of a Dominion company enables it to trade in a province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the provincial legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the province if civil rights were to be read as an expression of unlimited scope. But, as has already been pointed out, the expression must be construed consistently with various powers conferred by ss. 91 and 92, which restrict its literal scope. It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96; *Colonial Building and Investment Association* v. *Attorney-General for Quebec*, 9 App. Cas. 157, and *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575.

It follows from these premises that those provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the admin-

istration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion. Their Lordships are of opinion that this question must be answered in the negative.

In the course of the argument their Lordships gave consideration to the opinions delivered in 1913 by the Judges of the Supreme Court of Canada in response to certain abstract questions on the extent of the powers which exist under the Confederation Act for the incorporation of companies in Canada. Two of these questions bear directly on the topics now under discussion. The sixth question was whether the legislature of a province has power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province in the absence of a license from its Government, if fees are required to be paid upon the issue of such license. The seventh question was whether the provincial legislature could restrict a company so incorporated for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred, or could limit such exercise within the province. This question further raised the point whether a Dominion trading company was subject to provincial legislation limiting the business which corporations not incorporated under the legislation of the province could carry on, or their powers, or imposing conditions on the engaging in business by such corporations, or restricting a Dominion company otherwise in the exercise of its corporate powers or capacity.

Their Lordships have read with care the opinions delivered by the members of the Supreme Court, and are impressed by the attention and research which the learned Judges brought to bear, in the elaborate judgments given, on the difficult task imposed on them. But the task imposed was, in their Lordships' opinion, an impossible one, owing to the abstract character of the questions put. For the reasons already indicated, it is impracticable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by ss. 91 and 92 and between their various sub-heads inter se. Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of which individually the Courts have to determine on which side of a particular line the facts place them. But while in some cases it has proved, and may hereafter prove, possible to go further and to lay down a principle of general application, it results from what has been said about the language of the Confederation Act that this cannot be satisfactorily accomplished in the case of general questions such as those referred to. It is true that even when a company has been incorporated by the Dominion Government with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by s. 92. Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the province as to mortmain (*Colonial Building and Investment Association* v. *Attorney-General of Quebec*, 9 App. Cas. 157, at p. 164), or escape the payment of taxes, even though these may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe*, 12 App. Cas. 575). Again, such a company is subject to the powers of the province relating to property and civil rights under s. 92 for the regulation of contracts generally: *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96.

To attempt to define a priori the full extent to which Dominion companies may be restrained in the exercise of their powers by the operation of this principle is a task which their Lordships do not attempt. The duty which they have to discharge is to determine whether the provisions of the provincial Companies Act already referred to can be relied on as justifying the judgments in the Court below. In the opinion of their Lordships it was not within the power of the provincial legislature to enact these provisions in their present form. It might have been competent to that legislature to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes, such as the

furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the province should, under a statute of general application regulating procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under s. 92 to the provincial legislature. The analogy of the decision of this Board in *Union Colliery Co.* v. *Bryden* [1899] A. C. 580, therefore applies. They are unable to place the limited construction upon the word "incorporation" occurring in that section which was contended for by the respondents and by the learned counsel who argued the case for the province. They think that the legislation in question really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government of companies with other than provincial objects.

They will therefore humbly advise His Majesty that these appeals should be allowed, and that judgment should be entered for the appellant company in the action of *Wharton* v. *John Deere Plow Company* with costs. The action by the company against the respondent Duck must, unless the parties come to an agreement, be remitted to the Court below to be disposed of in accordance with the result of this appeal. As to the interveners, the Attorney-General of the Dominion and the Attorney-General of the province, there will be no order as regards costs. The respondents, Wharton and Duck, must pay the costs of the appellant company of this appeal, excepting so far as these have been increased by the interventions.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Linklater, Addison & Brown.*
Solicitors for intervenants: *Charles Russell & Co., and Gard, Rook & Co.*

(1916) A. C. 566.

[PRIVY COUNCIL.]

BONANZA CREEK GOLD MINING COMPANY, LIMITED . APPELLANTS;

AND

THE KING . . . . . RESPONDENT;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC AND OTHERS . . . . . INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority of Province—Incorporation of Companies—"With provincial objects"—Capacity outside Province—Letters Patent—Prerogative Power—Yukon Territory—Free Miner's Certificate—"Canadian Charter"—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 12, 46, 91, 92—Ontario Companies Act (R. S. Ont., 1897, c. 191), s. 9.

Section 92 of the British North America Act, 1867, confines the actual powers and rights which a provincial Government can bestow upon a company, either by legislation or through the executive, to powers and rights exercisable within the province, but does not preclude a province either from keeping alive the then existing power of the Executive to incorporate by charter so as to confer a general capacity analogous to that of a natural person, or to legislate so as to create, by or by virtue of a statute, a corporation with this general capacity. The power of incorporation by charter transferred to the Lieutenant-Governor of the Province of Ontario by s. 65 of the above mentioned Act has not been abrogated or interfered with by the Ontario Companies Act (R. S. Ont., 1897, c. 191).

The doctrine of *Ashbury Railway Carriage and Iron Co.* v *Riche* (1875), L. R. 7 H. L. 653, does not apply to a company which derives its existence from the act of the Sovereign and not merely from the relating statute:—

Held, therefore, that a company incorporated by letters patent issued by the Lieutenant-Governor of Ontario under the Ontario Companies Act (R. S. Ont., 1897, c. 191), s. 9, with the object of carrying on the business of mining, has a status and capacity which enables it to accept and exercise mining leases and the rights in the Yukon Territory conferred by the authorities of the Dominion and the Yukon Territory.

Held, further, that a company incorporated under the Ontario Companies Act is "incorporated under a Canadian Charter" within the meaning of the regulations governing the issue of a free miner's certificate in the Yukon Territory.

* *Present:* LORD BUCKMASTER, L.C., VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, AND LORD SUMNER.

APPEAL, by special leave, from a judgment of the Supreme Court of Canada (February 2, 1915) affirming the judgment of the Exchequer Court of Canada.

The appellants were incorporated on December 23, 1904, by letters patent issued by the Lieutenant-Governor of the province of Ontario under the authority of the Ontario Companies Act (R. S. Ont., 1897, c. 191), and of any other power or authority vested in him. The purpose and objects of the company stated in the letters patent were, so far as material, to carry on the businesses of mining and exploration in all their branches, and for such purposes to acquire by purchase, lease, or otherwise rights, powers and concessions to enable the company properly to exercise and carry on all or any of its rights, powers, and objects. There were no words which limited the area of the company's operations. For some years prior to the litigation the appellants had been operating certain hydraulic mining properties in the Yukon. The properties were the subject of leases granted by the Crown through the Minister of the Interior for Canada, of which leases the appellants were assignees with the consent of the Crown. In 1907 the Crown leased to the appellants further claims. There had also been issued to the appellants a free miner's certificate, dated December 24, 1904, under the regulations governing placer mining in the Yukon (Stat. of Can., 1 Edw. 7, p. xlix.), and a license, dated September 7, 1905, from the Yukon Commissioner, under s. 2, sub-s. 2, of the Foreign Companies Ordinance (Consolidated Ordinances of the Yukon Territories, 1902, c. 59), the latter authorizing them to carry on their business in the Yukon.

By a petition of right, dated January 27, 1908, the appellants claimed damages in respect of alleged breaches by the Crown of agreements contained in the leases. The Crown delivered an answer by which it was denied that the appellants had any power to carry on mining or to hold mining leases in the Yukon, and it was further pleaded that there was no power to grant a free miner's certificate to the appellants, a provincial company, nor power in them to accept one. The material paragraphs of the answer are set out in the judgment.

The Exchequer Court of Canada stayed the proceedings pending the determination by that Court of the questions of law so raised; upon their argument Cassels, J., dismissed the petition of right.

Upon appeal the Supreme Court of Canada, a majority of that Court (Sir C. Fitzpatrick, C.J., with Davies and Duff, JJ., Idington and Anglin, JJ., dissenting) affirmed the decision of Cassels, J. The majority were of opinion that the appellants under their letters patent of incorporation had neither the power nor capacity to carry on mining outside the province of Ontario. The appeal is reported, 50 Can. S. C. R. 534.

The appellants appealed by special leave. The Board directed that the arguments in *Attorney-General for Ontario* v. *Attorney-General for Canada* reported post, p. 598, so far as that appeal involved questions arising in the present appeal, should be heard together with the present appeal, the parties in both appeals being heard. (The arguments of counsel will be found *post*, p.).

1916. Feb. 24. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada in a petition of right which gave rise to questions of constitutional importance as to the position of joint stock companies, incorporated

within the provinces, but seeking to carry on their business beyond the provincial boundaries.

The appellants were incorporated in Ontario by letters patent dated December 23, 1904, and issued under the authority of the Ontario Companies Act, and by virtue of any other authority or power then existing, in the name of the Sovereign and under the Great Seal of the province, by its Lieutenant-Governor. The letters patent recite that this Act authorizes the Lieutenant-Governor-in-Council by letters patent under the Great Seal to create and constitute bodies corporate and politic for any of the purposes or objects to which the legislative authority of the province extends. They go on to incorporate the company to carry on the businesses of mining and exploration in all their branches, and to acquire real and personal property, including mining claims, with incidental powers. There are no words which limit the area of operation or prohibit the company from carrying out its objects beyond the provincial boundaries.

In the years 1899 and 1900 the Crown, through the Minister of the Interior of the Dominion, had granted to predecessors in title of the appellants leases of certain tracts of land, in what is now the Yukon district, for the purpose of hydraulic mining. Two of these leases contained exclusions of so much of the tracts as had been taken up and entered for placer mining claims. In the year 1900 the Crown entered into agreements with these predecessors in title to the effect that, if any of the placer mining claims within the tracts should be forfeited or surrendered, the Crown would include them in the tracts by supplementary leases. The original leases having subsequently been assigned to the appellants, and certain of the placer mining claims having reverted, the Crown purported in 1907 to demise to the appellants these claims, and to agree to demise to them such other of the claims as might thereafter revert for the same terms of years as those for which the original leases were granted.

In 1906 the Minister of the Interior of the Dominion had purported to issue to the appellants a free miner's certificate. This certificate was issued in conformity with certain regulations under an Order in Council made under the provisions of the Dominion Lands Act, which gives the right to a free miner's certificate to persons of over eighteen and to joint stock companies, the latter being defined to include any company incorporated "for mining purposes under a Canadian charter or licensed by the Government of Canada."

When the Yukon district was, by the statute passed by the Dominion Parliament in 1899, made a separate territory, power to make ordinances was conferred on the Commissioner of the territory. Under this power the Foreign Companies Ordinance was passed, under which any company, incorporated otherwise than by or under the authority of an ordinance of the territory or an Act of the Parliament of Canada, was required to obtain a license under the ordinance to carry on its business in the Yukon Territory. Such a license when issued was made sufficient evidence in the Courts of the territory of the due licensing of the company. In September, 1905, the appellants obtained such a license.

In 1908 the appellants presented a petition of right in the Exchequer Court of Canada, alleging that, in breach of the agreement entered into by the Crown, placer mining claims which had reverted to the Crown and should have been leased to the appellants had been wrongfully withheld from the appellants, and that by reason of this and of other breaches of the agreement the appellants had suffered heavy damage, for which they as suppliants prayed compensation. The respondent delivered an answer to the petition of right, the first two paragraphs of such answer being as follows: "1. The respondent denies that the suppliant has now or ever has had the power, either under letters patent, license, free miner's certificate, or otherwise, to carry on the business of mining in the district of the Yukon, or to acquire any mines, mining claims, or mining locations therein, or any estate or interest by way of lease or otherwise in any such mines, mining claims, or locations. 2. Should a free miner's certificate have been issued to the suppliant, the respondent claims that the same is and always has been invalid and of no force or effect, that there was no power to issue a free miner's certificate to the suppliant, a company incorporated under pro-

vincial letters patent, and that there was no power vested in the suppliant to accept such a certificate."

Cassels, J., the Judge of the Exchequer Court, ordered the questions of law raised by these paragraphs of the answer to be disposed of, and pending this stayed all other proceedings. He subsequently heard arguments upon the questions thus raised. As the result he decided that he ought to follow what he conceived to be the opinions given by the majority of the Judges of the Supreme Court of Canada in a general reference which had been made to them in regard to companies, opinions which are now before this Board for consideration in the appeal which was argued immediately after the present one. He thought that the majority in the Supreme Court had decided that a provincial company was confined to the exercise of its functions to the province where it was incorporated. He therefore dismissed the petition of right, but without costs, on the ground taken in the first of the above quoted paragraphs of the answer. On the narrower ground taken in the second paragraph he did not enter.

There was an appeal to the Supreme Court, and the learned Judges were divided in their views. The Chief Justice, Davies, J., and Duff, J., were of opinion that it was ultra vires of the appellants to exercise powers or to acquire rights outside the boundaries of the province of Ontario. Idington, J., and Anglin, J., were of a different opinion. They held that, while a provincial company could exercise its powers as of right only within the province where it was incorporated, it was elsewhere in Canada like a foreign company, and had capacity to accept rights and powers conferred on it by comity by another Government.

The majority in the Supreme Court were therefore adverse to the appellants on the first question raised, that as to general capacity. On the question raised by the second paragraph of the answer Duff, J., expressed an opinion in favour of the appellants. On the question, which was one of construction, and arose only if he was wrong in his answer to the wider question, he thought that the condition of acquiring, under the Dominion regulations approved by the Order in Council already referred to, the right to a mining location to be worked by hydraulic process was the obtaining a free miner's certificate under the Dominion regulations governing placer mining. Under these regulations a joint stock company might receive such a certificate, if it came within the definition of being "incorporated for mining purposes under a Canadian charter, or licensed by the Government of Canada." Differing from the Chief Justice, who had been adverse to the appellants on this point also, Duff, J., was of opinion that the expression "Canadian charter" meant, not a charter granted under Dominion authority, but one emanating from any lawful authority in Canada: Otherwise, as he pointed out, a company incorporated by Yukon authority, or by the Council of the North-West Territories before Yukon became a separate territory, would be excluded, along with companies incorporated by the province of Canada before confederation.

Their Lordships have come to the same conclusion on this point as Duff, J. They think that the appellants, if they possessed legal capacity to receive such a Dominion certificate, had it validly bestowed on them, and that, if so, they subsequently obtained a good title to the mining locations and also to the Yukon license to carry on business which was granted to them. This subordinate question ought therefore to be answered in favour of the appellants.

Their Lordships accordingly turn to the larger question raised by the first of the two paragraphs, a question which is of far-reaching importance. It is whether a company incorporated by provincial letters patent, issued in conformity with legislation under s. 92 of the British North America Act, can have capacity to acquire and exercise powers and rights outside the territorial boundaries of the province. In the absence of such capacity the certificates, licenses, and leases already referred to were wholly inoperative, for if the company had no legal existence or capacity, for purposes outside the boundaries of the province conferred on it by the Government of Ottawa, by whose grant exclusively it came into being, it is not apparent how any other Government could bestow on it rights and powers which enlarged that existence and capacity. The answer to this

question must depend on the construction to be placed on s. 92 of the British North America Act and on the Ontario Companies Act.

Section 92 confers exclusive power upon the provincial legislature to make laws in relation to the incorporation of companies with provincial objects. The interpretation of this provision which has been adopted by the majority of the Judges in the Supreme Court is that the introduction of the words "with provincial objects" imposes a territorial limit on legislation conferring the power of incorporation so completely that by or under provincial legislation no company can be incorporated with an existence in law that extends beyond the boundaries of the province. Neither directly by the language of a special Act, nor indirectly by bestowal through executive power, do they think that capacity can be given to operate outside the province, or to accept from an outside authority the power of so operating. For the company, it is said, is a pure creature of statute, existing only for objects prescribed by the legislature within the area of its authority, and is therefore restricted, so far as legal capacity is concerned, on the principle laid down in *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R. 7 H. L. 653.

Their Lordships, however, take the view that this principle amounts to no more than that the words employed to which a corporation owes its legal existence must have their natural meaning, whatever that may be. The words of the British Companies Act were construed as importing that a company incorporated by the statutory memorandum of association which the Act prescribes could have no legal existence beyond such as was required for the particular objects of incorporation to which that memorandum limited it. A similar rule has been laid down as regards companies created by special Act. The doctrine means simply that it is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation. This was held by the House of Lords to be the error into which Blackburn, J., and the Judges who agreed with him had fallen when they decided in *Riche* v. *Ashbury Railway Carriage and Iron Co.*, L. R. 9 Ex. 224, in the Court below that the analogy of the status and powers of a corporation created by charter, as expounded in the *Sutton's Hospital Case* (1613), 10 Rep. 1a, should in the first instance be looked to. For to look to that analogy is to assume that the legislature has had a common law corporation in view, whereas the wording may not warrant the inference that it has done more than concern itself with its own creature. Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. In the absence of such language they are excluded, and if the corporation attempts to act as though they were not, it is doing what is *ultra vires*, and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used. For the statute may be so framed that executive power to incorporate by charter, independently of the statute itself, which some authority, such as a Lieutenant-Governor, possessed before it came into operation, has been left intact. Or the statute may be in such a form that a new power to incorporate by charter has been created, directed to be exercised with a view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal personality which the charter creates to existence for the purpose of these objects and within territorial limits. The language may be such as to show an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn, J., will be the true one.

Applying the principle so understood to the interpretation of s. 92 and of the Ontario Companies Act passed by virtue of it, the conclusion which results is different from that reached by the Court below. For the words of s. 92 are, in their Lordships' opinion, wide enough to enable the legislature of the province to keep the power alive, if there existed in the executive at the time of confed-

eration a power to incorporate companies with provincial objects, but with an ambit of vitality wider than that of the geographical limits of the province. Such provincial objects would be of course the only objects in respect of which the province could confer actual rights. Rights outside the province would have to be derived from authorities outside the province. It is therefore important to ascertain what were the powers in this regard of a Lieutenant-Governor before the British North America Act passed, and in the second place what the Ontario Companies Act has really done.

The Act which was passed by the Imperial Parliament in 1840, 3 & 4 Vict. c. 35, in consequence of the report on the state of affairs in Canada made by Lord Durham, united the provinces of Upper and Lower Canada under a Governor-General, who had power to appoint deputies to whom he could delegate his authority. This Act established a single legislature for the new United Province of Canada, and shortly after it had passed responsible government was there set up. In 1867 the British North America Act modified the Constitution so established. This Act contained a preamble stating that the provinces of Canada, Nova Scotia, and New Brunswick had expressed their desire to be federally united into one Dominion under the Crown, with a Constitution similar in principle to that of the United Kingdom. In the case of *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.*, [1914] A. C. 237, this Board had occasion to comment on the contrast between the principles which underlie the distribution of powers in the Constitutions of Canada and Australia respectively. They drew attention to the fact that the expression "federal" in the preamble of the British North America Act had been used in a somewhat loose fashion, and that the principle actually adopted was not that of federation in the strict sense, but one under which the Constitutions of the provinces had been surrendered to the Imperial Parliament for the purpose of being refashioned. The result had been to establish wholly new Dominion and provincial Governments with defined powers and duties, both derived from the statute which was their legal source, the residual powers and duties being taken away from the old provinces and given to the Dominion. It is to be observed that the British North America Act has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority. The executive government and authority over Canada are primarily vested in the Sovereign. But the statute proceeds to enact, by s. 12, that all powers, authorities, and functions which by any Imperial statute or by any statute of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of these provinces shall, "as far as the same continue in existence and capable of being exercised after the Union in relation to the government of Canada," be vested in and exercisable by the Governor-General. Section 65, on the other hand, provides that such powers, authorities, and functions shall "as far as the same are capable of being exercised after the Union in relation to the government of Ontario and Quebec respectively, be vested in and exercisable by the Lieutenant-Governors of Ontario and Quebec respectively." By s. 64 the constitution of the executive authority in Nova Scotia and New Brunswick was to continue as it existed at the Union until altered under the authority of the Act.

The effect of these sections of the British North America Act is that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the Governor-General and through his instrumentality to the Lieutenant-Governors the exercise of the prerogative on terms defined in their commissions, the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers. In relation, for example, to the incorporation of companies in Ontario with provincial objects the powers of incorporation which the Governor-General or Lieutenant-Governor possessed before the Union must be taken to have passed to the Lieutenant-Governor of Ontario so far as concerns companies with this class of objects. Under both s. 12 and s. 65 the continuance of the powers

thus delegated is made by implication to depend on the appropriate Legislature not interfering.

There can be doubt that prior to 1867 the Governor-General was for many purposes entrusted with the exercise of the prerogative power of the Sovereign to incorporate companies throughout Canada, and such prerogative power to that extent became after confederation, and so far as provincial objects required its exercise, vested in the Lieutenant-Governors, to whom provincial Great Seals were assigned as evidences of their authority. Whatever obscurity may at one time have prevailed as to the position of a Lieutenant-Governor appointed on behalf of the Crown by the Governor-General, has been dispelled by the decision of this Board in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A. C. 437, 443. It was there laid down that "the act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion Government."

The form of the commission by which the Governor-General appoints a Lieutenant-Governor to be Lieutenant-Governor of Ontario bears this out. For it runs in the name of the Sovereign, and is "to do and execute all things that shall belong to your said command and the trust we have reposed in you, according to the several provisions and directions granted or appointed you by virtue of the Act of the United Kingdom of Great Britain and Ireland passed in the thirtieth year of the reign of Her late Majesty Queen Victoria, called and known as 'The British North America Act, 1867,' and of all other statutes in that behalf, and of this our present commission, according to such instructions as are herewith given to you in respect of the said province of Ontario under the sign manual of our Governor-General of our said Dominion of Canada, or by order of our Privy Council of Canada, and according to such laws as are or shall be in force in the said Province of Ontario."

Their Lordships have now to consider the question whether legislation before or after confederation has been of such a character that any power of incorporation by charter from the Crown which formerly existed has been abrogated or interfered with to such an extent that companies so created no longer possess that capacity which the charter would otherwise have attached to them.

Prior to confederation, the granting of letters patent under the Great Seal of the Province of Canada for the incorporation of companies for manufacturing, mining, and certain other purposes was sanctioned and regulated by the Canadian statute of 1864, 27 & 28 Vict. c. 23 Province of Canada. This statute authorized the Governor in Council to grant a charter of incorporation to persons who should petition for incorporation for the purposes of the enumerated kinds of business. Applicants for such a charter were to give notice in the *Canada Gazette* of, among other things, the object or purpose for which incorporation was sought. By s. 4 every company so incorporated under that Great Seal for any of the purposes mentioned in this Act was to be a body corporate capable of exercising all the functions of an incorporated company as if incorporated by a special Act of Parliament. Their Lordships construe this provision as an enabling one, and not as intended to restrict the existence of the company to what can be found in the words of the Act as distinguished from the letters patent granted in accordance with its provisions. It appears to them that the doctrine of *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R. 7 H. L. 653, does not apply where, as here, the company purports to derive its existence from the act of the Sovereign and not merely from the words of the regulating statute. No doubt the grant of a charter could not have been validly made in contravention of the provisions of the Act. But, if validly granted, it appears to their Lordships that the charter conferred on the company a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings. There is nothing in the language used which, for instance, would preclude such a company from having an office or branch in England or elsewhere outside Canada.

The Dominion Companies Act (c. 79 of the Revised Statutes of 1906) is, so far as Part I. is concerned, framed on the same principle, although the machinery set up is somewhat different. Part II. stands on another footing. This part deals only with companies directly incorporated by special Act of the Parliament of Canada, and to these it is obvious that other considerations may apply. But the companies to which Part I. applies are, like those under the old statute, to be incorporated by letters patent, the only material difference being that the Act enables these to be granted by the Secretary of State under his own seal of office. When granted by s. 5 they constitute the shareholders a body corporate and politic for any of the purposes or objects, with certain exceptions, to which the legislative authority of the Parliament of Canada extends. The Sovereign, through the medium of the Governor-General, in this way delegates the power of incorporation, subject to restrictions on its exercise, to the Secretary of State, and it is by the exercise of the executive power of the Sovereign that the company is brought into existence.

The Ontario Companies Act, which governs the present case, is c. 191 of the Revised Statutes of the province, 1897. The principle is similar, save that the letters patent are to be granted directly by the Lieutenant-Governor of the province under the Great Seal of Ontario. Excepting in this respect, the provisions of s. 9, which corresponds to s. 5 of the Dominion Act, are substantially the same as those of the latter section, so that, subject to the express restrictions in the statute, it is by the grant under the Great Seal and not by the words of the statute, which merely restrict the cases in which such a grant can be made, that the vitality of the corporation is to be measured. It will be observed that s. 107 enables an extra-provincial company desiring to carry on business within the Province of Ontario to do so if authorized by license from the Lieutenant-Governor, a provision which bears out the view indicated.

It was obviously beyond the powers of the Ontario Legislature to repeal the provisions of the Act of 1864, excepting in so far as the British North America Act enabled it to do this in matters relating to the province. If the Legislature of Ontario had not interfered the general character of an Ontario company constituted by grant would remain similar to that of a Canadian company before confederation.

The whole matter may be put thus: The limitations of legislative powers of a province expressed in s. 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial Government can bestow, either by legislation or through the Executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another. In the case of a company created by charter the doctrine of ultra vires has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not ultra vires, although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of ultra vires applies. Where, under legislation resembling that of the British Companies Act by a province of Canada in the exercise of powers which s. 92 confers, a provincial company has been incorporated by means of a memorandum of association analogous to that prescribed by the British Companies Act, the principle laid down by the House of Lords in *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R. 7 H. L. 653, of course, applies. The capacity of such a company may be limited to capacity within the province, either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries, or because the statute under which incorporation took place did not authorize, and therefore excluded, incorporation for such a purpose. Assuming, however, that provincial legislation has pur-

ported to authorize a memorandum of association permitting operations outside the province if power for the purpose is obtained ab extra, and that such a memorandum has been registered, the only question is whether the legislation was competent to the province under s. 92. If the words of this section are to receive the interpretation placed on them by the majority in the Supreme Court the question will be answered in the negative. But their Lordships are of opinion that this interpretation was too narrow. The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted *ab extra*. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted. It follows, as the Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-General of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, that the appellant company could accept powers and rights conferred on it by outside authorities.

The conclusions at which their Lordships have thus arrived are sufficient to enable them to dispose of this appeal; for, according to these conclusions the appellant company had a status which enabled it to accept from the Dominion authorities the right of free mining, and to hold the leases in question and take the benefit of the agreements relating to the locations in the Yukon district, as well as of the license from the Yukon authorities.

A yet larger view of the devolution and distribution of executive power in Canada was suggested in some of the arguments addressed to their Lordships from the Bar, and they are aware that this view has been contended for on former occasions in the Dominion. It has been urged in several cases which have occurred that the Governor-General and the Lieutenant-Governors of the provinces, excepting so far as the Royal prerogatives have been reserved expressly or by necessary implication, have the right to exercise them, as though by implication completely handed over and distributed in such fashion as to cover the whole of the fields to which the self-government of Canada extends. The Governor and the Lieutenant-Governors would thus be more nearly viceroys than representatives of the Sovereign under the restrictions explained in *Musgrave* v. *Pulido*, (1879) 5 App. Cas. 102, where it was laid down that, in the case of a Crown Colony, the commission of the Governor must in each case be the measure of his executive authority, a principle which, in such a case as that of a self-governing Dominion like Canada, might find its analogy in the terms not only of the commission but of the statute creating the Constitution.

The argument for the larger view concedes that it is the general rule in the construction of statutes that the Crown is not affected unless there be words to that effect, inasmuch as the law made by the Crown with the assent of the Lords and Commons is enacted *prima facie* for the subject and not for the Sovereign. But this principle of construction it is said cannot apply to an Act the expressed object of which is to grant a Constitution with full legislative and executive powers. In the case of such an Act there is therefore no presumption that the general provisions it contains were not intended to include any matter of prerogative which, in the absence of the rule of construction above stated, would fall within the general words employed. For a Constitution, granted to a Dominion for regulating its own affairs in legislation and government generally, cannot be created without dealing with the prerogative, and the British North America Act from beginning to end deals with matters of prerogative, for the most part without expressly naming the Sovereign.

If this argument were well founded it would afford a short cut to the solution of the question which has arisen in this appeal. For under the distribution of the prerogative which it assumes it would be difficult to see how a Lieutenant-Governor, placed in the position of a viceroy as regards matters pertaining to the government of his province, could be excluded from the prerogative power of incorporating by charter, unless that power had been expressly taken away by legislation.

But their Lordships abstain from discussing at length the question so raised. They will only say that when, if ever, it comes to be argued points of difficulty will have to be considered. There is no provision in the British North America Act corresponding even to s. 61 of the Australian Commonwealth Act, which, subject to the declaration of the discretionary right of delegation by the Sovereign in c. 1, s. 2, provides that the executive power, though declared to be in the Sovereign, is yet to be exercisable by the Governor-General. Moreover, in the Canadian Act there are various significant sections, such as s. 9, which declares the executive government and authority over Canada to continue and be vested in the Sovereign; s. 14, which declares the power of the Sovereign to authorize the Governor-General to appoint deputies; s. 15, which, differing from s. 68 of the Commonwealth Act, says that the command in chief of the naval and military forces in Canada is to be deemed to continue and be vested in the Sovereign; and s. 16, which says that, until the Sovereign otherwise directs, the seat of the Government in Canada shall be Ottawa. These and other provisions of the British North America Act appear to preserve prerogative rights of the Crown which would pass if the scheme were that contended for, and to negative the theory that the Governor-General is made a viceroy in the full sense, and they point to the different conclusion that for the measure of his powers the words of his commission and of the statute itself must be looked to. In the case of *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A. C. 437, already referred to, it was said by this Board that the provisions of the Act "nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the provinces and the Sovereign." Properly understood, and subject to such express provisions of the Act as transfer what would otherwise remain prerogative powers, their Lordships are disposed to agree with this interpretation. It is quite consistent with it to hold that executive power is in many situations which arise under the statutory Constitution of Canada conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative. It follows that to this extent the Crown is bound and the prerogative affected. But such a conclusion is a very different one from the far-reaching principle contended for in the argument in question.

For the reasons which they have assigned earlier in this judgment their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the trial of the petition of right should be proceeded with. As these are proceedings arising out of a petition of right with reference to which, under the Petition of Right Act of Canada, there is discretion to award costs as against the Crown, the respondent will pay the appellants' costs here and in the Courts below. There will be no order as to the costs of the interveners.

Solicitors for appellants and interveners: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

(1916) A. C. 588.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA — APPELLANT;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA AND OTHERS . . . . . } RESPONDENTS;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA . . . . . } INTERVENER.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada — Legislative Authority of Dominion — Insurance—"Regulation of trade and commerce"—Insurance Act, 1910 (9 & 10 Edw. 7, c. 32, Canada), ss. 4, 70—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92

By s. 4 of the Insurance Act, 1910, enacted by the Parliament of Canada, "In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister." Section 70 provided that any contravention of s. 4 should be punishable for a first offence by fine, and for a second offence or subsequent offences by imprisonment with hard labour:—

Held, that the above legislation was ultra vires of the Parliament of Canada, since the authority conferred by the British North America Act, 1867, s. 91, head (2), to legislate as to "the regulation of trade and commerce" does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces, and since it could not be enacted under the general power conferred by s. 91, to legislate for the peace, order, and good government of Canada as it trenched upon the legislative authority conferred on the provinces by s. 92, head (13), to make laws as to "civil rights in the province."

The principle illustrated by *Russell* v. *The Queen* (1882), 7 App. Cas. 829, that subjects which in one aspect come within the authority of the provincial legislatures may in another aspect fall within the authority of the Dominion legislature, is well established, but ought to be applied with great caution.

Held, further, that it would be competent to the Parliament of Canada, under s. 91, heads (2) and (25), by properly framed legislation, to prohibit an insurance company incorporated by a foreign State from carrying on business in Canada if the company did not hold a license from the Minister, even if the business carried on was confined to a single province.

Present: LORD BUCKMASTER, L.C., VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

APPEAL (1), by special leave, from opinions of the Supreme Court of Canada (October 14, 1913).

(1) The appeal was consolidated with *Attorney-General for Ontario* v. *Attorney-General for Canada*, reported at p. 598, post. It was, however, separately argued, and a separate report will, it is thought, be more convenient.

The Governor-General in Council by an Order under the Supreme Court Act (R. S. Can., 1906, c. 139), s. 60, referred to that Court the two following questions: (1) Are ss. 4 and 70 of the Insurance Act, 1910, or any or what part or parts of the said sections, ultra vires of the Parliament of Canada? (2) Does s. 4 operate to prohibit an insurance company incorporated by a foreign State from carrying on the business of insurance within Canada if such company does not hold a license under the said Act and if such business is confined to one province?

The terms of s. 4 of the Insurance Act, 1910, and the effect of s. 70 appear from the head-note.

The questions were argued in November, 1912, before the Supreme Court, consisting of Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. On October 14, 1913, the learned Judges delivered the opinions (reported at 48 Can. S. C. R. 260), in the majority of which it was held that the answer to the first question was that the two sections were ultra vires, and to the second "Yes, if intra vires." The Chief Justice and Davies, J., dissented, being of opinion that the questions should be answered respectively "No" and "Yes."

(The argument of counsel will be found *post* p.).

1916. Feb. 24. The judgment of their Lordships was delivered by

VISCOUNT HALDANE:—This is an appeal from a judgment of the Supreme Court of Canada answering certain questions put to the Judges by a reference from the Government of the Dominion. The questions so referred were as follows:—

1. Are ss. 4 and 70 of the Insurance Act, 1910, or any and what part or parts of the said sections, ultra vires of the Parliament of Canada?

2. Does s. 4 of the Insurance Act, 1910, operate to prohibit an insurance company incorporated by a foreign State from carrying on the business of insurance within Canada, if such company does not hold a license from the Minister under the said Act, and if such carrying on of the business is confined to a single province?

Section 4 is in these terms: "In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action, or proceeding, or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister." The Minister is defined in the Act to mean the Minister of Finance of the Dominion.

Section 70 is an ancillary section which imposes a penalty on every person who contravenes or attempts to contravene the provisions of the above and other sections. Section 3 provides that the provisions of the Act shall not apply to any contract of marine insurance effected in Canada by any company authorized to carry on such business within Canada, nor to any company incorporated by an Act of the late province of Canada or by an Act of the legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province. Section 3 also provides that any such company as is last described may, by leave of the Governor-in-Council, avail itself of the provisions of this Act on complying with the provisions thereof, and that if it so avails itself these provisions shall then apply to it, and such company shall thereafter have the power of transacting its business of insurance throughout Canada. Section 12 enacts that no license shall be granted to any individual underwriter or underwriters to carry on any kind of insurance business, excepting in the case of associations of individuals formed upon the plan known as Lloyd's, under which each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy. The Act contains other restrictive and regulative provisions.

It will be observed that s. 4 deprives private individuals of their liberty to carry on the business of insurance, even when that business is confined within the limits of a province. It will also be observed that even a provincial company operating within the limits of the province where it has been incorporated cannot, notwithstanding that it may obtain permission from the authorities of another province, operate within that other province without the license of the Dominion Minister. In other words, the capacity is interfered with which, according to the judgment just delivered by their Lordships in the case of the Bonanza Company, see [1916] A. C. 566, such a company possesses to take advantage of powers and

rights proffered to it by authorities outside the provincial limits. Such an interference with its status appears to their Lordships to interfere with its civil rights within the province of incorporation, as well as with the power of the legislature of every other province to confer civil rights upon it. Private individuals are likewise deprived of civil rights within their provinces.

It must be taken to be now settled that the general authority to make laws for the peace, order, and good government of Canada, which the initial part of s. 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in s. 92. There is only one case, outside the heads enumerated in s. 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under s. 92. *Russell* v. *The Queen*, 7 App. Cas. 829, is an instance of such a case. There the Court considered that the particular subject-matter in question lay outside the provincial powers. What has been said in subsequent cases before this Board makes it clear that it was on this ground alone, and not on the ground that the Canada Temperance Act was considered to be authorized as legislation for the regulation of trade and commerce, that the Judicial Committee thought that it should be held that there was constitutional authority for Dominion legislation which imposed conditions of a prohibitory character on the liquor traffic throughout the Dominion. No doubt the Canada Temperance Act contemplated in certain events the use of different licensing boards and regulations in different districts and to this extent legislated in relation to local institutions. But the Judicial Committee appear to have thought that this purpose was subordinate to a still wider and legitimate purpose of establishing a uniform system of legislation for prohibiting the liquor traffic throughout Canada excepting under restrictive conditions. The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction. There was a good deal in the Ontario Liquor License Act, and the powers of regulation which it entrusted to local authorities in the province, which seems to cover part of the field of legislation recognized as belonging to the Dominion in *Russell* v. *The Queen*, 7 App. Cas. 829. But in *Hodge* v. *The Queen*, 9 App. Cas. 117, the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario Statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board, though without giving reasons, that the Dominion licensing statute, known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout Canada, was beyond the powers conferred on the Dominion Parliament by s. 91. Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces. Section 4 of the statute under consideration cannot, in their opinion, be justified under this head. Nor do they think that it can be justified for any such reasons as appear to have prevailed in *Russell* v. *The Queen*, 7 App. Cas. 829. No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well founded. Where a company is incorporated to carry on the business of insurance throughout Canada, and desires to possess rights and powers to that effect operative apart from further authority, the Dominion Government can incorporate it with such rights

and powers, to the full extent explained by the decision in the case of *John Deere Plow Co.* v. *Wharton*, [1915] A. C. 330. But if a company seeks only provincial rights and powers, and is content to trust for the extension of these in other provinces to the Governments of those provinces, it can at least derive capacity to accept such rights and powers in other provinces from the province of its incorporation, as has been explained in the case of the *Bonanza Company*, [1916] A. C. 566.

Their Lordships are therefore of opinion that the majority in the Supreme Court were right in answering the first of the two questions referred to them in the affirmative.

The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a license from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative.

Their Lordships will therefore humbly advise His Majesty that the questions referred to should be answered as now indicated. Following the usual practice, there will be no order as to costs.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondents: *Blake & Redden, Lawrence Jones & Co.*
Solicitors for intervener: *Gard, Lyell, Betenson & Davidson.*

(1916) A. C. 598.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO AND OTHERS . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENT;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA . . . . . } INTERVENER.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority of Dominion—Legislative Authority of Provinces—Incorporation of Companies—Powers and Capacity—Insurance—British North America Act, 1867 (30 & 31 Vict. c. 3), ss. 91, 92.

Questions referred to the Supreme Court of Canada as to the power and capacity of companies incorporated under provincial legislative authority and as to the power of the provincial legislatures to restrict the operations of companies incorporated under Dominion legislative authority answered by reference to the judgments of the Board in *John Deere Plow Co.* v. *Wharton*, [1915] A. C. 330; *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] A. C. 566; and *Attorney-General for Canada* v. *Attorney-General for Alberta*, [1916] A. C. 588.

Present: **LORD BUCKMASTER, L.C., VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.**

APPEAL, by special leave, from opinions of the Supreme Court of Canada (October 14, 1913), upon a reference.

The Governor-General in Council by an Order under the Supreme Court Act (R. S. Can., 1906, c. 139), s. 60, referred to that Court the following questions for hearing and consideration:—

1. What limitation exists under the British North America Act, 1867, upon the power of the provincial Legislatures to incorporate companies?

What is the meaning of the expression "with provincial objects" in s. 92, art. 11, of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon com-

panies locally incorporated, or what otherwise is the intention and effect of the said limitation?

2. Has a company incorporated by a provincial Legislature under the powers conferred in that behalf by s. 92, art. 11, of the British North America Act, 1867, power or capacity to do business outside the limits of the incorporating province? If so, to what extent and for what purpose?

Has a company incorporated by a provincial Legislature for the purpose, for example, of buying and selling or grinding grain the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province?

3. Has a corporation constituted by a provincial Legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts (*a*) within the incorporating province insuring property outside of the province; (*b*) outside of the incorporating province insuring property within the province; (*c*) outside of the incorporating province insuring property outside of the province?

Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country?

Do the answers to the foregoing inquiries or any and which of them depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province?

4. If in any or all of the above-mentioned cases, (*a*), (*b*), and (*c*), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases, on availing itself of the Insurance Act, 1910 (9 & 10 Edw. 7, c. 32), s. 3, sub-s. 3?

Is the said enactment the Insurance Act, 1910 (9 & 10 Edw. 7, c. 32), s. 3, sub-s. 3, *intra vires* of the Parliament of Canada?

5. Can the powers of a company incorporated by a provincial Legislature be enlarged, and to what extent, either as to locality or objects by (*a*) the Dominion Parliament; (*b*) the Legislature of another province?

6. Has the Legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a license so to do from the Government of the province, or other local authority constituted by the Legislature, if fees are required to be paid upon the issue of such licenses?

For examples of such provincial legislation see Ontario, 63 Vict. c. 24; New Brunswick, Cons. Stats., 1903, c. 18; British Columbia, 5 Edw. 7, c. 11.

7. Is it competent to a provincial Legislature to restrict a company incorporated by the Parliament of Canada for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province?

Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the Legislature of the province may carry on, or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province?

Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how and in what respect by provincial legislation?

The questions were argued before the Supreme Court of Canada, consisting of Sir Charles Fitzpatrick, C.J. and Davies, Idington, Duff, Anglin, and Brodeur, JJ., in February, 1913.

The learned Judges delivered their opinions, which are reported at 48 Can. S. C. R. 331, on October 14, 1913. It would appear that from the nature of the questions submitted and the variety of conclusions reached by the individual Judges it was not possible for the Court to return answers to the questions. The various opinions are summarized in the head-note to that report.

The Attorneys-General for the provinces appealed by special leave.

So far as the questions referred were involved in the appeal in *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] A. C. 566, they were argued upon the hearing of that appeal. The names of the counsel appearing are stated in the report of that appeal.

1915. Dec. 17. At the conclusion of the argument of the above mentioned appeal,

Sir R. Finlay, K.C., for the appellants, said that the arguments already adduced in the Insurance Act reference ([1916] A. C. 588) and in the *Bonanza Co.'s Case*, [1916] A. C. 566, covered all the questions which the appellants desired to argue and which had not already been dealt with by the judgment of the Board in *John Deere Plow Co.* v. *Wharton*, [1915] A. C. 330.

Newcombe, K.C., in reference to question 4 as to s. 3, sub-s. 3, of the Insurance Act, 1910, cited *Valin* v. *Langlois* (1879), 5 App. Cas. 115.

1916. Feb. 24. The judgment of their Lordships was delivered by

VISCOUNT HALDANE: Of the questions before the Board in this appeal some have already been disposed of by the judgments already delivered in the cases of *John Deere Plow Co.* v. *Wharton*, [1915] A. C. 330; *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] A. C. 566, and the Insurance Act reference, [1916] A. C. 588. In the first of these cases, in which the judgments in the Supreme Court of Canada in the present reference were brought to their notice, their Lordships indicated that the task of answering the questions on the interpretation of the British North America Act imposed on the learned Judges in the Court below was one which it was, in their own opinion, impossible satisfactorily to accomplish. They gave reasons for thinking that the abstract and general character of the questions put rendered it unsafe in the interests of justice to future suitors to attempt to answer them completely. Their Lordships are desirous of rendering all the assistance they can to the Governments of the Dominion and the provinces in the work, which is often difficult, of securing adequate assistance in the interpretation of the Constitution of Canada and the consequent framing of legislation. But, for reasons several times assigned in earlier judgments of the Judicial Committee, they feel the paramount importance of abstaining as far as possible from deciding questions such as those now stated until they come up in actual litigation about concrete disputes rather than on references of abstract propositions.

However, it so happens that on the present occasion most of the questions raised have been disposed of in the judgments in the three cases already referred to, and their Lordships will shortly indicate how far they consider this to have been done.

Questions 1 and 2 are answered as sufficiently as is expedient in the judgment given in *Bonanza Creek Mining Co.* v. *The King*, [1916] A. C. 566.

Questions 3 and 4 are sufficiently disposed of by the judgments in the *Bonanza Case*, [1916] A. C. 566, and *Attorney-General for Canada* v. *Attorney-General for Alberta*, [1916] A. C. 588.

As to question 5, their Lordships think it unnecessary to add to what they have said at length in the judgment in the *Bonanza Case*, [1916] A. C. 566.

As to questions 6 and 7 their Lordships have endeavoured in the case of the *John Deere Plow Co.* v. *Wharton*, [1915] A. C. 330, to give as much assistance as is practicable in answering these questions. The questions are, however, in some of their developments of a highly abstract character, and the Board is of opinion that it is not prudent to go further than was done in the judgment in that case.

Their Lordships will humbly advise His Majesty that the answers to the questions brought before them on this appeal should be to the effect above indicated. There will be no order as to costs.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

Solicitors for Attorney-General for British Columbia, intervener: *Gard, Lyell, Betenson & Davidson.*

Solicitors for Canadian Manufacturers Association, interveners: *Lawrence Jones & Co.*

IN THE PRIVY COUNCIL.

COUNCIL CHAMBER, WHITEHALL,
Wednesday, 8th December, 1915.

Present:

THE RT. HON. THE LORD CHANCELLOR (LORD BUCKMASTER).
THE RT. HON. VISCOUNT HALDANE OF CLOAN.
THE RT. HON. LORD PARKER OF WADDINGTON.
THE RT. HON. LORD SUMNER.

In the matter of a reference by His Excellency the Governor-General-in-Council to the Supreme Court of Canada, pursuant to section 60 of the Supreme Court Act, of certain questions for hearing and consideration relating to the Insurance Act, 1910.

BETWEEN—

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA,

APPELLANT;

AND

THE ATTORNEYS-GENERAL FOR THE PROVINCES OF ALBERTA, MANITOBA, NEW BRUNSWICK, NOVA SCOTIA, ONTARIO, QUEBEC, SASKATCHEWAN, THE INSURANCE FEDERATION AND THE MANUFACTURERS' ASSOCIATION.

RESPONDENTS;

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA.

INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

(Transcript of the shorthand notes of Messrs. Cherer & Co., 8 New Court, Carey Street, London, W.C.)

Counsel for the Attorney-General for the Dominion of Canada (Appellant): Mr. E. L. Newcombe, K.C. (Deputy Minister of Justice for the Dominion of Canada), and Mr. Barrington Ward for Mr. Raymond Asquith, serving with His Majesty's forces) (instructed by Messrs. Charles Russell & Co.)

Counsel for the Attorneys-General for the Provinces of Alberta and Saskatchewan (Respondents), Mr. H. H. Parlee, K.C. (of the Canadian Bar), and Mr. H. J. Douglas (for Sir Hamar Greenwood, serving with His Majesty's Forces) (instructed by Messrs. Blake & Redden).

Counsel for the Attorneys-General for the Provinces of Ontario, Quebec and New Brunswick (Respondents): The Rt. Hon. Sir Robert B. Finlay, K.C., The Hon. Wallace Nesbitt, K.C. (of the Canadian Bar), Mr. Charles Lanctot, K.C. (of the Canadian Bar), Mr. Aime Geoffrion, K.C. (of the Canadian Bar), Mr. E. Bayly, K.C. (of the Canadian Bar), and The Hon. M. M. Macnaghten (for Mr. Geoffrey Lawrence, serving with His Majesty's Forces) (instructed by Messrs. Blake & Redden).

Counsel for the Canadian Insurance Federation (Respondents), Mr. W. H. Upjohn, K.C., Mr. R. B. Bennett, K.C. (of the Canadian Bar), and Mr. Gaudet (of the Canadian Bar) (instructed by Messrs. Lawrence Jones & Co.).

Counsel for the Attorney-General for the Province of British Columbia (Intervener), Mr. H. J. Douglas (for Sir Hamar Greenwood, serving with His Majesty's Forces) (instructed by Messrs. Gard, Rook & Co.)

BETWEEN—

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO, THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC, THE ATTORNEY-GENERAL FOR THE PROVINCE OF NOVA SCOTIA, THE ATTORNEY-GENERAL FOR THE PROVINCE OF NEW BRUNSWICK, THE ATTORNEY-GENERAL FOR THE PROVINCE OF PRINCE EDWARD ISLAND, THE ATTORNEY-GENERAL FOR THE PROVINCE OF MANITOBA, THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA, AND THE ATTORNEY-GENERAL FOR THE PROVINCE OF SASKATCHEWAN,

APPELLANTS;

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA, AND THE CANADIAN MANUFACTURERS' ASSOCIATION,

RESPONDENTS;

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA,

INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Counsel for the Attorneys-General for Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Alberta and Saskatchewan (Appellants): The Rt. Hon. Sir Robert Finlay, K.C., The Hon. Wallace Nesbitt, K.C. (of the Canadian Bar); Mr. E. Lafleur, K.C. (of the Canadian Bar); Mr. Charles Lanctot, K.C. (of the Canadian Bar); Mr. Aime Geoffrion, K.C. (of the Canadian Bar); Mr. E. Bayly, K.C. (of the Canadian Bar); The Hon. M. M. Macnaghten (for Mr. Geoffrey Lawrence, serving with His Majesty's Forces); Mr. H. H. Parlee, K.C. (of the Canadian Bar) and Mr. H. J. Douglas (for Sir Hamar Greenwood serving with His Majesty's Forces) (instructed by Messrs. Blake . 'edden).

Counsel for the Attorney-General for Canada (Respondent): Mr. E. L. Newcombe, K.C. (of the Canadian Bar) and Mr. Barrington Ward (for Mr. Raymond Asquith, serving with His Majesty's Forces) (instructed by Messrs. Charles Russell & Co.).

Counsel for the Attorney-General for the Province of British Columbia (Intervener): Mr. H. J. Douglas (for Sir Hamar Greenwood, serving with His Majesty's Forces) (instructed by Messrs. Gard, Rook & Co.).

Counsel for the Canadian Manufacturers Association (Interveners): Mr. F. W. Wegenast (of the Canadian Bar) (instructed by Messrs. Lawrence, Jones & Co.)

BETWEEN—

THE BONANZA CREEK GOLD MINING COMPANY, LIMITED,

(SUPPLIANT) APPELLANT;

AND

HIS MAJESTY THE KING,

(RESPONDENT) RESPONDENT;

AND

THE ATTORNEYS-GENERAL FOR THE PROVINCES OF ONTARIO, QUEBEC, NOVA SCOTIA, NEW BRUNSWICK AND BRITISH COLUMBIA,

INTERVENANTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Counsel for the Bonanza Creek Gold Mining Company (Appellants): Mr. I. F. Hellmuth, K.C. (of the Canadian Bar), and Mr. J. H. Moss, K.C. (of the Canadian Bar) (instructed by Messrs. Blake & Redden).

Counsel for His Majesty The King (Respondent): Mr. E. L. Newcombe, K.C. (of the Canadian Bar); Mr. Barrington Ward (for Mr. Raymond Asquith, serving with His Majesty's Forces), and Mr. G. W. Mason (of the Canadian Bar) (instructed by Messrs. Charles Russell & Co.)

Counsel for the Attorneys-General for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick and British Columbia (Interveners): The Rt. Hon. Sir Robert B. Finlay, K.C., The Hon. Wallace Nesbitt, K.C. (of the Canadian Bar), Mr. E. Lafleur, K.C. (of the Canadian Bar), Mr. Charles Lanctot, K.C. (of the Canadian Bar), Mr. E. Bayly, K.C. (of the Canadian Bar), and The Hon. M. M. Maenaghten (for Mr. Geoffrey Lawrence, serving with His Majesty's Forces) (instructed by Messrs. Blake & Redden).

FIRST DAY.

MR. NEWCOMBE: My Lords, I appear for the Attorney-General of the Dominion, with my learned friend Mr. Barrington Ward, in the case of the Insurance Reference, which is the first of the three cases.

THE LORD CHANCELLOR: It is very important that we should come to some arrangement at the earliest possible moment as to the way in which these cases are going to be dealt with. Of course the best method of all would be any method that had been arranged among counsel themselves. We shall be glad to know if any such arrangement has been effected. MR. NEWCOMBE: No, my Lord; except that I think it is quite agreed that the most convenient procedure would be to hear the Insurance case first, because I think that is quite independent of the other cases.

SIR ROBERT FINLAY: It stands first too. MR. NEWCOMBE: Yes.

THE LORD CHANCELLOR: The Bonanza case raises in a concrete form one of the abstract questions that is raised by the other appeals. MR. NEWCOMBE: When we come to that, my suggestion would be that the Bonanza case should follow this. That is a case raising the concrete question which would, I imagine, conveniently be disposed of. Whether there will be anything left to be heard in connection with the Companies case I do not know.

THE LORD CHANCELLOR: Supposing the Bonanza case were taken first, we should then have one of these abstract questions raised before us in a concrete form, which would be by far the most convenient form. Then, when that case is disposed of, all the counsel engaged in the case, which I may call the hypothetical case, want to be heard, and the question is how they ought to be heard. MR. NEWCOMBE: The Insurance Reference is perhaps as concrete as the Bonanza case.

THE LORD CHANCELLOR: I think that is true. The real difficulty is that when the concrete question, either in the Insurance case, or in the Bonanza case, has been fully discussed there still remains all the argument which is to be heard upon exactly the same point raised in an abstract form. MR. NEWCOMBE: Yes.

THE LORD CHANCELLOR: It would clearly be hard on counsel who have to deal with the abstract question, and it would be a little hard on the Board, if all the matter were to be heard over again. MR. NEWCOMBE: Yes.

THE LORD CHANCELLOR: The question is, what is the best way of bringing all the arguments before the Board. MR. NEWCOMBE: I do not know that I have considered that. I ventured to suppose that perhaps after those cases had been fully discussed, the Insurance case and the Bonanza case, perhaps your Lordships would not want to hear very much about those abstract questions.

THE LORD CHANCELLOR: The question is, what the learned counsel wish to tell us. They may desire, and not unnaturally, to say: Although this case has been very fully argued, there are still further points which we desire to place before the Board. I cannot help thinking that the Bonanza case is a case that should be first dealt with. It is the case that is the most obviously concrete case of all, and deals with one of the most important questions. You want the Insurance Reference heard first? MR. NEWCOMBE: The Insurance case is a very important case, and it has been standing for a couple of years. I am not particular to press any view upon your Lordships.

THE LORD CHANCELLOR: I am sure you will render us all the assistance you can. We will proceed with the Insurance case first, if you desire it. MR. NEWCOMBE: If your Lordship please.

SIR ROBERT FINLAY: I think it would be convenient that the Insurance case should be taken first.

THE LORD CHANCELLOR: You understand what the position is. If it were possible for any arrangement to be made among the learned counsel, whatever arrangement it was the Board would do their best to fall in with it.

VISCOUNT HALDANE: The Insurance case raises questions which are not quite the same as the other questions raised by the insurance companies in the Companies' case. MR. NEWCOMBE: No, my Lord, they are quite different I think.

VISCOUNT HALDANE: But still you cannot support the argument in the Insurance case on the points which are raised in the Companies' case. MR. NEWCOMBE: No, not altogether; they may overlap at the edges, but they are substantially different questions.

VISCOUNT HALDANE: I do not think it desirable that we should have two arguments about Insurance, one about the questions raised in the Special Reference, and the other about the questions raised in the General case. Could it be arranged that we should dispose of the insurance question altogether?

SIR ROBERT FINLAY: May I make this suggestion, that your Lordships should hear as much argument as is proper in the three cases before deciding either of them?

THE LORD CHANCELLOR: Before judgment is given in any one of them that will be done.

SIR ROBERT FINLAY: There are a great many gentlemen here who are very much interested on behalf of these provinces in these points, and it would be right that they should be heard before judgment is given.

THE LORD CHANCELLOR: It was the realisation of that fact, and our desire that it should not be thought for a moment that it was overlooked, that led me to make the statement I did, as a suggestion of the best means for enabling everybody to state all they desired before the Board.

SIR ROBERT FINLAY: Perhaps your Lordships would leave it open for the moment whether the Bonanza case should follow the Insurance case, or whether the General Reference should not be taken next.

THE LORD CHANCELLOR: It would probably be better for the Bonanza case to follow it. While we are proceeding with the Insurance case I trust it may be possible for counsel to come to some arrangement.

VISCOUNT HALDANE: The Insurance Reference is a reference by the Dominion. MR. NEWCOMBE: Yes.

VISCOUNT HALDANE: In the questions raised before the Supreme Court there are two questions relating to insurance which are closely connected with each other. Is it possible to separate the arguments properly on those two sets of questions relating to insurance?

SIR ROBERT FINLAY: I think it may come in by way of illustration, but I think that the Insurance question will play a comparatively small part in the General Reference.

THE LORD CHANCELLOR: If it appears to be convenient, after we have heard the opening of the Insurance case, and any counsel desire to put further argument while they are appearing in the other cases, we shall be perfectly prepared to treat all the cases together, and hear them in that form. That might be a way of dealing with it. SIR ROBERT FINLAY: Yes, my Lord.

MR. NEWCOMBE: May it please your Lordships. The Insurance Reference which we are now to proceed with is a Reference made by the Governor-in-Council, under the powers of section 60 of the Supreme Court Act, to the Supreme Court for hearing and consideration of two questions which are set out in the Order-in-Council on page 2 of the Record at the top of the page. The first question is: "Are sections 4 and 70 of the Insurance Act, 1910, or any and what part or parts of the said sections *ultra vires* of the Parliament of Canada"? Then the second question is: "Does section 4 of the Insurance Act, 1910, operate to prohibit an insurance company incorporated by a foreign State from carrying on the business of insurance within Canada, if such company does not hold a license from the

Minister under the said Act, and if such carrying on of the business is confined to a single province?"

The first question raises the constitutional question as to the power of the Parliament of Canada to enact section 4 of the Insurance Act. The second question is only a minor question, and involves, I think, only a matter of construction, which is not very difficult when once the constitutional point has been determined. The reference involves the whole policy and operation of the Statute which, in its antecedent and latest form, had been in force in Canada ever since a time antedating the union of the provinces, and for upwards of half a century. My Lords, we have had printed and bound together the Statutes relating to insurance, ending with the Insurance Act of 1910, which is the Statute as to which we desire your Lordships' decision. This volume contains the legislation from 1867 down to the present time in Canada, and goes back to and includes three earlier Acts of the provinces to which I shall presently refer. Perhaps I had better read the section which is referred to, section 4. It is section 4 of the Act of 1910. "In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister." Then section 70 is the section imposing penalties: "Every person who: (*a*) In Canada, for or on behalf of any individual underwriter or underwriters, or any insurance company not possessed of a license provided for by this Act in that behalf and still in force, solicits or accepts any risk, or grants any annuity, or advertises for, or carries on any business of insurance, or prosecutes or maintains any suit, action or proceeding, or files any claim in insolvency relating to such insurance, or acting as an insurance agent, receives directly or indirectly any remuneration from any British or foreign unlicensed insurance company or underwriters; or, except as provided for in section 139 of this Act, issues or delivers any receipt or policy of insurance, or collects or receives any premium, or inspects any risk, or adjusts any claim; or (*b*) except only on policies of life insurance issued to persons not resident in Canada at the time of issue, collects any premium in respect of any policy; and every director, manager, agent or other officer of any assessment life insurance company subject to Part II. of this Act, and every other person transacting business on behalf of any such company, who circulates or uses any application, policy, circular or advertisement on which the words 'Assessment System' are not printed as required by Part II. of this Act; shall, on summary conviction before any two justices of the peace, or any magistrate having the powers of two justices of the peace, for a first offence, be liable to a penalty not exceeding fifty dollars and costs, and not less than twenty dollars and costs, and in default of payment, to imprisonment with or without hard labour for a term not exceeding three months, and not less than one month; and for a second or any subsequent offence, to imprisonment with hard labour for a term not exceeding six months, and not less than three months."

VISCOUNT HALDANE: Is that more than a section ancillary to section 4?

THE LORD CHANCELLOR: It is a punishment for the breach of section 4.

MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE:—It is section 4 which we have to consider primarily.

MR. NEWCOMBE: Yes, my Lord. Of course section 4 has to be considered also in connection with the context of the Act. The intention of this Act, according to my submission, is to regulate the insurance trade of the country, and that is done by the expedient of requiring the companies to obtain a license from the Minister of Finance, who would issue that license upon compliance with the statutory requirements, looking to adequate provision in the view of Parliament for the protection of the insured. By the succeeding sections of the Act deposits are required as a condition of the license, and there are limitations as to the number and character of the various branches of insurance which may be included in one license. The capital stock and assets of the company are taken into

consideration; and there are provisions for inspection and filing of the securities, for the filing of information and returns; and, by section 37, provision is made for the appointment of an officer called the Superintendent of Insurance, who is given the rank of a Deputy Head of a Department, and who, under the instructions of the Minister of Finance, administers the Act through the branch of the Civil Service which, by sub-section 3 of section 37, is known as the Department of Insurance, which your Lordship will perceive is constituted for the administration and carrying out of the Act. Then there are provisions for suspending or cancelling licenses for insufficiency of assets, as to the investment of funds; and special provisions with regard to life insurance, fire insurance, and insurance other than life or fire insurance.

VISCOUNT HALDANE: I gather that under section 8 you cannot grant a license to a life company to carry on a fire business, and *vice versa*. MR. NEWCOMBE: That is so, my Lord.

VISCOUNT HALDANE: That is a very material interference with the liberty of insurance companies. MR. NEWCOMBE: Yes, my Lord, no doubt it is at the basis of the legislation to interfere with the liberty of the trade and regulate it.

THE LORD CHANCELLOR: It is not that the terms of section 4 are in any way obscure, or that their operation is doubtful, but the question is whether it was *ultra vires* or no. That is the point upon section 4. MR. NEWCOMBE: That is so, my Lord. Then penalties are enacted for the contravention of the various provisions of the statute. Your Lordships will observe that by section 12 it is enacted: "Except as in this section provided, no license shall be granted to any individual underwriter or underwriters to carry on any kind of Insurance business."—By section 4 no company or person is to carry on business without a license. Then when you come to section 12 it provides that no license shall be granted to any individual underwriter or underwriters to carry on any kind of insurance business. "Provided that associations of individuals formed upon the plan know as Lloyds, whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy, may be authorised to transact insurance other than life insurance in Canada in like manner and upon the same terms and conditions as insurance companies; such associations to be in all respects subject to the provisions of this Act, except that the statements required by this Act to be filed in the Department may be verified in such manner as the Superintendent shall direct and prescribe." Therefore, my Lords, no concern can carry on insurance business without a license. Except as to corporate bodies no persons except underwriters associated upon the system of Lloyds can receive a license. Therefore, this is a prohibition against the individual carrying on insurance on his own account.

THE LORD CHANCELLOR: That also appears from section 4 itself. MR. NEWCOMBE: Without a license?

THE LORD CHANCELLOR: Yes. MR. NEWCOMBE: But when you come to section 12 you find that an individual cannot get a license.

THE LORD CHANCELLOR: It looks rather like it from section 4. MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: It says it may not be done unless it is done by or on behalf of a company or underwriter holding a license from the Minister. MR. NEWCOMBE: Yes, my Lord, that is so.

SIR ROBERT FINLAY: My Lords, with regard to the proviso as to Lloyds I do not think that that has in any way taken into account that the underwriters at Lloyds act individually. MR. NEWCOMBE: There are two societies in the country licensed under that clause.

SIR ROBERT FINLAY: Lloyds does not act as an association in underwriting. MR. NEWCOMBE: There are two societies of underwriters who are supposed to comply with the requirements of section 12, and who in fact are licensed.

This Reference I may say differs from the Companies' Reference in this respect that the occasion for referring this question about the Insurance Act was not any difference of opinion manifested as between the authorities of the Dominion and of the provinces. This legislation in one form or another has been in force, as I have said, ever since a period antedating the Union. It transpired

in this way. A prosecution was instituted in 1909 in Montreal, which is a large centre of the insurance business, against a company which was carrying on business without a license. Section 70 provides a penalty, to be enforced before a justice of the peace, or two justices of the peace. The prosecution came before the police magistrate, and the company maintained that the Act was *ultra vires*, and the magistrate decided that the statute, which everybody had supposed up to that time was an unquestionable piece of legislation, was *ultra vires*. The effect of that decision was to enable that small unlicensed company to compete with the larger companies who were carrying on the insurance business of the country, and it was very unsatisfactory to these companies which are represented here. There was no provision for an appeal to any Court of authority, so that it was suggested by the insurance companies to the Government that this question should be referred to the Court under the procedure with which we are familiar at home, and be thus disposed of.

THE LORD CHANCELLOR: Have the justices power to declare that this section was *ultra vires*? MR. NEWCOMBE: That was an Information laid for an offence under section 70 of the Act, and if the Act were *ultra vires* of course there could not be any conviction.

THE LORD CHANCELLOR: I should have thought that would have had to be determined by another Court. MR. NEWCOMBE: At all events the magistrate undertook to determine that, and did determine it.

VISCOUNT HALDANE: You say this legislation is as old as and older than the Confederation? MR. NEWCOMBE: Yes, my Lord, I am going to refer to that.

VISCOUNT HALDANE: In fact the fact that there was legislation that was valid before Confederation made no difference, because before Confederation the provinces could legislate themselves? MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: It might have been that the legislation was constitutional before. After 1867 there came a marked division of power, and unless it was a provision of an old Act kept alive, it might be that the new Act was *ultra vires*. MR. NEWCOMBE: That might be so, my Lord.

VISCOUNT HALDANE: There is no suggestion that these licenses were issued under an old Act kept alive? MR. NEWCOMBE: No, my Lord, that is not suggested, but it might be the case, and I suppose is very likely the case, in view of what I am going to refer to, if your Lordships were to agree with the majority of the Supreme Court in saying that the legislation since the Union is *ultra vires*.

THE LORD CHANCELLOR: Would it be convenient for you to inform us of the facts relating to this case, in order that we may see exactly where we are? MR. NEWCOMBE: Your Lordship means the Magistrate's case?

THE LORD CHANCELLOR: Yes, the case out of which this appeal has arisen. If it is not convenient at this stage, please do not do it. MR. NEWCOMBE: Of course the magistrate's decision is not reported.

THE LORD CHANCELLOR: What were the facts relating to the company? What was the company; where was it working, and what did it do? MR. NEWCOMBE: The magistrate states the facts in his judgment as follows:—"This is a case brought under section 60 of the Insurance Act, being chapter 34 of the Revised Statutes of Canada. The accused, a business corporation having its head office in London, England, and a branch office in the City of Montreal, Canada, is accused of having delivered receipts and policies, and having collected premiums for a non-licensed insurance company, viz.: The Lloyds of London, England. The facts of the case are as follows:—The James Walker Hardware Company, Limited, of Montreal, not being satisfied with the rate of insurance they were paying, instructed their brokers, Messrs. Hare and Mackenzie, to see if insurance could not be gotten at a less rate than they were paying. Messrs. Hare and Mackenzie approached the manager of the accused company in Montreal, with the result that an insurance of ten thousand eight hundred and twenty-five pounds was placed with what is known as 'The Lloyds' London, which company is not licensed under the Insurance Act. The accused raised three points of defence:—First, that they represented, or were the agents of the insured, and not of the insurer. Second, that the Lloyds is not a company within the meaning of the Insurance Act. Third, that the Insurance Act is *ultra*

vires, and especially the provisions therein prohibiting any person from delivering receipts or policies, or collecting or receiving premiums for an insurer who has not been licensed under the Insurance Act.

THE LORD CHANCELLOR: They effected the insurance on what? MR. NEWCOMBE: It was a fire insurance, my Lord.

THE LORD CHANCELLOR: On buildings? MR. NEWCOMBE: Buildings or goods.

THE LORD CHANCELLOR: It was a fire policy on goods? MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: Where were the goods?

SIR ROBERT FINLAY: They were warehoused in Montreal, I believe. MR. NEWCOMBE: Yes, that is so. Then the magistrate states the facts and the points and he proceeds to overrule the first two objections and goes on in an elaborate judgment to demonstrate to his satisfaction that the whole Act is *ultra vires*.

VISCOUNT HALDANE: There is no appeal and they thought they would get an opinion on the point. MR. NEWCOMBE: Yes, my Lord, never doubting that they would get a favourable opinion. The unfortunate thing was that for reasons which had nothing to do with this Insurance Reference this difficulty about companies culminated as between the provinces and the Dominion in the Reference which is here in your Lordships' list. Your Lordships know the subsequent history of that. There was great objection on the part of the provinces to that question being litigated, and the two cases happened to come on the docket at the same time, and so the provinces appeared and objected to our jurisdiction as to the Insurance Act, because they said that this Act was mixed up with the question of companies, and it was necessary that they should object to that. Then there were objections to the jurisdiction of the Crown to put any questions at all. Your Lordships remember that that appeal came here and was very elaborately argued and was determined by your Lordships.

VISCOUNT HALDANE: You objected to there being an appeal as regards a number of general questions. You said it was inconvenient. MR. NEWCOMBE: The provinces had brought forward the general questions.

VISCOUNT HALDANE: And we granted leave to appeal subject to any objection that might be taken.

SIR ROBERT FINLAY: I rather think they were drafted entirely by my learned friend.

VISCOUNT HALDANE: It only means that everybody objected the moment it did not look convenient to them.

THE LORD CHANCELLOR: At any rate they are all here now.

SIR ROBERT FINLAY: I think my friend suggested that we were responsible for the form of some questions which he suggests are objectionable. If anyone is responsible it is himself. MR. NEWCOMBE: I did not intend to say anything about the form of the questions; it is the substance.

THE LORD CHANCELLOR: The real thing we have to consider is whether section 4 is or is not invalid. MR. NEWCOMBE: Yes, my Lord. I think it is material before I go further to refer to the antecedent legislation, but first in order to understand the application of section 4 may I read section 3 of the Act of 1910 which defines the application of the Act, because I think that may be important, section 3 provides: "The provisions of this Act shall not apply (1) to any contract of marine insurance effected in Canada by any company authorised to carry on within Canada the said business; nor (2) except as hereinafter provided shall its provisions apply (a) to any policy of life insurance in Canada, issued previously to the twenty-second day of May, one thousand eight hundred and sixty-eight, by any company which has not subsequently received a license" (that was the date of the first of the Union Legislation) "or, (b) to any company incorporated by an Act of the legislature of the late province of Canada, or by an Act of the legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province; or, (c) to any society or association of persons for fraternal, benevolent, industrial or religious purposes, among which purposes

is the insurance on the assessment system only of the lives of the members thereof exclusively; or, (d) to any association for the purpose of life insurance formed in connection with any society or association and exclusively from its members, and which insures on the assessment system only the lives of such members exclusively; or (e) to any society or organisation exempted, under this section, by the Treasury Board from the provisions of this Act; and (3) upon the passing of this Act licenses for the transaction of the business of inland marine insurance shall become inoperative and void and thereafter no company shall be required to obtain a license for the transaction of that branch of insurance, notwithstanding anything to the contrary in its Act of incorporation contained."

THE LORD CHANCELLOR: "Authorised" in sub-section 1 means authorised by its letters patent or its memorandum of association. MR. NEWCOMBE: Yes, my Lord; then sub-section 2: "Upon its being established to the satisfaction of the Treasury Board that the occupation of the members of any society or organisation of persons for fraternal, benevolent, industrial or religious purposes, among which purposes is the granting of life, accident, sickness or disability insurance to the members thereof exclusively, is of such a hazardous nature that the members of such society or organisation are either wholly unable to obtain insurance in the licensed insurance companies or are able to obtain it only to a limited extent and upon payment of very high premiums, the Treasury Board may exempt from the provisions of this Act such society or organisation or any association for the purpose of life, accident, sickness or disability insurance, or any one or more of such kinds of insurance formed in connection with such society or organisation and exclusively from its members, and which insures such members exclusively"; then sub-section 3 is rather important: "Any company incorporated by an Act of the legislature of the late province of Canada or by an Act of the legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated and which is within the exclusive control of the legislature of such province, may, by leave of the Governor in Council, avail itself of the provisions of this Act on complying with the provisions thereof; and if it so avails itself the provisions of this Act shall thereafter apply to it, and such company shall thereafter have the power of transacting its business of insurance throughout Canada." The Act is limited in its application so as to exclude the case of a company incorporated by a province and carrying on business wholly within the limits of the incorporating province. Then the company in my submission, and in the view of Parliament, being inherently incapable by reason of the limitation upon the legislative power of the province to incorporate a company to carry on its business beyond the limits of the incorporating province, the Act provides that if such a company desire to extend its business throughout the Dominion it may do so by complying with the provisions of the Insurance Act, putting up the necessary deposits and obtaining a license from the Minister.

VISCOUNT HALDANE: In other words this Act recognises a purely provincial company. It can carry on business in the province, but if it wants to carry on business throughout Canada it must get a license. MR. NEWCOMBE: Yes, my Lord, and then it carries on business by virtue of this Dominion Statute which says that "if it so avails itself the provisions of this Act shall thereafter apply to it throughout Canada."

VISCOUNT HALDANE: It may be that apart from the provision as to license such a company had power to carry on business throughout Canada? MR. NEWCOMBE: Yes, my Lord, what I desire to point out is that this Statute assumes that they have not the power, and that if they are going to carry on business throughout Canada they must do so by force of this Act.

THE LORD CHANCELLOR: If they are outside their own limits they are brought within section 4 and they must obtain a license from the Minister. MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: You are assuming that they could not proceed with any business outside their own province but for this Dominion Statute. MR. NEWCOMBE: Yes, my Lord. You will see when we go back to the antecedent

legislation that this principle runs through the whole legislation from the very beginning. There is one further sub-section, perhaps it is not very important, but I will read it: "Any society or association of persons for fraternal, benevolent, industrial or religious purposes, among which purposes is the insurance on the assessment system only of the lives of the members thereof exclusively, or any association for the purpose of life insurance on such system only formed in connection with any such society or association and exclusively from its members, and which insures the lives of such members exclusively, may apply to the Minister to be allowed to avail itself of the provisions of Part 2 of this Act, and upon such application being assented to, such society or association shall cease to be exempt from the application of this Act."

This book is entitled "A collection of the general insurance legislation of the Dominion of Canada from 1907 to 1915." That is not quite an accurate title, because it goes back further. There are several Acts here printed previous to Confederation which I will refer to. The first is that of New Brunswick of 1856. That is at page 1 of the book. This is the first enactment relating to insurance.

VISCOUNT HALDANE: Let us see how we stand. The province of Canada had no jurisdiction over New Brunswick at this time. MR. NEWCOMBE: No, my Lord, New Brunswick was one of the original provinces.

VISCOUNT HALDANE: It had its own legislature. MR. NEWCOMBE: Yes, and it was one of the provinces incorporated in the Union of 1867. This was the legislation of New Brunswick: "It shall not be lawful for any insurance company or association not incorporated by the legislature of this province, to establish or continue any branch or agency within this province, or directly or indirectly to take any risk, or transact any business of insurance in the same, after the day fixed for this Act to come into operation, unless a statement subscribed by the president, secretary, or principal manager of such company or association, shall be first filed in the Provincial Secretary's office in this province; which statement shall specify the aggregate amount of the risks at that time taken by the said company, the amount of losses incurred during the preceding year, the amount of capital actually paid in, and how the same has been invested and secured; also a particular statement of the manner in which the residue of the capital has been secured, the amount of the dividends for the preceding year and when declared, the amount of cash on hand and in the hands of agents or other persons, together with the amount of the surplus profits then belonging to the said company, and how the same have been invested and secured, and the amount of real estate owned by the said company; which statement shall be accompanied by an affidavit of the secretary," and so on.

VISCOUNT HALDANE: The only effect of this Act seems to me to be to place a certain restriction on the insurance companies carrying on business in New Brunswick. Does the Confederation keep alive that kind of legislation of the provinces which was incorporated until it was afterwards altered, either by the legislature of the province or the Dominion? MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: That may justify some gentleman who is carrying on business for an old New Brunswick company without complying with the present legislation of the Dominion, but it cannot touch the quest. n we are on. MR. NEWCOMBE: I am not going to detain your Lordship with this, but it shows, I think, the legislative view both of the Dominion and of the provinces at the time of the Union as to the competency of Parliament to enact the Statute of 1868 which is the forerunner of and raises the questions of constitutional difficulty which are present in the Act of 1910.

VISCOUNT HALDANE: That must turn on the Confederation. MR. NEWCOMBE: Yes, but your Lordships have said that the declarations of the legislatures are pertinent matters for consideration in connection with that.

THE LORD CHANCELLOR: There is a difference in saying that a company may not trade in a district and saying that the company if it does so must have a license. This section does not prevent a company from trading. It merely says if it does certain statements shall be filed. MR. NEWCOMBE: Yes, my Lord.

This was the beginning of the legislation, but section 2 provides that a certificate shall be issued, not a license; it is called a certificate.

VISCOUNT HALDANE: I fail to see what it has to do with it. Before Confederation the Parliament of Canada could make laws for the "peace, order and good governmnet" of the whole of Canada just the same. There is no distinction between provincial and Dominion powers; there is no difference between the two. New Brunswick was exactly in the same position. They could make laws just as the Parliament here passed this Act. It cannot touch the question arising under the Confederation Act. MR. NEWCOMBE: There is no doubt that they could pass this Statute. Equally there is no doubt that the old province of Canada could pass the Statutes of 1860 and 1863 which follow. My point is this. May I read a passage from the Act of 1860 of the old province of Canada: "It shall not be lawful for any fire insurance company, not incorporated by any Statute of this province, or of either of the late provinces of Upper or Lower Canada, to take any risk or transact any business of insurance of any description within this province, without first obtaining a license from the Minister of Finance of this province to carry on such business." In 1863 in the next Statute they extended that and provided that "The first section of the said Act shall be held to include any fire insurance company, society, association, or partnership, whether incorporated or not, other than those incorporated by Statute of this province, or of either of the late provinces of Upper or Lower Canada." These Statutes were standing as valid provincial legislation on the 1st July, 1867, when the British North America Act came into effect.

VISCOUNT HALDANE: They were provincial in a very special sense. The province was the whole of Canada. New Brunswick was an independent province. MR. NEWCOMBE: Canada covered what is now Ontario and Quebec.

VISCOUNT HALDANE: You must not call it provincial legislation. MR. NEWCOMBE: There was ample jurisdiction and comprehensive legislative powers. They were called provinces then, but the legislative jurisdiction is very different now from what it was before the Union. The effect of this legislation is not doubted, but at the Union under section 129 it was provided: "except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made: subject nevertheless (except with respect to such as are enacted by or exist under Acts of Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective province, according to the authority of the Parliament or of that legislature under this Act."

VISCOUNT HALDANE: It is the old difficulty over again, because it says the old legislation is to stand until repealed or altered, but who is to repeal or alter it? It is left to be determined by the Confederation Act. It may be the Dominion or the provinces. MR. NEWCOMBE: At any rate the legislation was standing then, and it had to be dealt with, and on the 22nd May, 1868, the Dominion Parliament passed the Act respecting insurance companies which is printed here.

VISCOUNT HALDANE: That is practically a repeal. MR. NEWCOMBE: Yes, it is in terms. The 24th section provides that chapter 45 of the Acts of New Brunswick and those other Acts shall be repealed from this date.

VISCOUNT HALDANE: I should be very sorry to decide whether that repeal was valid in all respects, but we have not to decide that. The Dominion Legislature has legislated *de novo*, section 4 of the Insurance Act. Is not the only question whether it is within the words "peace, order and good government"? MR. NEWCOMBE: My Lord, that is a question, but for the determination of that question your Lordships will resort to various aids. What I am submitting at the present moment is that if we find in 1868 immediately after the Union both the Dominion Parliament and the legislatures of the provinces agreed that this sort

of legislation, because the ante-Union legislation is precisely of the same character as the sections before your Lordships, was clearly within the legislative authority of Canada. . . .

VISCOUNT HALDANE: I should be very sorry to determine the historical question as to what they thought. MR. NEWCOMBE: There might have been controversy.

VISCOUNT HALDANE: There was constant controversy about it. Has that anything to do with the construction of sections 91 and 92? MR. NEWCOMBE: I was going to refer to the legislative declaration in 1877. All that I am pressing is this. Your Lordships remember that in the Parsons case Sir Montague Smith said that the declaration of the Dominion Parliament is not conclusive upon the construction of the British North America Act, but when the proper construction is doubtful the interpretation put upon it by the Dominion Parliament may properly be considered. If that may be properly considered as to the *ex parte* construction put upon it by the Dominion Parliament, and then we find that the Provincial Legislature has adopted the same construction, would not that be a still more important matter?

VISCOUNT HALDANE: Crutches are very helpful to a man who cannot walk without them, but they are not any use to those who can. I do not think you can refer to these sections unless there is ambiguity in the language here. I think the sooner you tell us about the distribution of powers the better we shall follow it.

LORD PARKER OF WADDINGTON: All you mean is this. If there is a doubtful question on the true construction of sections 91 and 92 it is permissible to refer to what has been done as showing the interpretation which throughout has been put upon the Act of Parliament. MR. NEWCOMBE: That is all; that is what I am suggesting.

THE LORD CHANCELLOR: You must first look at sections 91 and 92 to see if there is a doubt. MR. NEWCOMBE: Perhaps I am introducing this at a wrong period of the argument, but it came chronologically in connection with the review of the legislation. Then there was the Act of 1868 and various amendments of it which have been reproduced here. I call attention particularly to the Act of 1886 whereby the previous legislation was repealed and consolidated in the Insurance Act of 1866.

VISCOUNT HALDANE: Does it appear in the Statutes now or has it been repealed? MR. NEWCOMBE: It has been repealed, but there was a revision and it appeared in the Revision in 1886 of the Insurance Act of Canada, and it is said to have been repealed in the Consolidated Act of 1906. I refer to that now merely to show that the Act of 1886 is the one which brings the word "person" into section 4 for the first time in the Dominion legislation. Previous to Confederation the provinces of Canada had provided for licenses to persons. There was no provision about persons in the Act of 1868 or any Act previous to 1886, but in 1886 the word "person" was brought into what is now section 4 of the Insurance Act. We submit this legislation regulating insurance as expanded in the later Statute of 1910, section 4 of which is submitted for the opinion of your Lordships, is legislation regulating trade and commerce, and therefore goes to the Dominion under the second enumeration of section 91 of the British North America Act.

LORD PARKER OF WADDINGTON: Is not the logical way of putting it this: Section 91 gives the Dominion power with regard to every matter that is not exclusively assigned by section 92 to the provinces; then it enumerates things without prejudice to the generality of the things mentioned before.

VISCOUNT HALDANE: The concluding words of section 91 take anything that falls within section 91 out of section 92. By the concluding words of section 91 the power is reserved. It is very important I think. MR. NEWCOMBE: It says: "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."

VISCOUNT HALDANE: Therefore if you get it within regulation of trade and commerce you have got it for the Dominion, notwithstanding that it is an infringement of the property and civil rights in section 92. MR. NEWCOMBE: Yes, my Lord, that is so.

LORD HALDANE: Your first proposition is that this comes within the regulation of trade and commerce in section 91. If it does, no matter how much it would be infringing civil rights, or come under that heading in section 92 that is enough. MR. NEWCOMBE: Yes, my Lord, if it comes within the power of section 91 it must be operative legislation.

VISCOUNT HALDANE: If it comes only under the general power to make laws for the "peace, order and good government" you are wrong. MR. NEWCOMBE: Let me put it in this way, that this is legislation regulating the insurance trade. There is no doubt about the regulative character of the legislation, to provide security for the insured by seeing to it that the trade is put into responsible hands. An individual for instance, no matter how rich he may be, cannot stand a general conflagration. He is not to carry on the insurance business, because he may fail, or he may insure at unreasonable rates, high or low. A single individual upon his own responsibility is not to carry on the trade. The trade is to be carried on by an association of individuals, incorporations who will deposit security and comply with the provisions of the Statute. All this I say is regulative. I do not think it is necessary to say more on that subject. It is clearly a regulating Act.

VISCOUNT HALDANE: Is there any insurance company that carries on business only in one province? There are a great many insurance companies in Montreal and Toronto which carry on enormous businesses, but I gather they take insurance from other provinces. MR. NEWCOMBE: As they come along. I suppose there are companies that have no offices established outside.

VISCOUNT HALDANE: It may be that the Dominion is justified in taking the view which has been expressed several times by this Board; that when a business gets to such proportions that it affects the whole of Canada it is such a business as you may consider to come within the wider scope of section 91. MR. NEWCOMBE: Yes, my Lord. I am going to put that separately. That is my argument, but perhaps that is not involved in the consideration of trade and commerce.

VISCOUNT HALDANE: You may have to test your argument by taking the case of an insurance company in Ontario, the operation of which is confined strictly to Ontario limits. MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: There may be such a company? MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: That you say is excepted? MR. NEWCOMBE: Yes; only if it be an Ontario Company. Any company, British, colonial or foreign, coming in there is subject to the requirement of a license.

VISCOUNT HALDANE: Suppose there to be a Toronto fire insurance company by the constitution of which only houses in the City of Toronto were to be insured, that is excepted by the Act itself. MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: You say anything that extends over Canada by its constitution is on a different footing? MR. NEWCOMBE: Yes, my Lord. It is an Act regulating a single trade. The Supreme Court of Canada decided so long ago as 3 Supreme Court Reports that the Canada Temperance Act, which was an Act passed by the Parliament of Canada in 1878 under the title of "An Act to Regulate the Liquor Traffic"—

VISCOUNT HALDANE: Was not that the Act that was discussed in *Russell v. The Queen?* MR. NEWCOMBE: Yes, my Lord. The Supreme Court determined that that was *ultra vires* of the Dominion, as a matter of regulation of trade and commerce.

VISCOUNT HALDANE: Yes. MR. NEWCOMBE: The argument is set out by the Chief Justice on pages 532-535 of the Report. In fact the whole judgment was principally a demonstration that the Act was attributable to the power to regulate trade and commerce.

VISCOUNT HALDANE: This Board agreed in the result in *Russell* v. *The Queen*. It was never quite clear whether this Board meant to decide in *Russell* v. *The Queen* that the second case, the Canada Temperance Act, was within regulation of trade or commerce, or was enacted by virtue of being something of such magnitude that it came within section 91. You have in view the criticisms that were made upon this judgment by Lord Watson in the case in 1896. MR. NEWCOMBE: Yes.

SIR ROBERT FINLAY: I think he rather excluded the application of the provision as to trade and commerce. He rested it rather on the powers as to peace, order and good government.

VISCOUNT HALDANE: Lord Watson pointed out, following the decision of this Board of Lord Davey, that to regulate is a different thing from prohibition. He said that the Scott Act, the Canada Temperance Act, enacted local prohibition if the locality adopted it, and that that was not regulation of trade and commerce; but although the Board decided that the Canada Temperance Act was within the competence of the Dominion, I have always thought that the decision in *Russell* v. *The Queen*, with all respect to it, is a case which you cannot rely upon as deciding any principle, in view of the subsequent cases.

SIR ROBERT FINLAY: I think Lord Watson made it clear that he would have decided the other way if it had been *res integra*.

MR. NEWCOMBE: My Lords, the case stands, for the purpose of my present reference, in this way. The Supreme Court, as it turned out when their judgment came to be reviewed, and made a mistake; they had decided that the Act was referable to the power to regulate trade and commerce, but in the Russell case, which is reported in 7 Appeal Cases, at page 842, it is said: "In abstaining from this discussion their Lordships 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 falls 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." Then it transpired when it came up in the prohibition case in 1896 before Lord Watson, that the Act was not regulation of trade and commerce, because he said it was a prohibitory Act, and not a regulating Act, and that you cannot prohibit that which is given you to regulate.

VISCOUNT HALDANE: That is the reason given, and it may be that *Russell* v. *The Queen*, helps you to this extent, that they did decide that prohibiting the liquor traffic was something so affecting the life of Canada that it came within the larger scope of "peace, order and good government." MR. NEWCOMBE: But more than that—

VISCOUNT HALDANE: I was in the case of *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion*, and if my memory serves me right there is a printed report of the whole of the argument.

SIR ROBERT FINLAY: That was on the Act of 1883, the McCarthy Act.

VISCOUNT HALDANE: The 1896 case was as to local option in Ontario, and this Board decided, notwithstanding that it had held previously that the Dominion of Canada was competent to pass the Scott Act, the provinces were also competent to pass legislation which enabled prohibition to take place by the legislature of the province. These two things were held to be possibly reconcilable provisions. There was a Shorthand Note taken of the case and I think it was printed in a separate volume. MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: I think if anybody is curious to see what Lord Watson's views were they will find them more fully expressed there.

SIR ROBERT FINLAY: Your Lordship is speaking of the 1896 case.

VISCOUNT HALDANE: Yes.

SIR ROBERT FINLAY: I thought your Lordship was referring to the Report which appeared of the Reference with regard to the McCarthy Act.

VISCOUNT HALDANE: You may be right about that; I may be confusing the two.

SIR ROBERT FINLAY: I think your Lordship is right, but there is a report, and a very full report, of the argument of 1886. I think your Lordship took part in that with Sir Horace Davey. That was in 1886.

VISCOUNT HALDANE: It may be that in that case Lord Watson expressed his views.

SIR ROBERT FINLAY: I think your Lordship is right in what you say. I think Lord Watson was sitting in 1886. Your Lordship is right in saying it was in 1896 when Lord Watson expressed that view. There is a full and interesting report of the argument. The Board gave no judgment; they reported that the Act was invalid.

VISCOUNT HALDANE: I think all the light is to be found in the obiter observations.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: The Supreme Court in their judgment simply said if there be a power to regulate it includes a power to prohibit. That was the foundation of the whole judgment. Whether they are right or wrong that is what they said.

SIR ROBERT FINLAY: They said: This is a regulating Act; it is regulation of trade and commerce; it is *intra vires* of the Dominion, although it is regulating but a single trade.

VISCOUNT HALDANE: I wish you would call attention to what was said by this Board in that judgment in the 1896 case, because my recollection is that they overruled that.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: I thought they overruled it in terms.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: I have here the printed report of the Prohibition case, which was argued in 1895. I think judgment was delivered in 1896. This is probably the same case. The whole argument is in this volume and the judgment. Perhaps somebody will look and see whether I am right. Now we will look at the judgment itself. MR. NEWCOMBE: Lord Watson put it altogether upon the point that it was not a regulating Act. At pages 362 and 363 Lord Watson considers it. He says: "It becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886, as being an Act for the 'regulation of trade and commerce' within the meaning of No. 2 of section 91. If it were so, the Parliament of Canada would, under the exception from section 92, which has already been noticed, be at liberty to exercise its legislative authority, although in so doing, it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of section 91 were discussed by this Board at some length in *Citizens Insurance Co.* v. *Parsons* (7 Appeal Cases, page 96), where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade. Their Lordships do not find it necessary to re-open that discussion in the present. The object of the Canada Temperance Act of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view, their Lordships are unable to regard the prohibitive enactments of the Canadian Statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which was recently expressed, on their behalf, by Lord Davey, in Municipal Corporation of the *City of Toronto* v. *Virgo* (1896 Appeal Cases, page 93), in these terms; 'Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.'" In the Russell case the

Supreme Court said it was trade and commerce. The Committee, however, expressed no view upon that in that case. Lord Watson in 1896 said it was not trade and commerce, because it was a prohibitive and not a regulative Act, so that I submit if it had been a regulating Act it would have been trade and commerce in the opinion of Lord Watson.

VISCOUNT HALDANE: That may well be. Is it necessary to go into this, because after all it may be that your legislation here is of a regulative character. It says you must get a license of a regulative character. MR. NEWCOMBE: The legislation is regulative. What I am referring to is this. There are observations in the judgments and in the case as to power to regulate trade and commerce. They say that power cannot be exercised for the purpose of regulating an individual trade. I show that so far as the judicial authority goes it was certainly the opinion of the Supreme Court, and would seem inferentially to have been the opinion of this Board, that an Act in all other respects regulative would not be excluded from regulation of trade and commerce, merely because it had to do with a single trade.

VISCOUNT HALDANE: It must be right that a single trade can be regulated.

THE LORD CHANCELLOR: I do not think it is doubted in this case that the trade could be regulated. The question was whether what was done was regulation. MR. NEWCOMBE: I cannot conceive how it can be debateable in view of the terms of the Act. Nobody has said this is not a regulating Act. They have said this is not the kind of regulation; that the regulation is too limited in its application to be regulation of a big subject like trade and commerce.

THE LORD CHANCELLOR: That is that section 4 is too limited. MR. NEWCOMBE: Yes, because it has to do only with insurance.

THE LORD CHANCELLOR: Insurance is a trade, is it not?

SIR ROBERT FINLAY: We say not. Lord Watson said here that it was admitted to be a trade in the Parsons case. That was a slip. Referring to Parsons case your Lordships will find that it was not admitted.

THE LORD CHANCELLOR: At any rate no such admission would bind you.

SIR ROBERT FINLAY: No, my Lord, it is as I say, but your Lordships will also find that in the Parsons case the doctrine was laid down that regulation of trade and commerce does not mean the power to regulate any particular trade; it refers to general regulations.

VISCOUNT HALDANE: I have always doubted that. MR. NEWCOMBE: I am going to refer to that.

THE LORD CHANCELLOR: What Sir Robert Finlay means is this, that the provision relates to matters like bills of exchange and documents which affect all trade and that you can regulate trade in relation to these commercial documents. I think that is what you mean, Sir Robert?

SIR ROBERT FINLAY: Yes, general trade regulations. Reference was made to the Treaty of Union between Scotland and England.

VISCOUNT HALDANE: In Parsons case it was suggested it referred only to external trade.

SIR ROBERT FINLAY: Yes, my Lord.

MR. UPJOHN: In the very same sentence there was an addition as to the trade which concerns the Dominion as a whole. That is what we say here is the effect of the present legislation.

SIR ROBERT FINLAY: My friend will refer to it. MR. NEWCOMBE: Yes. This is a business carried on for profit and it is trade. There was some question in the Parsons case as to whether insurance was a trade or not, and the Board said that they would assume it to be a trade for the purpose of argument. When the question came up again in the Prohibition case Lord Watson, interpreting what happened in the Parsons case, said it was admitted to be a trade. It was dealt with as a trade and I should say that it has so plainly the characteristics of a trade that unless my friend advances reasons to shew that it is not a trade I do not propose at present to take up your Lordships' time by discussing that. At any rate the business of insurance is trade and commerce, I submit. It is trade and commerce or it is so intimately related and incidental to

trade and commerce that it comes within the powers which, as your Lordships have held in other cases, are to be construed to include, not only what is directly within the enumeration, but what is fairly ancillary to it. Regulation of trade and commerce is a very broad and comprehensive subject of legislation, and your Lordships in the very recent case of *John Deere Plow Co., Ltd.* v. *Wharton*, in 1915 Appeal Cases at page 330, held that "the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable and what limitations should be placed on such powers." I submit that the Parliament of Canada has done nothing but that. They have done nothing except to prescribe to what extent the powers should be exercisable and what are the limits of the powers. This is the scope of the Insurance Act. The insurance company incorporated by the Parliament of Canada is given power by the Parliament of Canada to carry on its business throughout the country. There is the British and perhaps the colonial company incorporated in the execution of sovereign powers the objects of which extend to do business throughout Canada. They go to Canada and are recognised by Statute and carry on their incorporated powers there. Then there is always the foreign company which is recognised by comity. Those companies are carrying on the trade of insurance. They are engaged in a business belonging to the general subject of trade and commerce, or strictly incidental to trade and commerce. The local company is not within the application of the Act. The objects of the companies which are within the application of the Act extend to the entire Dominion and it follows therefore I submit that the licensing requirements of the Insurance Act, as to Dominion, British, colonial or foreign companies trading throughout the Dominion, are competent to the Parliament of Canada in the regulation of trade and commerce.

VISCOUNT HALDANE: I see what is going to be the line of your argument on this. It is very interesting to see how the judgments have dealt with this point. Would it be convenient to you to break off your argument and tell us that. We should like to know what we are in conflict with. MR. NEWCOMBE: I will proceed at this point to read the judgments.

THE LORD CHANCELLOR: Do not break away from any course of argument of your own. If it is more convenient to you to follow your own argument please do so. I am merely suggesting that the discussion of these authorities and the proposition you are placing before us might possibly come conveniently after we have had the judgments, but if it does not please present your case in your own way. MR. NEWCOMBE: I will read the judgments, my Lord.

THE LORD CHANCELLOR: It may be more convenient for you. If it is not so convenient to you please take your own course. MR. NEWCOMBE: It is quite convenient to me and it may save time.

THE LORD CHANCELLOR: It is convenient to know what we have to deal with at an early stage. MR. NEWCOMBE: If your Lordships please. It is at page 11 of the Record. Before reading the judgments may I go a little further with what I am saying and then I will come back to it for the purpose of argument. I have suggested that this power comes under "trade and commerce"; and is a matter of the regulation of trade, or regulation of a matter necessarily incidental to the broad and comprehensive subject of trade and commerce? If I succeed in establishing that the legislation is referable to trade and commerce there is an end of the case. Supposing I fail on that there is the subject of naturalisation and aliens in section 91, which so far as the foreign companies are concerned I submit entitled Parliament to legislate for the rights and disabilities of foreign companies. Then there is the "peace, order and good government" of Canada in relation to matters not committed to the exclusive authority of the provinces.

VISCOUNT HALDANE: You are passing lightly over aliens. I remember it has been suggested that in one aspect they come within section 92, and in another aspect they come within section 91. The question is which aspect is right? MR. NEWCOMBE: "Aliens" in section 91 is used in the sense of cover-

ing the rights and capacities of aliens to the fullest extent, according to Lord Watson's judgment in the Bryden case.

VISCOUNT HALDANE: You are dealing with a foreign company carrying on business in Canada; you are not primarily dealing with an alien. MR. NEWCOMBE: You may not be.

VISCOUNT HALDANE: You remember what Lord Watson said on the subject in the Bryden case. MR. NEWCOMBE: If this legislation were pointed to aliens and confined to alien companies then I think we are quite entitled to say that the power to legislate is established by Lord Watson's judgment in the Bryden case.

VISCOUNT HALDANE: In section 91 the expression is "naturalisation and aliens," *juxtaposed*. Surely it is a different subject matter, as Lord Watson said. MR. NEWCOMBE: I will come back again to that if necessary. In the meantime I am giving your Lordships a preliminary statement of the points I propose to discuss so that the application of what the learned Judges say may be more apparent. Then supposing that this Act is not attributable to any power under trade and commerce, naturalisation and aliens, or any other subject (I think those are perhaps the only two enumerations) then we say that it is legislation for the "peace, order and good government of Canada" in relation to a trade or a business of a magnitude so vast as to be beyond the powers of a single province, or of the Provincial Legislatures combined, to regulate. That is discussed in the Supreme Court and in the Judgments. At page 11 the Chief Justice says: "The question in this reference is a narrow one, namely, whether section 4 of the Insurance Act, 1910, 9 and 10 Edward 7, chapter 32, and section 70 which fixes the penalty for violations of section 4 are *ultra vires* of the Parliament of Canada." Then he reads section 4. Then he goes on: "It is quite obvious that this Act is intended merely to regulate the business of insurance" etc., etc. (reads to the words at page 12, line 9) "in relation to contracts which corporations may enter into in that province." Then he says: "Sir Montague Smith in the same judgment refers to the weight to be attached to the exercise of jurisdiction by the Federal Parliament. In the argument of the Dominion Liquor License Case, page 67,"

VISCOUNT HALDANE: Is that the Act of 1886?

SIR ROBERT FINLAY: No, 1883—in the 1886 Reference—it is a report of the argument on the Special Reference in which no judgment was given.

VISCOUNT HALDANE: That was surely later than 1883: it was 1886?

SIR ROBERT FINLAY: 1886. MR. NEWCOMBE: The Act was in 1883. MR. WALLACE NESBITT: The argument was in 1885.

VISCOUNT HALDANE: As Lord Herschell's argument was overruled I do not know why it is quoted. MR. NEWCOMBE: I do not know; there is probably something good in it.

THE LORD CHANCELLOR: The point is it was not questioned.

VISCOUNT HALDANE: I do not think he does say it was not questioned, but it does not matter.

THE LORD CHANCELLOR: "I do not think it was questioned"—but it does not affect the question whether it is right or wrong. MR. NEWCOMBE: This language is adopted by the Chief Justice.

SIR ROBERT FINLAY: I think he is speaking with reference to *Citizens Insurance Company* v. *Parsons*. MR. NEWCOMBE: In that case they had referred to the Insurance legislation.

SIR ROBERT FINLAY: If you have the volume, it is in the room I am sure, you will see the precise passage upon page 68. MR. NEWCOMBE: What he says is: "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 that the Ontario legislation was not inconsistent with it." (Mr. Newcombe continued to read to the end of the Chief Justice's Opinion).

VISCOUNT HALDANE: On this judgment this criticism occurs to me. The Chief Justice seems to think that the question is solved if we once get it to this, that there is a business of such magnitude that its regulation comes within

the legislation for the "peace, order and good government of Canada," as a whole; but that does not solve the question, because if you are "trenching" and so legislating on "civil rights," section 92, that will not help. He seems to be rather under the impression that Sir Montague Smith meant to say if business was of such dimensions as to affect the whole of Canada section 92 could have no application to it. He never said that; he only said, as I understand his judgment, that in order to make it legislation for "the peace, order and good government," legislation regulating trade must be legislation of a trade of such magnitude that the interest of the Dominion as a whole was involved. Section 92 stands to be considered—MR. NEWCOMBE: Yes, my Lord, but I am not sure that the Chief Justice does not mean this—in fact he quotes the judgment of Lord Watson in the prohibition case of 1896, in which your Lordship will remember Lord Watson held that the Canada Temperance Act, which was referred to the Dominion power of "peace, order and good government," would override the legislation of Ontario, passed under either "property and civil rights" or private and local matters.

VISCOUNT HALDANE: Did Lord Watson hold that? I know that Lord Watson said something with regard to the doctrine of what is called the occupying field, in that sense, the province not having occupied the field, the Dominion occupied it. MR. NEWCOMBE: Yes, my Lord. They were concerned with two Statutes, the Canada Temperance Act of the Dominion, which was a local option Act providing for prohibition of the sale of liquor in localities, according to the vote of the inhabitants, throughout the Dominion, and the local option Act of Ontario, which was precisely the same sort of Act except that it was enacted by provincial legislation, had application to Ontario, and provided for prohibition in the localities on the vote of the inhabitants. Both Acts were pronounced to be *intra vires*, the Dominion Act not referable to any subject enumerated in section 91, but to "peace, order and good government of Canada," the local Act referable either to "property and civil rights" or "private" and "local" matters; Lord Watson said it was not necessary to say which, that it could not consistently come under both, but under one or the other and it did not matter which. It came under an enumerated subject of section 92, therefore was *intra vires;* but in communities where the Canada Temperance Act was adopted by vote that Act was to override the local option Act of Ontario.

VISCOUNT HALDANE: Where does Lord Watson say that? I think what he meant was, the Board having decided the Canada Temperance Act was *intra vires*, that was an accepted fact; he did not speculate how they accepted the fact, but he said he was clearly of opinion that the Ontario legislation was within the powers of the Ontario Legislature, and therefore that Act was valid; the two Acts co-existed. I do not remember his ever saying that the Ontario Act had to yield to the Dominion Act, but you may be right. MR. WALLACE NESBITT: Yes, if they both came in force.

VISCOUNT HALDANE: Where is that in the Report? I find he says: "In the present case the Parliament of Canada would have no power to pass a prohibitory law for the province of Ontario; and could therefore have no authority to repeal in express terms an Act which is limited in its operation to that province." Where is the other passage? Then he says, on page 638, that there might be a conflict. MR. UPJOHN: On page 370 Lord Watson says this.

VISCOUNT HALDANE: We ought to begin on page 369: "If the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the Legislature of Ontario to pass section 18 or any similar law had been superseded. In that case no provincial prohibitions such as are sanctioned by section 18 could have been enforced by a municipality without coming into conflict with the paramount law of Canada. For the same reason, provincial prohibitions in force within a particular district will necessarily become inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district." Then he goes on to say: "But their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario where the

prohibitions of the Canadian Act are not and may never be in force." MR. NEWCOMBE: Then the next paragraph I think is in point.

VISCOUNT HALDANE: "The Parliament of Canada has not, either expressly or by implication, enacted that so long as any district delays or refuses to accept the prohibitions which it has authorised the provincial parliament is to be debarred from exercising the legislative authority given it by section 92 for the suppression of the drink traffic as a local evil. Any such legislation would be unexampled; and it is a grave question whether it would be lawful." They say that, you see. MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: "Even if the provisions of section 18 had been imperative, they would not have taken away or impaired the right of any district in Ontario to adopt, and thereby bring into force, the prohibitions of the Canadian Act." MR. UPJOHN: I think the next paragraph is the final paragraph which sums it up.

VISCOUNT HALDANE: "Their Lordships, for these reasons, give a general answer to the seventh question in the affirmative. They are of opinion, that the Ontario Legislature had jurisdiction to enact section 18, subject to this necessary qualification, that its provisions are or will become inoperative in any district of the province which has already adopted, or may subsequently adopt," the second part of the Canada Temperance Act of 1886." Now Lord Watson said two things: first he said: I am constrained by previous authority to hold that the Parliament of Canada had power to pass the Canada Temperance Act; he does not say whether it validly passed it under sub-section 2 of section 91 "regulation of trade and commerce," or under the more general words "peace, order and good government." He says "I am constrained to think that that is validly passed." He leaves open the question so far as this judgment is concerned whether there is any legislation which can be passed, not under any powers in section 91, but by the Dominion under the general words relating to "peace, order and good government," which can trench upon the excepted heads in section 92. I think you will find authority for the proposition that you cannot legislate under the general words "peace, order and good government" in such a way as to trench on section 92.

SIR ROBERT FINLAY: Lord Watson I think said that in the course of the same judgment. MR. UPJOHN: There are observations in the judgment which might be read.

THE LORD CHANCELLOR: The judgment will probably be read all through. MR. NEWCOMBE: With all submission, Lord Watson did decide that the Canada Temperance Act was effective only under "peace, order and good government."

VISCOUNT HALDANE: I do not think he did—I think he said, "It has been decided, and that is quite enough for me." MR. NEWCOMBE: There would still be some conflict between the earlier part of that judgment and the later part: it is perhaps a more difficult judgment to construe than the Act which it construes.

VISCOUNT HALDANE: I do not find it really very difficult to construe. I think Lord Watson took the validity of the Canadian Act as having been decided by this Board in *Russell* v. *The Queen*—that he said: How or why it was decided, I do not know but it was decided that it was valid, and I am going to follow that. MR. NEWCOMBE: That is a long judgment, and, in considering it, your Lordships will consider the interpretation I suggest, that it does refer the legislation to "peace, order and good government."

VISCOUNT HALDANE: It has been said by this Board three or four times that you cannot by legislating under "peace, order and good government" trench on the subject of section 92, do you contest that? MR. NEWCOMBE: To the extent to which Lord Watson is my authority under that decision, only. I put that interpretation upon what he said.

VISCOUNT HALDANE: If you study the judgment of this Board in the John Deere Plow case, we said that the incorporation of the company with other than provincial objects was not a thing which fell within section 92 at all—it fell within Dominion powers in so far as it was excluded from section 92: that is quite plain. Then, you might legislate under "peace, order, and good government" in such a way that the province could not interfere because

the subject matter is not given to the province under section 92, but if it is given to the province under section 92, how you can get it within "peace, order and good government" if it is not within any of the provisions of section 91, I do not know. MR. NEWCOMBE: This is what Lord Watson said on page 361 of that judgment. It is the passage, I think, which his Lordship referred to: "Their Lordships do not doubt that some matters, in their origin, local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada." What I think the learned Chief Justice meant was that this insurance trade was of such immense magnitude as to be a "matter of national concern" within the meaning of Lord Watson's expression there.

VISCOUNT HALDANE: There is nothing in what Lord Watson said that I remember that would have precluded him from holding that it was "regulation of trade and commerce." MR. NEWCOMBE: No, certainly not, and I think there is very much to be inferred from his judgment that he would have put it under "trade and commerce."

At page 13 of the Record Mr. Justice Davies answers question 1 in the negative, and question 2 in the affirmative for the reasons which follow: "I do not desire in these reasons for my answers to the questions put upon this reference to repeat what I have already said in the reasons for my answers to the questions on the reference respecting companies generally. It is impossible, however, to avoid some repetition if one is to make one's opinion in the special questions submitted at all clear. The Dominion Parliament has doubtless the right to impose restrictions upon companies of its own creation enacted in section 4 now under discussion. That I understand is not questioned. It is conceded on the other hand that the exclusive legislative control over provincial insurance companies carrying on their business wholly within the province rests with the province creating such companies. The legislation here in question recognises this and exempts from its operation and application every such provincial company." Now he says: "It is conceded on the other hand that the exclusive legislative control over provincial insurance companies carrying on their business wholly within the province rests with the province creating such companies." Parliament has not extended its legislation, there is no question about that, but as far as I am concerned there was no concession and I did not concede to the Court that, if they wished to embrace within this regulating Act the local companies, Parliament had not power to do it.

THE LORD CHANCELLOR: This judgment is in your favour. MR. NEWCOMBE: Certainly, my Lord, but I want to correct any misapprehension that there might be about that. "I have already, in the Companies' Reference, expressed the opinion that the limitation upon the provincial power of incorporating companies with provincial objects is amongst other things territorial and that the Dominion Statute professing to confer upon them extra territorial powers by means of a license is *ultra vires*." There was a question there as to sub-section 3 of the Insurance Act which says, If a local company wishes to come under this Act it may do so, then by complying with the provisions it shall have authority to extend its business all over Canada:—

VISCOUNT HALDANE: That is a question we had better leave alone, we shall have to come to that later. MR. NEWCOMBE: Yes, my Lord. Then Mr. Justice Davies says: "If I am right, the Act does not apply at all to provincial companies." (The learned counsel read down to) "In the case of *Fredericton* v. *The Queen*, 3 S. C. R., page 505, this Court held that the provisions of the Canada Temperance Act, 1878, prohibiting the traffic in intoxicating liquors came within this enumerated power."

SIR ROBERT FINLAY: That is really the same case as *Russell* v. *The Queen* under another name. MR. NEWCOMBE: It is the same case. "On appeal to the

Judicial Committee of the Privy Council, *sub nomine Russell* v. *Regina*, 7 A. C., p. 829, this judgment was not sustained as coming within the regulation of trade and commerce, but was sustained, as I understand the judgment, on the ground that the Act in question came within the general powers of legislation respecting peace, order and good government and not to the class of subjects assigned exclusively to the Provincial Legislature." (The learned counsel read down to) "In the Judicial Committee in *Citizens Insurance Company* v. *Parsons*, 7 A. C., 96, Sir Montague Smith said, c. p. 113: "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 in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. 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."

VISCOUNT HALDANE: He seems to have held that that fell under "civil rights." MR. NEWCOMBE: Yes, the contracts in a single province.

VISCOUNT HALDANE: We must always bear in mind in construing sections 91 and 92 that they are not logical disjunctions. It may well be that a subject falls, in one aspect, under section 91 and that section 91 would apply to it were it not that, in another aspect and a more dominant aspect, it falls within section 92. A thing may primarily be a contract to be regulated by the law of the legislature which deals with "civil rights," and secondly, only something that comes within "trade and commerce." MR. NEWCOMBE: Yes, my Lord. I think in this case there is another observation, which is not quoted here, which shows that this was Sir Montague Smith's view only in the absence of Dominion legislation requiring uniform clauses or attempting to regulate the contract. There is nothing in the judgment in Parsons' case to show, that the Dominion could not if it desired regulate throughout the Dominion the form of contract in insurance.

VISCOUNT HALDANE: He so carefully guarded himself that he has thrown very little light on the question which he states, MR. NEWCOMBE: At all events he takes pains to show that he is concerned there merely with the question of contract in a single province. "In this view of the case it became unnecessary to consider 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. But I take it as settled law now at any rate that regulation of trade and commerce when competently exercised by the Dominion Parliament may legally modify and affect any of the exclusive powers of the legislatures of the provinces."

VISCOUNT HALDANE: No doubt about that. MR. NEWCOMBE: "The point decided in the *Citizens Insurance Company* v. *Parsons* was of an extremely limited character and to the effect that the regulation of insurance contracts within a province as to the terms and conditions of the contract was within the legislative power of the province as a matter of property and civil rights and did not affect the regulations of trade and commerce. It is conceded that the Judicial Committee has never yet expressly assigned to this power over trade and commerce, any Dominion legislation which has come before it." This judgment was before the decision in John Deere Plow Company, Limited. "The furthest they have gone in that direction is I think to be found in the above quotation from the judgment of the Judicial Committee in the Citizens Insurance Company case 'it may be the words would include general regulation of trade throughout the whole Dominion.'" (The learned counsel reads further down to) "If on the general question of the incorporation of companies the power of the provinces to legislate is strictly limited to their respective territorial areas, then it would necessarily follow that all companies with power larger than provincial must be incorporated by the Dominion Parliament and of course be entirely subject to its jurisdiction and control."

VISCOUNT HALDANE: You notice that it follows from that that the learned Judge does not take the view that the mere fact that there is power to legislate under the words "peace, order and good government" enables one to overrule provincial legislation competent under section 92, only that no such legislation is competent in virtue of the view he has already taken rightly or wrongly about limiting power to incorporate companies. He says there is a residuum, which may not fall within section 92 but is otherwise unprovided for, and therefore comes under "peace, order and good government." In that case the province would have no jurisdiction to interfere with it. MR. NEWCOMBE: No, my Lord. "If the legislation in question is sustainable only on the general powers of the Dominion relating to peace, order and good government then in my opinion the subject matter of it is one which to-day has become of national interest and importance, affecting the body politic of the Dominion as a whole and being so would on the authority of the Prohibition case, A. C., 1896, p. 348, be paramount legislation." He founds that statement on the passage which I read.

VISCOUNT HALDANE: I think he is under a misapprehension of what Lord Watson said: according to his view, it is not within section 92 at all. MR. NEWCOMBE: "It would seem strange indeed if the Parliament of Canada, on a subject-matter affecting directly the lives, property and interests of a very large proportion of its inhabitants could not legislate either to prohibit foreign companies which may or may not be responsible or reliable from engaging in the business at all in Canada: and still more strange if such Parliament could not regulate these companies in the carrying on of their business in Canada by requiring them to make deposits of money as an assurance of their reliability and take out a license and subject themselves to inspection or otherwise as Parliament may decide. As a fact ever since the year following Confederation, now more than forty years ago, Parliament has assumed the right so to legislate and the legislation for the past 25 years at least has been substantially in the form the constitutionality of which is now challenged. The subject-matter of the legislation in question is of a Dominion and not of a provincial character. In its Dominion aspect it is not certainly within any of the exclusive powers of the provincial legislatures and so far as companies incorporated by these legislatures can competently and legally operate and carry on their business they are exempted from the operation of the legislation. The policy of regulating the business of insurance throughout Canada by foreign companies as well as Dominion companies to the extent of requiring deposits from them as a guarantee of their responsibility and subjecting them to inspection and to the obligation of obtaining a license to operate has been a feature of Dominion legislation since 1868, the year following the Union. It is beyond doubt regulative legislation only and its subject-matter may, I think, be appropriately described as the trade or business of insurance. The fact that with provincial companies excepted the legislation applies to foreign companies and to Dominion companies only"—of course he used the word "foreign" there as including British and Colonial I presume—"and that it has remained unchallenged as to its constitutionality until now is not without significance and weight. The business of life assurance alone in Canada carried on by the companies Dominion and foreign which come within the purview of the Act in question has to-day reached proportions which may well be described as enormous if not colossal. As to the mere amount of this assurance, it runs up into hundreds of millions of dollars. The ramifications of such business extend to every city, town, village and hamlet of the Dominion. The beneficiaries of these assurances are constantly moving from one part of the Dominion to the other. The failure of one or more of these companies, carrying the enormous obligations their contracts assume in Canada would be a national disaster. Their proper regulation and the conditions on which foreign companies should be permitted to operate in Canada would seem necessary therefore from a Dominion or national standpoint. The fact that any such foreign company may limit its operation for the time to a single province would not in my opinion relieve it from compliance with the law. It is the subject-matter of its operation which brings it within the control of the Dominion legislation and not the amount of those operations or the limits within which they are carried on. This observation would also apply to persons and not

companies engaging in the insurance business. But it is not alone because the companies to which the section extends are Dominion and foreign, nor because of the enormous proportions and extent to which the business covered by the legislation has grown in volume and with respect to persons and properties which the subject-matter embraces affecting greatly the happiness, comfort and welfare of such a large and yearly increasing proportion of the Dominion population, nor because some of its branches are clearly interprovincial, nor because the Dominion has exercised unchallenged legislative power with respect to it substantially in the form now before us for so many years that I hold this legislation to be valid, but because the combination of these various factors [illegible] convinces me that the regulation and control of these insurance companies is necessary and [illegible] I do not see how it would be possible for provincial legislation effectively to deal with the subject. Lastly, it seems to me that if the legislation is upheld under the Dominion general powers and not its enumerated ones [illegible], A. C. [illegible], p. 348, is authority that when so legislating on subject matters which [illegible] national importance and affect the body politic of the Dominion such legislation is plenary and must be given effect to even if it affects subject matters within the exclusive powers of the local legislatures."

VISCOUNT HALDANE: That doctrine of the learned judge's judgment I most respectfully question. MR. NEWCOMBE: It depends on what Lord Watson said.

VISCOUNT HALDANE: On his interpretation of what Lord Watson said. MR. NEWCOMBE: "As I have said, I think the subject matter of this legislation has reached this state of national importance and in fact to a greater extent than had the sale of liquors prohibited by the Canada Temperance Act of 1886."—It cannot be denied that the magnitude of the liquor trade was a circumstance in the decision of the Prohibition case.

VISCOUNT HALDANE: There is such confusion of thought about that——it is not every small thing that can be brought within the general words giving power to legislate for the "peace, order and good government of Canada," and these words are contrasted with specific enumerations. What is meant, surely, is that the subject must be of some great magnitude in order to bring it within the scope of these words at all. It does not follow because of great magnitude, it may not also come within section 92, and I look in vain for anything in the British North America Act which cuts down the plain language of the Confederation Act which gives exclusive jurisdiction to the province in matters which fall within the enumeration in section 92:—"In each province the legislature may exclusively make laws." The doctrine supposed to be taken from Lord Watson and which is repeated by the learned Judge seems to me to fly in the face of "exclusive" in section 92 besides being inconsistent with several decisions of this Board.

THE LORD CHANCELLOR: I cannot see that it is relevant to your case. The facts of this case are quite different to the other case; you have something quite different; your Statute is quite different and the operation is quite different. The whole provincial legislation is excluded, if the provincial legislation relates exclusively to provincial work. You have totally different considerations. I do not see how it is relevant. MR. NEWCOMBE: I think that is so. "—and the legislation with regard to the form which the regulation should take is entirely within the province of the Dominion of Canada. Having reached this conclusion as to the 4th section, it follows of course that section 70 providing sanctions for its due enforcement would also be valid. For these reasons, I answer the first question in the negative and the second question in the affirmative."

Those two judgments are in my favour in the result, whatever your Lordships may think of the reasons. The others are against me. Mr. Justice Idington has written a long judgment: "To answer any questions involving, as these now submitted do, an accurate apprehension of the power of Parliament, we must first ask ourselves whether the power asserted can be rested upon any of the enumerated legislative powers specifically assigned by section 91 of the British North America Act or by other sections thereof to the exclusive legislative authority of Parliament. Whatever enactment can be rested thereon is maintainable. When it cannot be so maintained we must then ask if it touches upon any of the subject-matters assigned by section 92 or other section of said Act to the exclusive legislative authority of the provincial legislatures. If in any such case it trenches

upon any of the powers thus assigned these legislatures, it is to that extent *ultra vires*. If it can be maintained as resting solely upon the power given Parliament in section 91, over the "peace, order and good government" of Canada, without invoking any of the enumerated powers therein, and without trenching upon any of these powers given the legislature, then it is *intra vires*."

VISCOUNT HALDANE: A thoroughly sound statement. MR. NEWCOMAE: "What thus rests in this limitation of these words "peace, order and good government" in said section, I shall hereinafter refer to as the residual power of Parliament." (The learned counsel read down to) "The latest decision thereon relative to this question of insurance seems to be *New York Life Insurance Company* v. *Craven*, 178 U. S., 389, and the Court there held that the subject-matter of insurance did not fall within the term "commerce" as there used." I think they so held because they said it was not commerce but it was incidental to commerce. "The decisions of the Judicial Committee of the Privy Council upon the subject of prohibition relative to the liquor traffic in the case of *Russell* v. *The Queen*, 7 A. C., 829, and *The Attorney-General for the Dominion* v. *The Attorneys-General for the Provinces*, 1898, A. C., 700, seem to have proceeded upon the residual power in Parliament, though the Court was invited there, as we are now, to rest upon the power to regulate trade and commerce. (The learned counsel read down to) "I now turn to the first question and find the sections submitted apply to persons as well as companies, and the many questions involved in this first one may be simplified and best answered by testing the validity of such legislation when applied to the individual." Then he reads the section. Then he says: "Can I say that Parliament is acting *intra vires* when enacting that 'no . . . . person shall . . . . grant any annuity on a life or lives . . . . unless it be done by or on behalf of someone holding a license from the Minister'? Surely if there is any civil right everybody has been supposed to have enjoyed, it is that of doing this very thing and no person but the local legislature can take it away."

LORD PARKER: I thought the section only referred to a person doing it on behalf of a company? MR. WALLACE NESBITT: No, any person. MR. NEWCOMAE: Just there, and it comes out in some of the other judgments too, the purpose of this Act is not to render invalid an insurance contract; it was not intended to make the contract invalid. On the other hand, it was intended to punish the insurer for non-compliance.

THE LORD CHANCELLOR: For not having got the license. MR. NEWCOMAE: For not having got the license.

THE LORD CHANCELLOR: He might have abundant assets. MR. NEWCOMAE: The object was to provide security for the insured. Let me submit this just here because Mr. Justice Idington raises it, and I think other Judges have been misled. They suppose that the object of the section and the effect of the section is to make the contract entered into by a person unlicensed void to all intents and purposes, ——to invalidate the contract. The section is there, and there is a penalty imposed for non-compliance with that section. I submit, if that had been an Imperial enactment, it would not follow that the contract——

THE LORD CHANCELLOR: It might be a voidable contract; it does not necessarily follow that it is void? MR. NEWCOMBE: Yes, and when you consider that it is passed by the legislature which has the power to regulate "trade and commerce," and there is another legislature having power over "property and civil rights," I submit there is a plain operation for this Statute in accordance with the intent of the Parliament without affecting the quality of the contract at all.

LORD PARKER: You see the difficulty I feel here is that the exemption clause does not exempt companies and persons, but only companies, whose area of operations is confined to a province. MR. NEWCOMBE: The person is prohibited.

LORD PARKER: This is an absolute prohibition on anybody in say Ontario, notwithstanding anything which the Provincial Legislature may say, from doing a certain act which he is otherwise entitled to do. If that is so, you cannot justify under the first part of the clause, what is called the residuum power, because the possibility of a conflict between the Canadian Government and the Provincial Government would show at once it was *ultra vires* of the Canadian Government.

THE LORD CHANCELLOR: In this case we are dealing with a company? MR. WALLACE NESBITT: No.

THE LORD CHANCELLOR: I was told that we were, that it was a limited company. MR. WALLACE NESBITT: That is how the question arose. MR. NEWCOMBE: That was how the question started originally.

VISCOUNT HALDANE: This is not an appeal at all.

SIR ROBERT FINLAY: The question is a perfectly general question. As a matter of fact, as my friend stated, it arose out of proceedings against a firm of brokers.

THE LORD CHANCELLOR: I follow now.

SIR ROBERT FINLAY: That was merely the occasion giving rise to the question.

VISCOUNT HALDANE: Let us get to the bottom of this. The prohibition is on a "company or underwriters or other person" to act unless with a license. MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: And excepting the act be done "by or on behalf of a company or underwriters holding a license from the Minister." MR. NEWCOMBE: Of course, my Lord, the question of "person" is a very small question practically, but what we claim, as I said, is that we have the right as a matter of regulation, and it is an obvious and necessary thing to do, to provide that a person is an individual not of capacity to carry on an insurance business; but not in a sense to say that he is to plead his incapacity. When sued on a contract he has made he is liable for that, but he is liable to a penalty for making it without a license.

THE LORD CHANCELLOR: It may well be that, if a man has entered into a contract contrary to the express provisions of the Act of Parliament and the Act of Parliament has provided something in the nature of a criminal penalty if the contract is made, that the whole thing is void. It is more than likely that it is, but I do not know that that matters for the moment. MR. NEWCOMBE: Perhaps it does not matter.

LORD PARKER: The answer would be that, supposing in Ontario he entered into a contract to grant an annuity or insure a life, and he might lawfully do it according to the law of the Province of Ontario, the Dominion Legislature interferes with the "civil rights" in Ontario—that, if it is only done under the "peace, order and good government" clause, it is *ultra vires*. MR. NEWCOMBE: If it is "regulation of trade and commerce" it prevails. MR. UPJOHN: There are decisions of this Board somewhat limiting the words "property and civil rights in the province" by general considerations.

VISCOUNT HALDANE: Yes.

THE LORD CHANCELLOR: On that view it would mean that the section was *ultra vires* so far as it included "or underwriter," it would only have to be valid so far as it affected companies. MR. NEWCOMBE: Only invalid so far as it concerns persons other than underwriters or companies?

THE LORD CHANCELLOR: It would be invalid according to that argument so far as it extended beyond the companies—except those in section 3.

SIR ROBERT FINLAY: As regards foreign companies?

THE LORD CHANCELLOR: Yes. MR. NEWCOMBE: Any company can get a license if it has proper qualifications; or any society of underwriters; the individual person cannot get a license.

Now, my Lord, I was reading at line 20 on page 21: "I know of no such urgent situation as to take away from men their ordinary civil rights even if some should expand the operation thereof beyond its daily use, and do so for other considerations than usually move thereto." (The learned counsel read down to): "It was held in the case of *Citizens Company* v. *Parsons*, already referred to, that it was competent for the Provincial Legislature to so enact relative to the contracts of a foreign company, or of one which might be the creation of Parliament, when made in a province so enacting, that it must comply with the conditions imposed by the legislature for the form of contract, and the company be bound by what the legislature specified such contracts were

to be held to mean and could not contract itself out of such act. Much more must a home company the creation of the legislature be so bound. It seems futile to suggest that Parliament can by such legislation as this invade such exclusive jurisdiction of the provinces."

THE LORD CHANCELLOR: I think it might be convenient if we adjourned now.

(Adjourned for a short time.)

THE LORD CHANCELLOR: I suppose it has not been possible for counsel to come to such an arrangement as I suggested this morning. I think, Sir Robert Finlay, that you ought to know what is the course which the Board suggests should be taken. In the ordinary course only two counsel would be heard on each side. That is the ordinary rule. The Board is not anxious to press that rule too harshly in a case like this, but after two counsel have been heard if there is any counsel who thinks there is some matter which has not been dealt with, which he desires to deal with, the Board will be prepared to hear him, but if it is merely repetition of the argument that has been already advanced there is no reason why the rule should be relaxed. What I have said will enable counsel to come to some arrangement I have no doubt.

SIR ROBERT FINLAY: I am obliged to your Lordships. MR. NEWCOMBE: Then, my Lords, I was reading the judgment of Mr. Justice Idington at page 22 of the record. This is a long judgment.

THE LORD CHANCELLOR: You need only read what passages you think desirable. MR. NEWCOMBE: One passage is of as much value as another. The learned Judge goes on: "It is answered, that as to such companies the Act excepts them from its operation. I do not so read the Act. In the Act of 1868 there was an excepting provision, which was changed by the Act of 1886, 49 Victoria, chapter 45, section 3, sub-section (*e*), so as to read more stringently in that regard, and that was later amended to read as it does now in sub-section (*b*), of section 3, of the present Act, which is as follows: 'to any company incorporated by an Act of the legislature of the late province of Canada, or by an Act of the legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province.' The clear effect of that is to exclude from the exception in favour of provincial companies, such of them as might choose, though acting within their corporate powers, to do business, for example, in the United States, and thus leave them subject to the penalties added as sanctions of the Act, and make their contracts illegal if the sanction is valid. In the case of the *Canadian Pacific Railway Co.* v. *The Ottawa Fire Insurance Co.*, 39 Canadian Supreme Court Reports, page 405, the question of the right of a corporate creation of a province to do anything beyond its limits was raised, in an incidental manner only, but thought so relevant to the issues in the case that a second and special argument was had in this Court in regard thereto." That was the origin of the Companies Reference because the Court itself stated general questions for argument regarding the various constitutional difficulties, and then it turned out in the end that the question did not really arise. Then came the Reference under section 60 of the companies' questions. Mr. Justice Idington goes on: "I examined the matter then in as thorough a manner as I knew how, and came to the conclusion that corporate creations of a local legislature acting under section 92, sub-section 11, had inherent in their creation and must always have been intended to have inherent in their creation the same rights as other corporations to do business wherever it was to be found so far as the doctrine of the comity of nations would carry them unless specially restricted by the creating provision or prohibited by the foreign state or province where attempted. I have found no reason to change my opinion, and I adhere to the conclusion I then reached and have just re-stated. The argument is too long for repetition here even in an abbreviated form, indeed was thought by myself too long for what I was almost tempted (but for difference of opinion in this Court and respect due thereto) to have considered as elementary law. Even if I was and am wrong, and my reasoning therein worthless in itself, I would

commend the quotation from Vattel which appears therein at page 438, as deserving the attention of any one concerned in the questions raised herein. If I am right in regard to the inherent right of a provincial company to go abroad, then the attempt in this Act now in question to restrict the powers or the exercise of the powers, so conferred is quite unwarranted. The Dominion Parliament has no power to take away indirectly what it could not interfere with directly. And the curious thing is that by this very Act it clearly appears Parliament considered these provincial corporations had an inherent power to go beyond the limits of the province creating them." With all submission it appears to me that the exact opposite plainly appears.

LORD PARKER OF WADDINGTON: To what does he refer there? MR. NEWCOMBE: To the clause which says that if a company wishes to avail itself of the provisions of the Act and to go outside the province it may so avail itself and then it shall have power to carry on its business throughout the country. He says that implies an inherent power granted provincially. I say it implies the opposite.

SIR ROBERT FINLAY: It must involve the recognition that it is *intra vires* of the company to carry on its business beyond the province of its creation. What it imposes is the necessity of a license from the Dominion Government before it does what *ex hypothesi* it has the capacity to do. MR. NEWCOMBE: That is the opposite view. The judgment of the learned Judge proceeds at the top of page 23: "The draftsman of the Act clearly held the same view of their capacity as I have expressed," &c. (Reads to the words, page 24, line 16) "The right to legislate relative to contracts, as now presented, was never directly touched upon in the argument so far as I can see"—So far it is not necessary to say and I do not wish to say that they have not power. There may be something *ultra vires* in the Act, but it does not affect the general question as to the power to require a license—"and the subject of property and civil rights including same, was only touched upon incidentally to finding a place for the local legislature to rest its right to prohibit, which seems to have been found in sub-section 16 of 92 relative to local matters. In the Russell case the regulation of trade and commerce was not abandoned, the criminal law was hinted at, the right to prevent dangerous things being done suggested. What all these meant or might mean was not decided. But if these measures had been treated as part of the criminal law many men would have approved that treatment as sound sense, and I certainly do not see from the point of view of constitutional law, what answer could have been set up thereto. It might have fallen there quite as appropriately as the restraint of trade clauses in the Criminal Code upon which we decided the case of *Weidman* v. *Shragge*, 46 Supreme Court Reports, page 1. Hence I am not disposed to attach undue importance to the bearing on this question of contract of the last of these liquor cases so recent as 1896, and only perhaps a mere advisory opinion which the first was not. The struggle in 1896 was a peculiar one. It would not, I suspect, have suited either party arguing to have the subject treated as part of the criminal law. And as to property and civil rights I would call attention to the remarks of Lord Macnaghten in the case of *The Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, 1902 Appeal Cases, page 73, at page 78 from which, as it bears directly upon what I am now dealing with, I quote the following: 'Indeed if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter.'" That quotation has reference to the fact that Lord Watson in the Prohibition case had said that the local option enactment of Ontario was *intra vires*. Subsequently a year or two later came the Manitoba Reference of the Manitoba Statute which was decided by Lord Macnaghten and he said he thought that the true view must be that the Ontario Local Option Act must be referred not to property and civil rights but to private local matters, that is to say, he considered that the general clause "private or local matters in the province" was a general sort of clause in section 92, and was more susceptible to the operation of Dominion legislation under the general

terms than legislation of the kind that was referable to any other enumeration in section 92. That, I submit, with very great hesitation is the explanation of Lord Macnaghten's statement which Mr. Justice Idington quotes: "In passing I may note that at this period in *Anctil* v. *Manufacturers' Life Insurance Co.*, 1899 Appeal Cases, page 604, article 2590 of the Quebec Code was held to have so fixed what might be an insurable interest that a condition in the policy making it incontestable at the end of a time which had elapsed at the death could not validate it," &c. (reads to the words, page 25, line 49): "It has been frequently said that what cannot be enacted by a local legislature must of necessity be found within the competence of Parliament to enact. This I respectfully deny. It is in my humble opinion, beyond the scheme of our federal system to give operative effect thereto, no matter how high may be the authority laying down such dogma. It would be indeed a very simple formula for solving knotty questions." Your Lordships' Board has laid down over and over again that the opposite is the case. "Uniformity of law may be a most desirable thing. In the instrument creating our system this very thing is provided for by section 94, within certain limits, but subject to such conditions and limitations as to demonstrate the impossibility of such a conception being within the power of Parliament. Our alcohol systems vary, our municipal systems vary still more. Our systems of land tenure also vary as do our laws of inheritance and succession. Yet Parliament cannot meddle therewith. No man would be bold enough to say we might create by and through Parliament, a state church, and against the will of the legislature levy in support thereof tithes in the provinces upon property in same, though the oldest of civilised countries deem such an establishment essential. No more could Parliament in pursuance of such an establishment, add to or trench upon provincial mortmain Acts. Yet every one of these things could be dealt with by virtue of this doctrine if correct. If we will bear in mind that our federal scheme has first assigned to the exclusive power of Parliament the authority to legislate on twenty-nine subject matters enumerated in section 91, besides some other things found in other sections; that subject thereto it has assigned to the legislatures the exclusive legislative authority over sixteen other matters, and only beyond these, but subject thereto and limited thereby, on such other subjects as may, without infringing thereon, be legislatively dealt with for the peace, order and good government of Canada, we will have cleared our minds on these matters and cease assuming that because a better state of law is conceivable, it must of necessity rest in Parliament. In regard to some things the power of legislation does not rest in this country. In regard to other matters desirable results are conceivable as possible by the co-operation of both legislatures and Parliament."

VISCOUNT HALDANE: I think it was the policy of the Imperial Parliament to delegate to Canada by the new Constitution which was set up by the Confederation Act complete powers of self-government. There were certain things that were necessarily excepted, but there was a complete delegation of the powers of Parliament which was in itself sovereign to deal with the whole field. Distribution took place which may make it very difficult for the complete field to be covered in that respect, but that does not mean that there is anything excepted. I do not think the Board would assent to what is suggested by the learned Judge here, that there was something withheld. MR. NEWCOMBE: I think I can refer your Lordship to half a dozen decisions of this Board by different learned Lords against that.

VISCOUNT HALDANE: There is an authoritative decision of this Board on the subject, the case of the Dominion against the provinces in 1912 on this question. Lord Loreburn gave judgment on this very point. MR. NEWCOMBE: Yes, and he followed what had been said long before.

VISCOUNT HALDANE: In the provinces they might set up a state church. MR. NEWCOMBE: It would require the concurrence of the Provincial Legislature.

THE LORD CHANCELLOR: The suggestion is that there is something outside the authority of the Dominion Parliament and the Parliaments of the provinces.

SIR ROBERT FINLAY: I doubt whether Mr. Justice Idington was dealing with the case of what they could do by joint action. He is dealing with the

proposition that whatever is outside the Parliament of the provinces the Dominion Parliament may do. I submit that with deference, because it is not quite clear. MR. NESBITT: In the Companies' case he suggests that may well be done.

VISCOUNT HALDANE: I am quite clear that this Board has expressed that opinion. MR. NESBITT: I think what the learned Judge means is that it did not refer to naval and military matters and legislation upon shipping contracts beyond the three mile limit.

VISCOUNT HALDANE: There again that is something which does not fall within the field of the Dominion Legislature. We decided that the provinces could legislate within the three mile limit. That was in the Fraser River case. We said what are the relations beyond the three mile limit are matters to be determined by international arrangements. MR. NEWCOMBE: Mr. Justice Idington goes on at line 37, page 26: "So far as the corporate creations of the Dominion rest upon one or more of the twenty-nine enumerated subjects over which Parliament has exclusive legislative authority, there can be no doubt of its power to authorise them to do such business as within the ambit of or resting on such basis of authority either throughout the entire Dominion or such part thereof as Parliament may choose to specify and every statute of any legislature or other law of a province, though possibly operative and helpful so far as adaptable in that regard must be held null before the expression of the Parliament will in such cases, when [illegible] so far as in conflict therewith." &c. (reads to the words, page 27, line 33) "The purpose of the legislation before us no doubt is so commendable that it has therefore stood a long time unchallenged. It had its origin in legislation of Old Canada existent at Confederation. See 23 Victoria, chapter 33, and 26 Victoria, chapter 43." Those are the Acts I was reading in my opening. "Its purpose can be attained by the provincial legislatures each taking away from men and corporations or such class as specified, acting within the province so enacting the power or contracting with insurers, unless and until the Dominion shall have given a license therefor. Then this kind of Dominion legislation, if otherwise unobjectionable, having the field so cleared, could be so fitted thereto as to be made undoubtedly operative in the province so enacting or could be enacted conditionally upon provincial legislation being provided or found existent. This plan need not interfere with the operation of the provincial companies in their own provinces, or with them being licensed by the Dominion to go elsewhere. I put it forward as illustrative of what may be done within the undoubted powers of Parliament and legislatures, when combined, and to show that there is no such necessity for straining the residual power of Parliament as seems to be assumed in the theory that, because we have a very large measure of self-government with distributed powers of legislation, therefore we must only ask whether or not a given measure is within the power of the local legislatures, and if not found in its entirety there, conclude it must rest in Parliament. It may be said the method I have suggested as within our powers of self-government is clumsy or difficult of execution. I answer that if the alternative of stretching the residual power of Parliament to cover all these defects is open, then there is an end of, or at least a means of ending, the federal system. I answer further that we already have analogous legislation in the adoption of the provincial franchise however variant it be as the basis for Parliamentary elections. Other illustrations exist. It would seem very absurd to have had so many struggles renewed herein to try and bring any exercise of the power of Parliament within any of the enumerated powers of Parliament, if it has always had the power, the easy formula I have referred to says it has. It, however, should never be forgotten that it was out of the need there was found for abridging the powers of Parliament that the federal scheme was begotten. Notwithstanding all I have said, when I seek to apply it to the case in hand I am confronted by the judgment in the case of *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion*, 1912 Appeal Cases, which at the foot of [illegible] and top of page 582, surely assumes that if it is desirable to legislate in respect of something which a province cannot, then Parliament must have [illegible] I quite the following therefrom." This is Lord Loreburn's judgment: "[illegible] the present case, however, quite a dif-

ferent contention is advanced on behalf of the provinces. It is argued, indeed, that the Dominion Act authorising questions to be asked of the Supreme Court, is an invasion of provincial rights, but not because the power of asking such questions belongs exclusively to the provinces. The real ground is far wider. It is no less than this—that no legislature in Canada has the right to pass an Act for asking such questions at all. This is the feature of the present appeal, which makes it so grave and far reaching. It would be one thing to say that under the Canadian Constitution what has been done could be done only by a Provincial Legislature within its own province. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter of affecting the internal affairs of Canada, and, on the face of it, regulating the functions of a Court of law, which are part of the ordinary machinery of government in all civilised countries.'" Then Mr. Justice Idington goes on: "In support of such doctrine we were referred by counsel to the judgment in the case of *La Compagnie Hydraulique* v. *Continental Heat and Light Company*, 1909 Appeal Cases, page 194, which uses terms taken literally might go far to support any Parliamentary legislation. It does not seem to me that the expressions thus relied upon were so clearly necessary for the decision of the case in either instance on the facts there respectively presented. But if that language (which is to be found also elsewhere) so used and referred to in either of these cases is to be taken as if final decisions demonstrating the true doctrine, the matter is ended. What I have said relative to the predominance of the enumerated exclusive powers of Parliament rests upon the declaration at the end of section 91, as follows"; then he reads it and continues: "I refer to this and the remarks thereupon of Lord Watson in *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion*, 189[illegible] Appeal Cases, at page 359, and top of page 360, as justification for the posi[illegible] I take. I prefer thinking his exposition there given is correct and do so all the more readily because of his high authority and unusnal experienc[illegible] in dealing with our federal system," &c., &c. (reads to the words, page 30, line 21) "The criminal law jurisdiction of Parliament was also relied upon herein. My suggestion of its aid in the Marriage case does not seem to have evoked [illegible]ch enthusiastic support, though in that connection it seemed to me much mor[illegible] appropriate than here."

VISCOUNT HALDANE. By the Marriage case he means the mixed Marriage case that came before this Board. MR. NEWCOMBE: I do not know what the learned Judge refers to here.

SIR ROBERT FINLAY: It is his judgment in the Court below.

VISCOUNT HALDANE: I do not really see why he speaks of concurrent legislation. That does not mean that the two parties have any more power when added together than they have separately. It means that they can each do it individually. They cannot increase each others powers. MR. NEWCOMBE: No, my Lord.

VISCOUNT HALDANE: The Dominion cannot pass an Act saying that the province has power to do this. That would be repealing the Statute. MR. NEWCOMBE: Yes.

SIR ROBERT FINLAY: The whole of the passage which has been read supports the suggestion I ventured to make that he was dealing only with the question that because the province could not do it thereupon the Dominion could do it. He says there is a large field left which can only be covered by concurrent action, each acting within its own sphere.

VISCOUNT HALDANE: He cannot mean that either Act gave further vitality to the legislation.

SIR ROBERT FINLAY: No, but there are many matters which can be dealt with only if both of the Parliaments perceive what is wanted in their own sphere.

VISCOUNT HALDANE: Dealt with as practical matters. MR. NEWCOMBE: Yes. The learned Judge goes on at line 21: "The criminal law jurisdiction of Parliament was also relied upon herein. My suggestion of its aid in the Marriage case does not seem to have evoked much enthusiastic support, though in that connection it seemed to me much more appropriate than here. The truth is this Insurance Act was obviously not a piece of criminal legislation or

intended as such. The mere penal sanction given to it cannot add to its jurisdictional strength, unless clearly resting upon that subject of jurisdiction." I never said the Act as a whole was to be attributed to Criminal legislation; what I did say was that section 70 would stand absolutely as a criminal enactment, but section 4 must be justified on other grounds. Then line 28: "Local legislatures are given the like power, and their Acts were given by 31 Victoria, chapter 71, section 3 (Dominion) even greater sanctions. I may observe that that itself was a very early instance of what I am calling, for want of a better phrase, concurrent or co-operative legislation," &c., &c. (reads the remainder of the judgment of Mr. Justice Idington.) Then Mr. Justice Duff says: "It is contended on behalf of the Dominion that the enactments in question can be supported as a valid exercise of the legislative authority of the Dominion either (1) under the introductory clause of section 91, or (2) under No. 2 of the enumerated heads of that section 'the regulation of trade and commerce.' First, as to the power of the Dominion under No. 2 of section 91: I think this does not embrace the regulation of occupations as such. 'Trades,' the pursuit of which constitutes a part of the trade and commerce of the country, may very well be subject to regulation under this power; but only as branches of trade and commerce." We do not care under which it comes, regulating a trade or regulating a branch of trade and commerce; under one head or the other it must fall, in our submission.

Sir Robert Finlay: He explains what he means. Mr. Newcombe: "The regulation of occupations as such seems in its nature to be a matter rather of local than of general importance, and I think it requires some straining of the language of No. 2 to bring that matter within it. I do not think that the various kinds of business which are comprehended under the term 'insurance' as used in the Act in question can be said to be part of the trade and commerce of the country; or that the transactions dealt with by section 4 of the Act are operations of trade or commerce in the sense in which those words are used in this provision. (2) As to the introductory clause: I think the Act cannot be sustained as having been passed in exercise of this power for two reasons. I think that the legislature of any one of the provinces could have passed an Act containing provisions substantially identical with the provisions in question (limited of course in its application to the province) under the authority given by section 92 to make laws in relation to 'property and civil rights in the province.' In order to understand the effect of section 4 it is necessary to refer to the interpretation clause (section 2). I think that legislation declaring the qualifications required to enable persons—natural or artificial—in any given province to enter into contracts of the various kinds embraced under 'policy of insurance' as defined in section 2 would be legislation in relation to civil rights. If I am correct in this the exception found in the introductory clause of section 91 excludes the subject-matter of this section from the general authority of the Dominion." On that statement I submit the learned Judge overlooks the statement which has been reiterated by this Board that subjects of legislation in Canada have two aspects, there is the Dominion aspect and the local aspect, and as I have said the aspect in which this subject is treated is the regulative aspect, not the aspect of providing how contracts are to be made or what should be the conditions of a valid contract.

Viscount Haldane: But, Mr. Newcombe, you see he is alluding to words which are quite fatal to your suggestion that by reason only of its swelling up to such importance as to come within the category of "peace, order and good government" a subject can be so legislated on by the Dominion as to over-rule what otherwise would have been legislation with regard to it, under section 92, competent to the province. He is referring to these initial words, "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." That is what he means; in other words it is to negative the suggestion which has been made about the decision of this Board in 1896. Mr. Newcombe: He is dealing with this legislation as declaring the qualifications required to enable persons, natural or artificial, in any province

to enter into contracts. I say this legislation stands quite independent of any requirement of that sort at all. My point is that this is legislation proceeding from the authority having power to regulate.

VISCOUNT HALDANE: Your contention is that, although in one aspect this legislation may trench on "civil rights," in another and primary aspect it deals with the "regulation of trade and commerce." MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: Every regulation which deals with "trade and commerce" must trench on "civil rights," because trade and commerce are civil occupations? MR. NEWCOMBE: Yes, my Lord, and just as the company incorporated by the Dominion under the general terms goes to trade in the province and is bound there by the laws of the Provincial Legislature as to property and civil rights and other matters, so the powers which the local company or any company attempts to exercise in the province are subject to the regulation of trade and commerce.

VISCOUNT HALDANE: In *Union Colliery Company of British Columbia, Limited, and others* v. *Bryden*, according to my recollection what was decided was this: the province of British Columbia, I think it was, was very anxious to get control of the Chinese that came in, and passed a law relating to coal mines—a Coal Mines Regulation Act—that no Chinaman was to go down into the mine; it was said that that was "civil rights in the province," but the Attorney-General for the Dominion argued that, although it was true that in one aspect the legislation dealt with civil rights, its primary aspect was legislation about aliens, and as such came within section 91, and was incompetent of the province. This Board so decided, and Lord Watson gave the judgment in which he illustrated how things which in one aspect come within one section, in another come within another, and we have to decide which is dominant. MR. NEWCOMBE: Yes, my Lord. That case is in 1899 Appeal Cases. Mr. Justice Duff says: "If the Act is not an Act relating to civil rights, then it is, in my judgment, an Act relating to matters which in each province are 'merely local or private,' as those words have been construed by the Judicial Committee in the Privy Council in different cases. On behalf of the Dominion it is said that the object of the Act is to require companies and persons engaged in carrying on the business of insurance to provide security for the performance of their obligations; and that this being a subject of general importance the Dominion is entitled to deal with it by legislation applying uniformly to all the provinces. The decisions upon the 'drink legislation' are relied upon as authorities for this proposition, that when in the opinion of the Courts a given matter as a subject-matter of legislation is of general Dominion importance the Dominion is entitled to legislate upon it even although *prima facie* it is a matter of local interest in each province."

VISCOUNT HALDANE: I wish the learned Judge had left the "drink legislation" alone; I have the same uneasy feeling about it that Lord Watson had. MR. NEWCOMBE: "I have already given my reasons in my opinion in the Companies' Reference for thinking that the decisions on the 'drink legislation' afford no positive rule of general application." (The learned counsel reads from the opinion down to) 'The fact that this legislation has been in force since 1868 was dwelt on by Mr. Newcombe. It is a circumstance for consideration, no doubt, but it must be observed that when the Act was introduced it was opposed by Mr. Mackenzie and Mr. Blake on the ground that the subject of insurance was a subject committed exclusively to the provinces, and the Act passed through Parliament on the assumption that the business of insurance carried on locally, that is to say, in a single province, was not interfered with." I have not looked at the debate, my Lord, to see, because I remember what was said by this Board in one case on the construction of the customs tariff.

THE LORD CHANCELLOR: It is a matter of interest, but it cannot decide it. MR. NEWCOMBE: It does not affect the construction at all: "The Act in truth has until recently, at all events, never been enforced except as against Dominion companies and extra-Canadian companies." I do not know why the learned Judge says that, because I see in the report—

THE LORD CHANCELLOR: Can it matter in the least when it has been enforced? MR. NEWCOMBE: There are cases in which the magistrates have enforced it.

THE LORD CHANCELLOR: Does it matter? It is either right or wrong? MR. NEWCOMBE: The learned Judge is misinformed. Then he says: "To the first question my answer is 'Yes.' To the second question my answer is 'Yes' if *intra vires*." Then Mr. Justice Anglin says: "The subject of insurance is not specifically enumerated as a head of legislative jurisdiction either in section 91 or in section 92 of the British North America Act." (The learned counsel reads from the judgment down to) "The argument based on 'the regulation of trade and commerce,' while perhaps more plausible, appears upon consideration to be equally fallacious. Whether the business of insurance can ever properly be spoken of as a trade is at least doubtful. But, read, as it must be, in connection with the word 'commerce,' with which it is associated, I think it reasonably clear that the word 'trade' in clause 2 of section 91 of the British North America Act does not cover the business of insurance. The weight of authority certainly supports that view. If, however, insurance is a trade in the ordinary sense of that term, having regard to what has been said as to the scope and meaning of clause 2 of section 91, in such cases as *Citizens' Insurance Company* v. *Parsons*, 7 Appeal Cases, 96, I think that under it Parliament is not empowered to regulate the conduct of any single trade or business in the provinces or to prescribe the conditions on which it may be carried on. That seems to me to be so purely a matter of civil rights in each province, something so essentially local that it appertains exclusively to provincial jurisdiction." I cannot see why, if it is a matter of regulation. If it is only necessary to regulate a single trade, if general rules may be made governing all trades and it is not necessary to apply them except to one big trade like insurance, why does not the jurisdiction exist in the power that they may regulate trade and commerce?

THE LORD CHANCELLOR: The argument is that regulation of "trade and commerce" means the abstract thing and does not include the concrete instance. MR. NEWCOMBE: Yes, my Lord.

LORD PARKER: What sort of instance would you give of "regulation of trade and commerce" in that sense—suppose you take the question of bills of exchange?

THE LORD CHANCELLOR: They are expressly provided for.

LORD PARKER: A Sales of Goods Act analogous to our English Act would go far outside anything confined to trade; it would be applied to private people. You could not define it in that way because it might be too large. I was trying to think of anything which could be a regulation of trade and commerce. Is there any instance in which that clause has been relied on other than in the case of the liquor traffic? MR. NEWCOMBE: Yes, my Lord, in the recent case of John Deere Plow Company, which has attributed a power directly to "trade and commerce."

VISCOUNT HALDANE: Not quite; the power to incorporate companies was derived from the Dominion powers because there were no provincial powers extending to companies which could trade outside—that, having got companies operating all over Canada, the "regulation of trade and commerce" was necessitated with regard to them.

LORD PARKER: Unless it be something in reference to a trade or in reference to commerce I cannot quite see how you can possibly get in anything under that—anything in the shape of Sales of Goods Acts or that sort of general regulations to an extent far beyond any question of "trade" and far beyond any question of "commerce."

VISCOUNT HALDANE: They are not necessarily "trade."

LORD PARKER: They are not necessarily "trade," and unless you have something referring to a particular trade I do not see quite how you can get any "regulation" at all. MR. NEWCOMBE: The customs policy, the fiscal policy, of the company might come within the description given by Sir Montague Smith in *Citizens Insurance Co.* v. *Parsons*, as political or general regulation of trade,

but unfortunately it does not come under that because "customs" is otherwise provided for.

LORD PARKER: Supposing you had something as to quarantine or disinfection of ports, unless it is expressly excluded from other things it would apply to more than "trade."

THE LORD CHANCELLOR: You might have trade mark legislation which would apply to all trades. It would not apply to private people. Copyright is dealt with. MR. NEWCOMBE: Copyright is dealt with, my Lord.

VISCOUNT HALDANE: I was thinking of munitions of war, which is a matter the country as a whole is interested in. Might not you regulate the manufacture and sale of munitions of war under the "regulation of trade and commerce"?

LORD PARKER: Then, of course, you get rid of the objection that the legislation under that must be general.

THE LORD CHANCELLOR: The real point between you and your opponent is on that head: whether "regulation of trade and commerce" relates to the abstract conception of "trade and commerce" or to a concrete and individual instance.

VISCOUNT HALDANE: May it not relate to a particular trade so far as that trade is concerned with matters which relate to the trade and commerce of the Dominion of Canada? For instance, to take the case of munitions.

SIR ROBERT FINLAY: And inter-provincial trade and overseas trade. That is the sphere pointed at in Parson's case. MR. NEWCOMBE: Or the Act to regulate the grain trade. Ever since the Western provinces were developed we have had an Act, and it has grown like the Insurance Act. It is more modern.

THE LORD CHANCELLOR: A Dominion Act. MR. NEWCOMBE: Yes, 1912, chapter 27, providing for the grading and shipment of grain and the licensing of warehouses and all that sort of thing.

MR. WALLACE NESBITT: And inspecting and weighing. Many clauses of that will be challenged in due time.

LORD PARKER: To quote anything which has not been the subject of judicial decision is not much use, because these Acts have been in force apparently for a number of decades. MR. NEWCOMBE: Yes.

THE LORD CHANCELLOR: I think you had better finish reading the judgments. MR. NEWCOMBE: I was reading at line 15: "That seems to me to be so purely a matter of civil rights in each province, something so essentially local that it appertains exclusively to provincial jurisdiction." (The learned counsel reads from Mr. Justice Anglin's opinion down to) "Yet in the Prohibition case, after pointing out that the jurisdiction of the Dominion Parliament to enact the Canada Temperance Act had been rested on the 'peace, order and good government' provision, rather than on 'criminal law,' and could not be supported under 'the regulation of trade and commerce,' Lord Watson says, at page 367, that in so far as the provisions of the provincial Local Option Act (upheld as an exercise of legislative power by the province of Ontario under either clause 13 or clause 16 of section 92), come into collision with the provisions of the Canadian Act, they must yield and remain in abeyance until the Canadian Act is repealed. In the same judgment his Lordship had already said (page 361) that 'some matters in their origin local and provincial might attain such dimensions as to affect the body politic of the Dominion and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great care must be observed in distinguishing between that which is local and provincial and, therefore, within the jurisdiction of the Provincial Legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern in such sense as to bring it within the jurisdiction of the Parliament of Canada.' This judgment rests upon the view that when a matter primarily of civil rights has attained such dimensions that it 'affects the body politic of the Dominion,' and has become 'of national concern,' it has, in that aspect of it, not only ceased to be 'local and provincial,' but has also lost its character as a matter of 'civil rights in the province,' and has thus so far ceased to be subject to provincial jurisdiction

that Dominion legislation upon it under the 'peace, order and good government' provision does not trench upon the exclusive provincial field, and is, therefore, valid and paramount."

VISCOUNT HALDANE: Now that seems to me to be a misreading of the judgment. It is extraordinary that the learned Judge should so misread it, because on the previous page he quoted Lord Watson as saying in the same judgment that the legislation under the "peace, order and good government" provision "ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92." Having laid that down he interprets it—not by what he says, but in the shape of an inference as meaning that you can by legislation under the "peace, order and good government" provision displace provincial powers under section 92. I think all that Lord Watson said in that case was that he took it as decided authoritatively by this Board—he did not say how—that the Canada Temperance Act was *intra vires* of Parliament. To interpret him as saying more seems to me to go in the face of the express words of the Statute. MR. NEWCOMBE: The argument was to put the Canada Temperance Act under "trade and commerce." The Canada Temperance Act had been affirmed by this Board. It was not a question in the Prohibition case, whether that was *intra vires* or not; the question was whether the Local Option Act of Ontario was *intra vires*. If we could have put the Canada Temperance Act under "trade and commerce" it would necessarily follow that the local Act was *ultra vires*; therefore, it had to fall under "peace, order and good government"; but the difficulty which the learned Judges have met with is, how does the Canada Temperance Act override the Local Option Act of Ontario, as it is declared to be under the peace, order and good government provision, unless there be a power in the Dominion in the execution of the peace, order and good government provision to override specific powers.

VISCOUNT HALDANE: All Lord Watson said was: The Judicial Committee has decided it so, and I am bound. He did not speculate as to their reasons; he said, It is a decision which I accept, and then he went on to say that none the less Ontario has this power. The power is there. MR. NEWCOMBE: The power is there, but when the Local Option Act of Ontario and that of the Dominion come to compete in the same community the Dominion Act prevails.

VISCOUNT HALDANE: He says because it has been decided that it is *intra vires*. MR. NEWCOMBE: It does not come under "trade and commerce."

VISCOUNT HALDANE: He did not say that; he expressed strong reasons for thinking it should not, but he gave no reasons on how the Scott Act was to be supported.

LORD PARKER: Either it came under "trade and commerce" on one possible explanation, or if it did not it was a thing which had become so big that somehow or another any *prima facie* power that Provincial Legislatures might have had had been lost?

VISCOUNT HALDANE: I do not think he meant that.

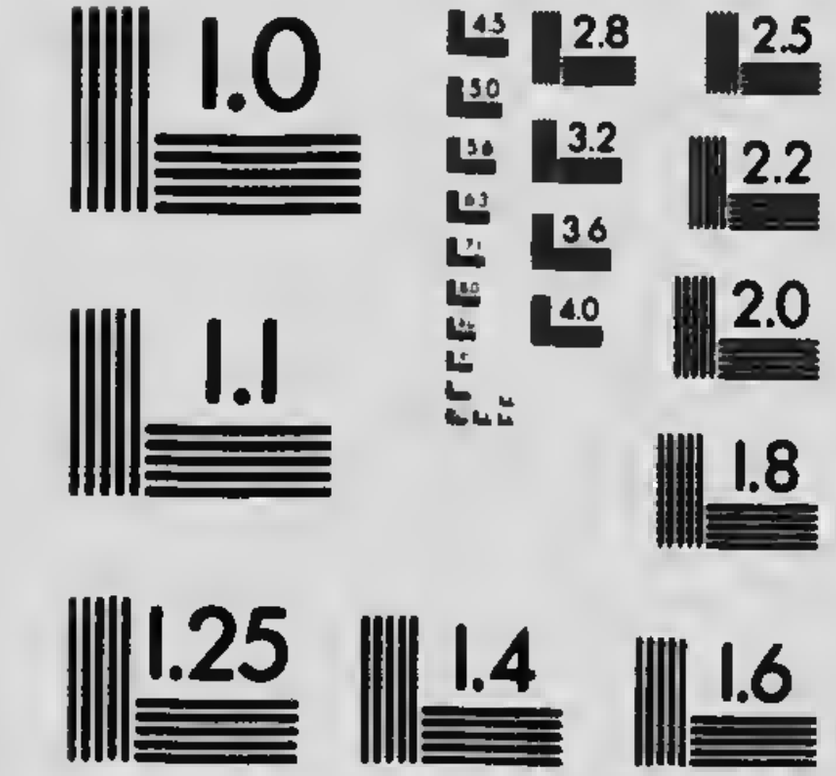
LORD PARKER: He may not have meant it, but those are the only two possible ways out of the difficulty. It has been long decided that as long as the Provincial Legislatures have any power the Dominion has not.

VISCOUNT HALDANE: I think he might have said, in order to come under "peace, order and good government," it must have attained to a certain magnitude; still it must not trench on the exclusive legislation of the provinces; but he says: "I am not here to decide how the legitimacy of the Act came about, it has been laid down by the Judicial Committee that it is *intra vires*, there it is and, therefore, of course, it displaces the Ontario Act; he says, how, I am not concerned to say."

LORD PARKER: I do not personally see how it could possibly supersede the Ontario Act if the Ontario Act was *intra vires*, because it could only be *intra vires* under section 92, and if it was *intra vires* under section 92—then under the peace, order and good government provision the Canadian Government would have no jurisdiction.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

VISCOUNT HALDANE: I think he says that.

LORD PARKER: Then it would be wrong, and the only way of justifying the case would be to say the liquor traffic had got so big that the Ontario people had lost their powers. MR. NEWCOMBE: It outgrew its provincial environment.

VISCOUNT HALDANE: What Lord Watson did, was to say: "It has been conclusively decided; therefore it is a valid Act; I come to the conclusion that the Mowatt Act was within the powers of the Parliament of Ontario; I so decide; how they are to be reconciled is not for me to decide; it is sufficient. I will say in parenthesis I do not see how the Scott Act could have been passed under the power to regulate trade and commerce. MR. NEWCOMBE: With all submission, I think, he said it was under the general words "peace, order and good government."

LORD PARKER: I think really the two decisions cannot stand together.

VISCOUNT HALDANE: That is what Lord Watson meant to convey.

LORD PARKER: If he did it was no use saying that it had been decided and was binding on him; the first decision was in effect that the Canadian Legislature had the jurisdiction to pass the Act, and that excluded the jurisdiction of the Provincial Legislature; the second decision was that the Provincial Legislature had the power, and it logically followed from that the Canadian Legislature had not, and those two decisions appear to be contradictory.

VISCOUNT HALDANE: If it was within "trade and commerce," it was outside section 92; if within section 91, it would be under "peace, order and good government."

LORD PARKER: Then it was outside the powers.

THE LORD CHANCELLOR: What puzzles me is why regulations which affect "peace, order and good government," do not also affect "civil rights." MR. NEWCOMBE: Undoubtedly they do, my Lord.

THE LORD CHANCELLOR: If that is so, what class of "peace, order and good government" can you deal with which does not affect the "civil rights" within a province?

VISCOUNT HALDANE: But the expression "civil rights" has to be construed.

LORD PARKER: Is not it all reconciled by this, that, if you have legislation by the Dominion of Canada under any of these heads which affects civil rights, it is really wider than anything which any provincial legislation could de because they could only deal with the civil rights within their jurisdiction? MR. NEWCOMBE: Locally.

LORD PARKER: It may be so with regard to trade and commerce, it may be the distinction is that you may pass your regulation if you want to extend it to every trade and concern, but you cannot as part of Dominion legislation pass an Act to regulate the rights within any particular province, because that is within the powers of the local legislature. If you had an Act that every insurance company carrying on business in Ontario should be subject to certain disabilities and have certain rights, that might be directly within the powers of the Provincial Legislature, but taking the whole it would not be within the powers—

SIR ROBERT FINLAY: May I submit that it would "mop" them all up? If my friend conceded that they could not do it in one province it would be very extraordinary if they could do it because they attacked two or three. MR. NEWCOMBE: I did not concede it. It might be carried on in such a way as to be a private and local matter; on the other hand it is conceivable that trade might be carried on in a province so as to admit of its regulation as a matter of trade and commerce by the Dominion, although the application of the Dominion Statute was confined to a single province. I was reading at the top of page 36. Mr. Justice Anglin proceeds: "As I understood him, counsel for the Dominion contended at Bar that if there would, upon any state of facts, be jurisdiction to enact the legislation in question the existence of that state of facts must be assumed in favour of its validity." (The learned counsel reads down to) "If such an assumption should be made—if indeed the Parliament of Canada could by an appropriate declaration conclusively establish the existence of a state of facts

upon which such a transfer of legislative jurisdiction would occur, the autonomy of the province would be entirely at its mercy, and there would be few subjects of civil rights upon which it might not displace the provincial power of legislation.

VISCOUNT HALDANE: You need hardly read the next; he says that it interferes with the jurisdiction over civil rights. Then Mr. Justice Brodeur's judgment in short. MR. NEWCOMBE: "The question that we have to consider is whether the Dominion Parliament can regulate the insurance business." (The learned counsel reads from Mr. Justice Brodeur's opinion down to) "It seems to me that if the authors of the British North America Act intended to put insurance under federal control they would have mentioned it as they have done banking, weights and measures, bills of exchange, interest, patents and copyrights." Of course, that would have a very different effect; if they put insurance on the same level as banking, it would give Parliament the jurisdiction, not only to regulate, but to provide as to property and civil rights, and the whole field of legislation with regard to insurance. "The special enumeration of those subjects does not necessarily preclude any others being included in the provisions of section 91 of the British North America Act, but it goes a long way to show how the insurance question was considered. Besides, the existing legislation at the time of Confederation, and the proceedings of the Quebec Conference, show very conclusively that the matter of insurance pertains to provincial legislation. Under the Union of Upper and Lower Canada the matter was considered so much a question of local interest that those two provinces had each their own mutual insurance law. See Consolidated Statutes of Lower Canada, 1860, chapter 68; and Consolidated Statutes of Upper Canada, 1859, chapter 52. The chapter 68 of the Lower Canada Statutes was under the title 'Joint Stock Companies,' and the Upper Canada legislation was under the title 'Municipal Institutions.' The Commissioners appointed for the codification of civil laws of Quebec in their 7th report, dealt with the insurance law, and enacted the articles 2468, and following of the Code which cover the whole subject." Of course, my Lords, that was merely a Code of the common law of the province of Quebec with regard to insurance: "They considered the insurance law as a matter of civil law. That report was made and discussed in Parliament at about the same time the Confederation resolutions were framed and discussed." (The learned counsel read down to) "The section 4 of the Dominion Insurance Act that requires all persons to take a permit before making any contract would be *ultra vires*, and the section 70 which imposes a penalty on those that would carry on the business of insurance without taking that license would also be illegal."

THE LORD CHANCELLOR: Then he answers both questions. MR. NEWCOMBE: Yes, my Lord.

Now, my Lords, I was proposing to read a passage from the judgment in the case of the John Deere Plow Company; I think it is at page 340 of the report in 1915 Appeal Cases. Referring to the judgment in *Citizens Insurance Company* v. *Parsons*, an extract of which I have read as quoted in one of these judgments, his Lordship says: "Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons*, on head 2 of section 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head must, like the expression, 'Property and civil rights in the province,' in section 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers." That I submit is all that this Act undertakes to do—with the exception of the "person," which perhaps stands in a different category, and it is not very important. "For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade." It is quite as much I submit in principle a question of general importance throughout the Dominion as the

fashion in which a foreign company should trade, or a British company or a colonial company outside of Canada should trade as a company incorporated by the Dominion, and while it is incompetent to the local legislatures to regulate the terms and conditions upon which a Dominion company can trade, it is equally I submit, and for the same reason incompetent that they should provide the terms and conditions upon which any company should trade unless it be a company incorporated by themselves. "Their Lordships are, therefore, of opinion that the Parliament of Canada had power to enact the sections relied on in this case in the Dominion Companies Act and the Interpretation Act. They do not desire to be understood as suggesting that because the status of a Dominion company enables it to trade in a province, and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the Provincial Legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the province if civil rights were to be read as an expression of unlimited scope. But, as has already been pointed out, the expression must be construed consistently with various powers conferred by sections 91 and 92, which restrict its literal scope. It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation. This conclusion appears to their Lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Co.* v. *Parsons, Colonial Building and Investment Association* v. *Attorney-General for Quebec,* and *Bank of Toronto* v. *Lambe.*"

Now I have submitted that insurance is a trade, it must be a trade, and it is spoken of in the books very generally under that description. Might I read from the case of *Bristow* v. *Towers,* in 6 Term Reports, page 36. It is reported in 101 English Reports at page 422. It is as to the use of the word "trade" as describing insurance. I think it is illuminating. It was held in that case that the insurance of an enemy's property is illegal, and that no action can be sustained thereon. Park arguing for the defendant (at the foot of page 426 of 101 English Reports), says: "By the mere declaration of war or reprisals permitted, all direct commerce immediately and necessarily becomes prohibited between hostile nations; and if so, it follows that insurances must also be forbidden; for it cannot be lawful to do that indirectly which is not permitted to be done directly."

THE LORD CHANCELLOR: It does not seem to help us much that it would be contrary to public policy to let a house to an alien enemy during the war, yet letting a house would not be a trade. MR. NEWCOMBE: No, my Lord, but they speak of the trade here. He also quotes Bynkershoek as decisively of opinion against the legality and policy of it, considering it as a means of promoting the commerce of the enemy.

THE LORD CHANCELLOR: Yes, that is true. MR. NEWCOMBE: He refers at the top of page 428 to regulations by Act of Parliament, and continues: "But not only the legality, but the expediency of the measure is against such insurances. The great argument in favour of them, which was urged by Lord Mansfield when Attorney-General in the House of Commons, is that a valuable branch of trade is thereby secured to us"—that is the insurance trade—"which would be diverted into other channels and thereby occasion the loss of a considerable profit to the country; and that in fact more benefit than loss arises from such contracts. This argument was used in 1748, when an Act was in force for preventing such insurances; yet the trade was not diverted into other channels, but was easily regained by the English insurers, who dealt at a cheaper rate, and fulfilled their engagements more punctually than the insurers of other nations."

Now, my Lords, that suggests the enquiry: could the province legislate to permit insurance of enemy property in the present circumstances without encroaching upon the Dominion power to regulate trade and commerce? Can it legislate

to permit an enemy company to carry on business in the province even if they do so locally? Those are matters which, if the common law is to be affected upon that subject, I submit must be dealt with by the legislature that has power to regulate trade and commerce.

(Adjourned till to-morrow morning at 10.30).

SECOND DAY.

SIR ROBERT FINLAY: Your Lordship, the Lord Chancellor yesterday asked as to the order of proceedings. I have conferred with my learned friends, and if your Lordships think it convenient that the case from Yukon, which is number 3, the Bonanza case, should be taken next, that is a concrete case, and some of the issues in that are of very great general importance. Then after that might come the more general matter.

THE LORD CHANCELLOR: I quite agree, Sir Robert; that is far the best way.

SIR ROBERT FINLAY: If your Lordship pleases, then in the Bonanza case the provinces are intervenants. Perhaps your Lordships would allow the respondent in that case, and the intervenants to settle among themselves who should open the general part of the case.

THE LORD CHANCELLOR: I think that would be most desirable, remembering what we said yesterday, that any representative of any of the provinces who thinks there are points that have not been put, which he would desire to put on behalf of his province should be at liberty to do it.

SIR ROBERT FINLAY: I am much obliged to your Lordship: that will be very satisfactory.

MR. NEWCOMBE: My Lords, upon the question of the quality of the insurance business as being trade or affecting trade, I have referred to the use of the word in *Bristow* v. *Towers*. I find also that the Assurance Companies Act, 1909, of the Imperial Parliament, which is an Act regulating the trade, although not to the same extent as our Act, but still a kindred Act requiring deposits, an Act enacted for the security of the policy-holders, is put here under the administration of the Board of Trade. The Board is given power to make rules with respect to the deposits required by the Act to be made by insurance companies. It receives on deposit the accounts and balance sheets.

THE LORD CHANCELLOR: You will not get any advantage from that, you know, because the Board of Trade is a large Government Department, and things placed under its control are not necessarily trade at all. MR. NEWCOMBE: Possibly so, but I point to the fact that this is placed under the administration of the Board of Trade.

THE LORD CHANCELLOR: Yes. MR. NEWCOMBE: Then, curiously enough, Adam Smith refers to the insurance trade as one of the few trades that may be carried on without a monopoly.

THE LORD CHANCELLOR: What is the reference to that? MR. NEWCOMBE: "Wealth of Nations" (Rogers' edition) volume 2.

VISCOUNT HALDANE: Rogers' is a very good edition, but can you give us the chapter? MR. NEWCOMBE: I have only got it from the page of that book; I have not the book here.

THE LORD CHANCELLOR: What is the edition? I did not know whether it had run through more than one edition. MR. NEWCOMBE: I have it at page 340. He says: "The only trades which it seems possible for a joint stock company to carry on successfully without an exclusive privilege are those of which all the operations are capable of being reduced to what is called a routine or to such uniformity of method as admits of little or no variation. Of this kind is first, the banking trade, secondly the trade of insurance from fire and from sea risk and capture in time of war . . . " Then he says: "The value of the risk either from fire or from loss by sea or by capture, though it cannot perhaps be calculated very exactly, admits, however, of such a gross estimation as renders it, in some degree, reducible to strict rule and method. The trade of insurance, therefore, may be carried on successfully by a joint stock company without any

exclusive privilege." "The trade of insurance gives great security to the fortunes of private people, and by dividing among a great many that loss which would ruin an individual makes it fall light and easy upon the whole society. In order to give this security, however, it is necessary that the insurers should have a very large capital."

Then, my Lords, in the proclamation against trading with the enemy, the recital is: "And whereas it is contrary to law for any person resident, carrying on business or being in our Dominions, to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without our permission." And it proceeds to include among the prohibitions "not to make or enter into any new marine, life, fire or other policy or contract of insurance with or for the benefit of an enemy." Therefore, I submit that the business of insurance is clearly a trade; it is carried on for profit; it is dealt with as a trade; it has been referred to the category of trade in all legislation. It happens here that, while we have in Canada a Department called the Department of Trade and Commerce which was organized comparatively recently, this Act does not fall under the administration of the Minister of Trade and Commerce, but under the Department of Finance, where it was placed in 1868, when it was first enacted, long before any Department of Trade and Commerce was organized.

VISCOUNT HALDANE: Have you looked to see whether, in the days when the Bankruptcy Acts applied only to traders, insurance was within the description? MR. NEWCOMBE: I think they said in *Citizens Insurance Company* v. *Parsons* it was not.

LORD SUMNER: It is. There is a schedule to the Act of 1869 which says what persons are included among traders, and underwriters and shipowners and bankers are included. The point in *Citizens Insurance Company* v. *Parsons*, as I understand it, is that an underwriter is not a trader because he had to be called a trader *eo nomine* for the purposes of that Act—which is not a very convincing statement, but in the Act of 1869, and I think the earlier Acts being a trader by the Statute included underwriters. MR. NEWCOMBE: Yes, my Lord.

Now referring to section 92 of the British North America Act, I wish to point out that everything provided for under that Act is of a strictly local character in the province; the enumerations, my Lords, before you come down to item 5, "The management and sale of the public lands belonging to the province and of the timber and wood thereon," are political provisions with respect to the Government; section 2, provides for "Direct taxation within the province in order to the raising of a revenue for provincial purposes." It was explained by this Board that the reason why the power to tax provincially was limited to direct taxation was that indirect taxation would be felt all over the Dominion—would have an influence on the whole country; therefore, in order to keep the taxation within the local limits of the province, the provincial power was limited to direct taxation.

THE LORD CHANCELLOR: What seems to me the real point you have to meet in the Statute is this, if the "regulation of trade and commerce" in section 91, sub-head 2, means the regulation of any particular trade or industry, what is the reason in the later heads of that section for the introduction of obvious trades like banking and shipping? MR. NEWCOMBE: Well, my Lord, the introduction of "banking" and "shipping" and "savings banks" gives to the Parliament a very much broader power of legislation than would exist under the power to regulate trade and commerce if they had been omitted.

THE LORD CHANCELLOR: Why? MR. NEWCOMBE: Because you have to construe now, "property and civil rights in the province" less property and civil rights in respect of "banking," and in respect of "savings banks" or "shipping." The Dominion Parliament has the full jurisdiction with regard not only to regulation, but with regard to property and civil rights. If "banking" had not been mentioned in section 91, then I submit it could not be denied that the banking trade could be regulated by the Dominion just as we now propose to regulate the insurance trade. On the other hand, it could not be denied that contracts and civil rights with respect to banking except as affected by regulation

would be within the exclusive legislative authority of the provinces, but now I submit it is otherwise.

THE LORD CHANCELLOR: Do you mean in the "regulation of trade and commerce" under sub-head (2) it is possible to infringe upon the reservation of "civil rights" which is made the subject of provincial legislation? MR. NEWCOMBE: Yes, certainly.

THE LORD CHANCELLOR: But with regard to "banking" and "shipping," that is taken outside the category of "civil rights" altogether, by virtue of being specially named? MR. NEWCOMBE: Yes, my Lord; whatever is strictly banking may not be covered by a local legislation; there may be a field incidental to banking which the Dominion might embrace; and which, so far as it is merely incidental, might be controlled by provincial legislation in the absence of any Dominion legislation.

VISCOUNT HALDANE: The province could not incorporate a Bank at all? MR. NEWCOMBE: No, my Lord; nor a savings bank; it could not pass any legislation which is strictly referable to one of these enumerations and to nothing else. Incidentally it might legislate in the common field so long as there was no inconsistent Dominion legislation, but Dominion legislation if inconsistent would exclude provincial power and would override if enacted later than the provincial legislation.

Then I was saying that everything under section 92 is local governed by such words as "provincial" or "in the province," "the establishment, maintenance and management of public and reformatory prisons in and for the province," asylums and charities "in and for the province," "municipal institutions in the province."

THE LORD CHANCELLOR: The best way of proving that is by referring to sub-head 16, which sweeps it all up and says: "Generally all matters of a merely local or private nature in the province," showing what is meant by what has gone before. MR. NEWCOMBE: Yes, my Lord; and upon that I want to refer to what Lord Watson said in the Prohibition case, 1896 Appeal Cases, at page 359: "It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by section 91 might, occasionally and incidentally, involve legislation upon matters which are *prima facie* committed exclusively to the provincial legislatures by section 92. In order to provide against that contingency, the concluding part of section 91 enacts that '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.' It was observed by this Board in *Citizens' Insurance Co. of Canada* v. *Parsons* that the paragraph just quoted 'applies in its grammatical construction only to No. 16 of section 92.' The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in section 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of section 92, as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91."

Therefore, that passage covers both the points, as to the strict local character of these enumerations and powers of section 92, and as to the authority of the Dominion to override in the exercise of any enumerated power of section 91.

Now, I am not going to refer to the authorities further, my Lords, because my learned friend is going to discuss them and I have discussed these authorities several times before your Lordships; but what I wish merely to say now is that the cases which have been referred to and will be referred to of *Citizens' Insur-*

ance Company v. *Parsons*, and *Bank of Toronto* v. *Lambe*, and those cases in which the "regulation of trade and commerce" has been referred to previous to the very recent decision of the John Deere Plow case, have discussed the question in a general way, and, without referring any piece of legislation to the power of "regulation of trade and commerce," have suggested or indicated that this power to regulate must relate to inter-provincial trade or trade in matters of inter-provincial concern. Those are expressions of this Board, "inter-provincial trade" and "trade in matters of inter-provincial concern." Then we have further the authority of the recent case that the terms and conditions upon which companies whose objects extend to the whole of Canada are to be permitted to trade in Canada would be imposed in the power to regulate trade and commerce. That is the submission. Here I submit we are dealing with "inter-provincial trade" and "trade in matters of inter-provincial concern." There is no such thing, of course, as inter-provincial trade or inter-provincial concern in connection with trade, except in so far as the people of the Dominion, the inhabitants and traders and people engaged in commerce, resident, domiciled and established in the different parts of the country are concerned. One province as a political entity does not trade with the other. It is matter of carrying on business between the traders established in the different provinces. Insurance business is from the very nature of the subject-matter, I submit, a sort of business which cannot be localised; it is not local. It is very difficult—and impossible, I submit—to imagine the case of a company even if it only has one office in one place, so localised, carrying on an insurance business as not to affect in a sense the country at large. Take the question of fire insurance if you like. In fire insurance, the risk is personal, but the property has a locality, and the insurance may be written in this province and the property may be situated in another province. The person insured may be here and his property may be there. The whole thing, my Lords, is so extensive that I submit it is as Mr. Justice Fry said in the case of *Rousillon* v. *Rousillon*, a widely diffused trade. This case is of no importance except for the expression. It is reported in 14 Chancery Division, page 366; he says: "Now, in the first place, let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the kingdom, which by their very nature are extensive, and widely diffused. There are others which from their nature and necessities are local." What I say is that the insurance trade from its very nature is extensive and widely diffused.

THE LORD CHANCELLOR: You cannot get more than this, from its very nature it is likely to be diffused. You can imagine an insurance company set up in a big industrial district whose whole operations are confined to granting industrial insurance to people who may suffer injuries in the particular factories in the particular area. MR. NEWCOMBE: You might have a mutual company.

THE LORD CHANCELLOR: No, I am not speaking of a mutual company, it might be a perfectly reasonable trade transaction to have an industrial insurance company limited in its area to the particular industrial district in which it carried on business. MR. NEWCOMBE: That sort of company I should think would go with the general bulk of the business. If we have the power to regulate the trade—

THE LORD CHANCELLOR: Yes. I am only pointing out that you cannot say that it is impossible. MR. NEWCOMBE: Perhaps I go too far in saying that it is impossible.

THE LORD CHANCELLOR: It is quite fair to say under general circumstances, as we know insurance companies, they have no local area in which they operate exclusively. MR. NEWCOMBE: They do not operate locally.

VISCOUNT HALDANE: Is it your argument that (as section 91 begins with the reference to "peace, order and good government of Canada" and goes on "for greater certainty" to enumerate the subject-matters under the heads of section 91, that it enumerates them in connection with a general power which relates to the interest of the Dominion as a whole) "regulation" in sub-head (2) should be interpreted as meaning regulation where the interest of the Dominion comes in? MR. NEWCOMBE: Yes. I am putting that.

VISCOUNT HALDANE: Not "regulation" unlimited. MR. NEWCOMBE: Not "regulation" unlimited, because it has been suggested that that expression "regulation of trade and commerce" must be confined, there must be limits upon it, but where the general public interest comes in the right to regulate arises.

THE LORD CHANCELLOR: It does not necessarily follow that what you are saying touches the matter, because in this Statute of 1910, which we are considering, it is contemplated that an insurance company may be formed with a strictly local area of operations. MR. NEWCOMBE: A provincial insurance company.

THE LORD CHANCELLOR: With a strictly local area of operations. MR. NEWCOMBE: Yes, with a strictly local area of operations; we have not undertaken to regulate that.

THE LORD CHANCELLOR: No, but when you point out that those companies are in their nature companies whose operations spread everywhere, it is right to point out that in this very Act there may be companies which have no such extended operation. MR. NEWCOMBE: With all submission, I think the proper interpretation of that is the Dominion has abstained from exercising any power which it may have with regard to the regulation of the business of the local company; not that the business of the local company is necessarily locally confined, because that company may compete with the general agencies of insurance throughout the country. For instance, although it has an office in Nova Scotia, say, it will insure anybody who comes along there; the property may be abroad or in any other province or in Nova Scotia; the owners may be elsewhere. When you consider the magnitude of the trade to which reference has been made, it appears, I submit, manifest, that it must be a matter of inter-provincial interest or concern. I have some figures here which have been printed from the year book.

VISCOUNT HALDANE: Are these figures in the judgment? MR. NEWCOMBE: No, my Lord; these are some more extensive figures. They embrace what is in the judgment.

VISCOUNT HALDANE: We know from the judgment that the amount of Dominion insurance business is much greater than the amount of provincial insurance business. MR. NEWCOMBE: Yes, my Lord. Here is a statement taken from the Official Report showing the total population of the country, the total value of field crops, the total value of livestock, the total value of forest products, and so on; and your Lordships will see the figures are large, but when we come to the amount of fire insurance, we have a figure there of three billions and odd, almost double of any other item connected with the statistics of the country. Life insurance is enormous also, and other insurance. That shows of what tremendous importance this business is. My Lords, if anything should happen to the Canada Life Insurance Company it would be a disaster, of less magnitude, perhaps, but only of less magnitude, than the failure of the Bank of Montreal. It is impossible to conceive anything in which the business of the country is so much involved as in this very trade of insurance. "Savings banks" of course are given to the Dominion; "banking" is given to the Dominion, but in the course of time in the development of the country—and this Constitution must develop as the country develops—what happens? You find the insurance company is converted into a savings bank; it becomes the place where the deposits of the country are. You find the trade of the country wrapped up in insurance as conditions of trade develop; the prices, the profits, everything regulated having regard to the element of insurance. Life insurance, as a matter of capital, as a substitute for capital in trade, for the purposes of advances, for the purpose of partnership arrangements and everything of that sort, is of vast general consequence, and there must be a power to regulate; the Act regulates, even if in some particular aspects it may affect contracts or civil rights in the provinces; this necessarily may or perhaps must happen, but so long as it is "regulation," that is not an objection to the Act. It provides for security, for deposits, for reserves. The scheme of this Act, as your Lordships have realised probably, is that in fire insurance there shall always be in the hand of the Minister of Finance an amount sufficient to secure the policy-holder for all claims that have matured, and for all premiums unearned. The same as regards life insurance. Every life insurance policy has, as premiums are paid upon it, what is called a reserve value,

so much is earned of the insurance; if the insurance company fail at any time and have no other assets; there is always an amount under the system provided by this Act equivalent to that in the hands of the treasury to go to the Canadian policy-holder. My Lords, I submit that is nothing but "regulation," and that the regulation is competent to the Dominion.

Then, I say independently of the question of "trade and commerce," it is a matter for the "peace, order and good government of Canada" in a matter not committed to the provinces. I am not saying that because of its vast magnitude as was suggested yesterday under the Prohibition case, there might be an overriding power—I am not saying that now; I submitted yesterday some considerations about that; but independently of that altogether, there are certain exclusive powers provincially limited committed to the provinces under section 92. Then the Dominion has the general powers for the peace, order and good government in every respect. There are certain enumerations put down here for the purpose of giving the Dominion an overriding power as to provincial legislation, but in anything not committed to the provinces whether enumerated in this Act or not under section 91 the Dominion has the exclusive power. This insurance legislation, I submit, is of a character extra-provincial, not committed to the provinces, and, therefore, even if not under any of the enumerated powers, it is competent to the Dominion under the general words. Lord Watson made a suggestion in the Prohibition case which I would like to refer to as to the limited character of provincial powers. It is merely an observation, but it is in the line of my argument. At page 368 of that case, he said: "The manufacturers of pure native wines, from grapes grown in Canada, have special favour shewn them. Manufacturers of other liquors within the district, as also merchants duly licensed, who carry on an exclusively wholesale business, may sell for delivery anywhere beyond the district, unless such delivery is to be made in an adjoining district where the Act is in force. If the adjoining district happened to be in a different province, it appears to their Lordships to be doubtful whether, even in the absence of Dominion legislation, a restriction of that kind could be enacted by a provincial legislature." It is suggested there, on the authority of the Board, that it is a very doubtful matter, though not necessary to decide there, whether the power of a province with regard to "property and civil rights" extends so far as to enable a province to prohibit the sale of goods within the province to be delivered in an adjoining province.

LORD PARKER: What might make a difficulty in accepting your argument in its entirety is this. You can read section 4, which is one of the sections as to which the question is asked, in this way: No person shall grant any annuity for life unless it be done on behalf of a company holding a license from the Minister. That goes to the very root of the rights of people in the province. Why should not a man grant an annuity for the life of his wife or under any circumstances he chooses in the province? It is so extraordinarily broad. I can understand your argument as applying to companies, but why persons? A company carrying on business which is not confined to a particular province may fairly be considered as carrying on a Canadian business, and if it carries on a Canadian business it is possible that the clause about regulating trade and commerce may apply, but how about "persons?" MR. NEWCOMBE: Persons in the sense of carrying on the business of insurance in competition with large insurance companies?

LORD PARKER: You have not competition here. It simply incapacitates the person from granting an annuity. MR. NEWCOMBE: It might be too comprehensive; but what I say is this, that when you come to consider the individual carrying on insurance business and competing with the companies, you may introduce words which it may be possible to introduce by reason of the position in which the two stand.

LORD PARKER: It is one of the great dangers of these references: suppose we declare these sections *intra vires*, and some unfortunate man wants to grant an annuity in Ontario to his wife? MR. NEWCOMBE: If in that respect it goes too far, your Lordships, I should think, would point that out.

LORD SUMNER: This may help you a little bit. It would not be difficult to say that "other person" is a person *ejusdem generis* with "underwriters;"

that is to say, a person engaged in business and who grants annuities for that purpose. It may even then be a difficulty in your way. MR. NEWCOMBE: What I submit is that any decent or proper scheme of regulation of the insurance trade must prohibit a single individual from competing.

THE LORD CHANCELLOR: It is fair to say that the Statute is an insurance Statute, and that a grant by a man of an annuity to his wife is not an "insurance." MR. NEWCOMBE: It is not within the purview of the Act.

LORD PARKER: Even if you read it *ejusdem generis* with carrying on the business of granting an annuity, neither the "underwriters" nor the "other persons" are within the exception contained in the earlier clause about the section not applying to any company who carries on a local business only; there is no similar exception with regard to "persons" or "underwriters." I cannot see why a company carrying on business wholly in Ontario say, is excluded, but a person who carries on business is not. The moment you come to that, you come to this, do not you, that it is not really the general regulation of a Canadian trade? MR. NEWCOMBE: No, if it be strictly local and private, but it does not follow, that because the office, the place of business, is only in Ontario therefore it is a strictly local business; when it is carrying on insurance business and taking all the risks which come, it carries on business which affects the country at large.

LORD PARKER: ". . . which carries on the business of insurance wholly within the limits of the province." MR. NEWCOMBE: That is a provincially incorporated company, and the Dominion no doubt in passing this Act did not wish unnecessarily to interfere with what they call provincial rights. Whether they had those rights or not or whether the Dominion could interfere is another question. They did not interfere. But suppose a local company. This Act has its application not to the provincially incorporated company carrying on business within the province—we might have extended it to that company perhaps—it is not for your Lordships to determine that now—but we have provided as to foreign companies coming in, as to British and colonial companies coming in and as to our own companies. There is no doubt that the Dominion can regulate the company of its own creation. I submit it follows from the decisions that we can provide the terms and conditions upon which the outside companies can come in and are to be recognised according to the comity of the state. If under the comity it is necessary to regulate the terms and conditions upon which foreign companies with objects extending to the whole world can come in and carry on business throughout Canada, having relation to foreign treaties or otherwise—it might be the subject of a treaty under the 132rd section of the British North America Act, it would be for the Dominion to regulate. The Dominion is capable of having a policy to admit or exclude those companies; it is for the Dominion, not the province, to legislate with regard to them.

VISCOUNT HALDANE: You read the Statute that the Dominion has the power to regulate the whole business of insurance, as being one in which Canada as a whole is interested, but it makes an exception, possibly of grace and favour, in the case of companies incorporated with strictly provincial purposes. It is quite true it interferes with "civil rights," but you say it has the paramount power of regulating the business of insurance in the interests of the Dominion as a branch of "trade and commerce," and it makes an exception—which might have been larger or smaller or which might not have existed at all—in the case of provincial companies. MR. NEWCOMBE: Yes, my Lord, and I say that the subject is too extensive to be reached by a province. And moreover, my Lords, I say that a province cannot "license" for regulating purposes. Now this is a requirement to have a license from a public authority not for the purpose of taxation, but for the purpose of regulation, and amongst these enumerations which I refer to, the power of the local legislatures with regard to licenses is measured and defined by article 9 of section 92: "Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local or municipal purposes." Now, if you suppose that this is legislation requiring a license in order to provide safeguards to the insured, not for the purpose of raising revenue, I submit it is plain that the authority of the legislatures is

excluded, being excluded by the enumeration which limits their power of licensing to licensing for the purpose of raising a revenue. Therefore, upon the authority of numerous decisions of this Board that licensing power which cannot be enacted by the province is granted to the Dominion.

Now, my Lords, I come back to what in my proposed outline of argument would have come at the beginning. If there be any doubt as to where this legislative authority rests, I do submit that the view taken at the very beginning of the Confederation by the fathers of the country, who drafted this measure and understood what they intended to express by a skeleton Act, is of importance and might assist your Lordships. I have referred to the fact that the pre-union legislation was repealed immediately after Confederation by the Dominion, in the exercise of the power which they assumed and thought they possessed under section 129, to repeal the Act because the legislative power rested with them. Now there was the Act of the old province of Canada, repealed by the Dominion, and when they came in 1877 to revise the Statutes of Ontario, they had to go back before the union and see what laws there were which should be consolidated, and they came to this one, and this is the way they dealt with it. The Appendix is here in the Revised Statutes, volume 2, page 2304: "33. Fire Insurance Companies not within the province of Canada," opposite that are the words "Dom. Rep." (that is, Dominion Repeal) "31 V. chapter 4." Then on page 2314: "Fire insurance companies not incorporated within the province"—"Dom. Rep. 31 V. chapter 48," and in their definition of abbreviations at the top of the Appendices Dom. means "subject to the exclusive legislative authority of the Dominion Parliament." That was the declaration of the Ontario Legislature. Similarly Quebec dealt with it as a Federal measure, and it was not repealed. Therefore the consequence of holding this Act *ultra vires* would be, as to the pre-Confederation Statute of Upper Canada which applied until repealed in Ontario and in Quebec that although the Dominion thought they had the power to repeal it and did repeal it, and although the provinces thought they had not the power to repeal it, and therefore treated it as repealed by the Dominion, neither Dominion nor province, knew what its constitution was, and they come over here fifty years afterwards to find out it was all a mistake and that the old legislation is still in force.

I submit, my Lords, that this is a matter of vast interest to the Dominion; the principle determined by this case is going to govern not only the insurance legislation, but a very large body of legislation, which is grouped in our Statutes under the heading of "trade and commerce." We have a Gold and Silver Marking Act, an Adulteration Act, various Acts which occupy a very considerable proportion of the space in our two volumes of the Revised Statutes, which must go, I submit, if the principle affirmed by the majority of the Supreme Court is maintained here. And I submit that if the Dominion is to become an agency of national government such as was projected by its founders, it must have the jurisdiction to declare a national policy, and provide for national safeguards, such as may be necessary in connection with a trade of this magnitude and common interest.

MR. UPJOHN: May it please you, my Lords:

I appear in this case with Mr. Bennett and Mr. Gaudet for the federation of Canadian insurance companies, that is to say for the people. I think the very large majority, something like 85 per cent., of the companies engaged in this business.

Now, my Lords, there are two points, as I think has been made clear by my learned friend, on either of which we say that the reference to the Court ought to be answered in the affirmative, that is to say in favour of section 4.

May I first draw attention to the limited character of the reference and the exact point which arises? Your Lordships will see in the appellants' case, page 2, paragraph 2: "The questions referred are as follows: 1. Are sections 4 and 70 of the Insurance Act, 1910, or any and what part or parts of the said sections, *ultra vires* of the Parliament of Canada?" Then as to the construction of section 4, I think no question really arises. Section 70 I think also follows the decision as to section 4.

Now, I want to ask attention to section 4, because I want to submit that the point suggested by Lord Parker ought to be answered in a certain way.

VISCOUNT HALDANE: Do you say the second question as to the foreign company does not arise? MR. UPJOHN: No, I say it is quite plain on the construction—that is mere construction.

VISCOUNT HALDANE: You do not mean that you do not want it answered? MR. UPJOHN: No, my Lord; I am sorry if I did not express myself accurately. It is mere construction, and does not involve the great constitutional question. So I propose to leave that to a word or two at the end. The Act is headed "An Act respecting Insurance," and the first section of it is: "This Act may be cited as the Insurance Act, 1910." So that this is an Act which deals with the business of insurance, and does not deal with isolated transactions, and I think section 4 must be read with regard to the subject matter of the Act. Now section 4 makes this provision: "In Canada, except as otherwise provided by this Act, no company or underwriters or other person"—now, my Lords, I submit in accordance with well known principles of construction we must apply the *ejusdem generis* construction there—"shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss or"—now, I think you get words which cover what has gone before—"carry on any business of insurance."

THE LORD CHANCELLOR: The granting of the annuity is part of the "carrying on" of the "business of insurance." MR. UPJOHN: Exactly, my Lord; that is the submission we make. If either for consideration or without, as an isolated transaction, I being say a professional person, or in a totally different branch of trade, I respectfully submit it would not come within the Act at all. It must be done as part of the carrying on of a business of insurance.

LORD PARKER: Of course, that does not quite meet my point. What I suggested was not only that it was open to that construction, but even if a man did carry on a business confined to a province the exception is confined to "companies" and he is hit. MR. UPJOHN: I think that is so. I was going to deal with section 3 (2), and perhaps I may do it now. I quite agree the only exception is of a provincial company, that is to say, incorporated by the legislature of a province, and which carries on its business wholly within the limits of that province.

VISCOUNT HALDANE: Is it your argument that the regulation of insurance being within "trade and commerce," and in the interest of the Dominion, the Dominion may say: There is to be no insurance business carried on except by proper people; the proper people are those whom either the Dominion Minister licenses or if the Provincial Legislature is so good as to incorporate a company for provincial purposes, then that? MR. UPJOHN: Yes, my Lord.

VISCOUNT HALDANE: You say: "We could touch it but we do not." MR. UPJOHN: That is the way I should desire to put it.

LORD PARKER: You say the exception is a matter of the benevolence of the Dominion Parliament, and not as of right, as to the local company. MR. UPJOHN: It might be put that way. This is an historical exception. I have traced it back in the Dominion Act as far as 1875. By the year 1910 it was quite well known that the companies within 3 (2) are very few and doing a very small business. Thirdly, I think the answer of principle is this, if we are right in saying that under section 4 there is a regulation of trade and commerce, then I apprehend this Board will not criticise the extent of the "regulation."

THE LORD CHANCELLOR: Nor the extent of the exception. MR. UPJOHN: Nor the extent of the exception. If the Dominion Legislature being seised under section 91 has exercised its power, this Court will not criticise either the terms of the exercise or of any exception. As a matter of fact, the exception is firstly sentimental, and secondly historical.

VISCOUNT HALDANE: It is possible that you might go even a little further, I am not sure, and say that as the restriction and regulation is put, that it must be something in the interest of the Dominion, when the province had taken up the subject and incorporated a company for provincial purposes, it was not necessarily in the interests of the Dominion, but a legitimate exception. MR. UPJOHN: Yes, my Lord. I think it would be well within the reasoning on which we pro-

pose as our second point to ask your Lordships to say that it may be justified under the "peace, order and good government," power. Now, if I may ask your Lordships' attention again to section 4, that which is provided for there is only this: it is in the last two lines of the section: "unless it be done by or on behalf of a company of underwriters holding a license from the Minister." That is all that section 4 does. Section 70 only follows upon that; if you do it without license, you are subject to a penalty. So that the substance of the reference to the Court is this: Aye or no, is it within the power of the Dominion Parliament to make this general regulation respecting the business of insurance, that—subject to such exceptions as seem good to the Dominion Parliament—the license of the Minister of the Dominion is required for the carrying on of the business anywhere within the Dominion? That is a very limited question.

THE LORD CHANCELLOR: You have also to add, have not you, that the license cannot be granted to a "person"? As I understand this section, the "person" is eliminated altogether. All that can be done is the business can be carried on by a company or underwriters who hold a license. MR. UPJOHN: The underwriters might be "persons."

THE LORD CHANCELLOR: But not a "person."

LORD PARKER: Not persons who carry on a kind of Lloyds' business.

THE LORD CHANCELLOR: That no company or other persons, generally shall carry on this business of insurance. Then they say unless whoever does it, does it as representing either a "company or underwriters holding a license"—not "a company or underwriters or other person holding a license"—the "other person" is struck out. MR. UPJOHN: I noticed that; whether it was intentional or there is any construction to be put on it, I do not know.

THE LORD CHANCELLOR: We can hardly get away from the words. MR. UPJOHN: I do not ask your Lordships to, but I do not find in the Act any definition of "underwriters."

THE LORD CHANCELLOR: There is of "company." MR. UPJOHN: My friend, Mr. Newcombe, refers to section 12, and that does carry out what the Lord Chancellor mentioned: no license is to be granted to an individual.

THE LORD CHANCELLOR: So that an individual is out altogether. MR. UPJOHN: I accept that. So that really the question comes to this: Aye or no, is it within the power of the Dominion Parliament to make this regulation respecting insurance business, namely, that it shall not be carried on by an individual, and, secondly, that it shall only be carried on by a corporation or body of underwriters that have a license from the Minister?

Now on that I propose to submit an argument under two heads, one of which I hope will be a short, and we think, plain point; the other, I admit, gives rise to questions of considerable difficulty.

My first point is that such an enactment as that is a "regulation of trade and commerce." If we are right in that, all difficulty disappears from the case, because if we are right in that, then, inasmuch as "regulation of trade and commerce" is one of the classes of subjects enumerated in section 91, the Dominion Legislature has exclusive authority over the matter, and it does not come within the class of matters which are mentioned in section 92.

Now, my Lords, the way we put our case upon that is this. It was suggested, I heard yesterday, by Sir Robert Finlay that insurance is not a trade. Well, my Lords, of course there are scores of decisions as to the meaning of the word "trade." Having looked at a good many, I do not think myself that you can really get out of them a neat decision as to what is trade in general. You can find decisions as to what are trades within the meaning of the Bankruptcy Acts. You can get decisions as to what is a trade within a covenant against carrying on trade, what is trade under different Acts of Parliament, and so forth: but I do not think you anywhere get, and I do not think you would expect to get, a definition of "trade" such as you would find in a book on political economy. But we have these points in our favour: carrying on the business of insurance is a trade within the old Bankruptcy Acts when there was a difference made between traders and non-traders.

SIR ROBERT FINLAY: By special enumeration. MR. UPJOHN: So my friend says. I submit that shows the view that the legislature took. Then we have also this, more than a century ago, in *Bristow* v. *Towers* in 6 Term Reports, page 35, it was held that to insure enemy goods is trading with the enemy. That, I think, carries me a long way. Again, I am not aware of any authority in which this has been raised, but I submit there cannot be any question as to what the decision ought to be: suppose I take a house or a flat and I covenant not to carry on therein any trade, and I thereupon carry on as these companies do a business for profit—I use "business" as a neutral term not to beg the question—an open business for issuing policies of insurance, marine, fire, life, and so forth, having power to do so, and having complied with all statutory provisions. I carry on openly and for profit a business of issuing policies with all kinds or some kinds of insurance to anybody who will come and pay the premiums or otherwise comply with the terms of the contract I offer. I respectfully suggest it would be an inarguable case that I was not committing a breach of covenant.

THE LORD CHANCELLOR: As you say, it is a little difficult to construe the word "trade" here by considering what it might be in a particular case, but supposing you divide the community into two classes, the trading and non-trading class, you might do that, it is a possible division, could it be said that an insurance company was a non-trading class? MR. UPJOHN: I submit it would not be an intelligent definition.

LORD SUMNER: I suppose the insurance company in its report to the shareholders would speak of "a trading profit for the year"? MR. UPJOHN: Yes, my Lord. I think really there is a little ambiguity underlying it. What seems to have been argued in the Court below seems to be something like this: a man wants to insure his life and so he comes to an office, makes his proposal, is examined and his policy is issued, and he pays his premium. It is said: What is there in the nature of trade in that—a private individual not carrying on any trade insures his life? What element of trade is there in that? If you look at it from the point of view of the assured exclusively, it may be true from that aspect to say that he is not engaging in a trading operation; but my answer to such an argument is that for the purpose of the Insurance Act, you have to look at it and look at it really exclusively from the point of view of the companies who are carrying on the business, and if a company makes it its business to issue any number of policies whether of life, of marine, or of fire insurance or burglary or what not—if it makes it its business for reward and with a view of making a profit for its shareholders to enter into negotiations with anybody who comes and wishes to insure and ultimately to issue the insurance policy, then I say that is in every sense of the word a carrying on of business, a carrying on of trade by that company.

VISCOUNT HALDANE: Your view of the sub-section is that it was intended to regulate trade and commerce when carried on as a business and not otherwise? MR. UPJOHN: Yes, my Lord.

VISCOUNT HALDANE: "Business" is a wider expression than "trade and commerce." It was not all business they intended to regulate. The business of a solicitor would not come within this? MR. UPJOHN: No, my Lord.

VISCOUNT HALDANE: That is not "trade and commerce," and still it is a business. Whenever anybody systematically carries on bargaining (buying and selling, if you like), things which come within the category of insurance transactions, then he may be said to be carrying on insurance as a branch of trade and commerce? MR. UPJOHN: Yes, my Lord.

THE LORD CHANCELLOR: Before you pass away from it, I am quite sure I have apprehended the argument (which will not be developed on the other side) at this moment in relation to what you said just now. It does not seem to me that the fact that a private person goes to an insurance company and insures his life as a private concern prevents the action of the insurance company being an act of trade. MR. UPJOHN: No, my Lord.

THE LORD CHANCELLOR: It does not seem that you want two people trading. If a person who is a housekeeper goes to a shop and buys things, the housekeeper is not trading: it is the person who sells. I follow that, and I follow with interest what you say as to this being a trade, but you will not overlook a

very important thing here, the question whether trade and commerce is, as I said yesterday, the abstract or the concrete thing. MR. UPJOHN: I am much obliged. I am going to grapple with that difficulty, but it is really on the point which your Lordship has been good enough to mention that I want to make this further observation about insurance being a trade. The words we have got in the Act are "regulation of trade and commerce." I respectfully put it to the Board that now in this year of grace one cannot conceive of trade and commerce going on without the business of insurance as its handmaid, as much as one cannot conceive of trade and commerce going on without the business of banking as its handmaid. The banker does not actually engage in trading in the sense that he buys and sells. The banking business is subsidiary to the operation of trade and commerce at all, and thereby becomes and is part of trade and commerce. Now how can one imagine trade to-day or trade and commerce to-day going on without marine insurance, fire insurance, and insurance against liability to work people, and probably many other kinds of insurance? In the case of certain trades, such as insurance against burglary, in the case of jewellers and so forth, and even life insurance which is not so obviously connected with the carrying on of trade and commerce, it is very often done as part of trading and commercial operations. I think we all know it is common enough for partners to effect insurances on their lives as part of their arrangements for the carrying on of a partnership trade to prevent, on the death of a partner, the partnership assets and capital being suddenly depleted by the firm having to pay out a large sum for the deceased man's capital. And, again, life insurance is often carried out in order to enable persons engaged in trade to give security to their bankers for overdrafts and advances, but at all events, marine and fire insurance—fire insurance, of course, in connection with trade and commerce is not confined to the fabric of buildings, it is concerned with the insurance of stock-in-trade, which, of course, might be of enormous value—marine insurance, fire insurance, and insurance in respect of liability to work people, I submit, are three kinds of insurance without which one can no more suppose in the present day that trade and commerce can be carried on as they are now than one can conceive of trade and commerce being carried on without the business of banking as ancillary to it. So that I submit from the broad point of view there cannot be and ought not to be any question that the business of insurance comes within the expression "trade and commerce."

LORD SUMNER: I do not know whether this would assist you, but quite recently in the House of Lords in a case where the profits of an insurance company were charged under section 100 of the Income Tax Act of 1842 "First case" "Duties to be charged in respect of any trade, manufacture, adventure or concern in the nature of trade," I see my noble friend Lord Mersey uses this language: "It is not disputed that the appellants do carry on a trade within the meaning of the first case." MR. UPJOHN: I am obliged. The connection of the business of insurance with trade and commerce at large being such as I have submitted, I say that the case may be put quite shortly, and without asking your Lordships to decide—and I mention that because I think from one of the earliest cases, the Insurance case in 7 Appeal Cases, and in many later cases it has always been laid down by the Board, particularly with regard to these References—where there are no concrete facts that the Board will deal with the difficulties as they arise and will not lay down wider principles than are necessary for the particular case—

THE LORD CHANCELLOR: It is in accordance with our Chancery experience, Mr. Upjohn, is not it? MR. UPJOHN: That is so, my Lord. I think the Board in this case laid it down, I think Lord Haldane, if I may say so respectfully, has been emphatic about it in one case, because when you get a reference without any facts it is so very difficult, if you lay down wide propositions to avoid laying down a proposition which may cover a case not present to the mind of the tribunal because there are no concrete facts defining the case.

VISCOUNT HALDANE: Especially as decisions given in such a form are not binding and may be set aside by a Court when it gets a concrete case—even an inferior Court. MR. UPJOHN: I do not know whether they would take that liberty. What we have got is this, that the exclusive legislative authority of the Parliament of Canada extends to the "regulation of trade and commerce." As

we submit in the first place in the exercise of that power in case the Dominion Parliament has said this: The business of insurance is so connected with trade and commerce that we think fit to pass this regulation, namely that it shall not be carried on by an individual person, and it shall not be carried on by a corporation unless with the license of the Dominion Minister. Now what is that but a "regulation of trade and commerce"? It does not descend to particulars: it does not say this particular trade is only to be carried on under certain provisions, it does not attempt to regulate the provisions of a contract—I mean this section does not; there are sections in the Act about which questions may arise, but the only reference to the Court is section 4. That is nothing but a general regulation of trade and commerce, that a vast branch of that which we submit is trade and which exists as an ancillary or handmaiden of trade and commerce at large shall only be carried on under this general regulation, that it must be a company and a company licensed by the Minister. Now that is really a short point and a simple point. Now on that there is one authority, and I think only one authority that I propose to trouble your Lordships with, that is the Insurance case in 7 Appeal Cases, at page 96.

VISCOUNT HALDANE: That was a decision, was not it, that the province had power to interfere with an insurance company to the extent of taxing? It was a decision of Sir Montague Smith. MR. UPJOHN: It was. That was a decision that an Act of the province of Ontario prescribing the conditions on which fire insurance within the province should be done should be in accordance with certain forms.

VISCOUNT HALDANE: Does anybody know whether Cartwright's cases have been carried on down to the present day? MR. NEWCOMBE: No.

VISCOUNT HALDANE: When did they stop?

SIR ROBERT FINLAY: I am told they stopped about ten years ago or more. MR. UPJOHN: In this case the point as to the Dominion power did not arise directly, the case was as to the provincial power.

VISCOUNT HALDANE: I see it was not about taxation. MR. UPJOHN: No, it was conditions of the contract. If I might just read the material part of the head-note, then I will ask your Lordships' attention to what is said in the judgment. "Sections 91 and 92 of the British North America Act, 1867, must in regard to the classes of subjects generally described in section 91, be read together, and the language of one interpreted and, where necessary, modified by that of the other"—I shall ask attention to that again when I argue the second point on "peace, order and good government"—"so as to reconcile the respective powers they contain and give effect to all of them. Each question should be decided as best it can, without entering more largely than is necessary upon an interpretation of the Statute."

> "Held, that in No. 13 of section 92, the words 'property and civil rights in the province' include rights arising from contract (which are not in express terms included under section 91), and are not limited to such rights only as flow from the law, for example, the status of persons. In No. 2 of section 91, the words 'regulation of trade and commerce' 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, general regulation of trade affecting the whole Dominion; but do not include the regulation of the contracts of a particular business or trade such as the business of fire insurance in a single province, and therefore do not conflict with the power of property and civil rights conferred by section 92, No. 13. Consequently (Ontario) Act 39 Victoria, chapter 24, which deals with policies of insurance entered into or in force in the province of Ontario for insuring property situate therein against fire, and prescribed certain conditions which are to form part of such contracts, is a valid Act; applicable to the contracts of all such insurers in Ontario, including corporations and companies, whatever may be their origin, whether incorporated by British authority or by foreign or colonial authority."

At this date there was a Dominion Act exactly similar to section 4 in force, and it was considered by the Board then:—

"Held, further, that the said Ontario Act is not inconsistent with Dominion Act, 38 Victoria, chapter 20, which requires all insurance companies whether incorporated by foreign, Dominion or provincial authority to obtain license, to be granted only upon compliance with the conditions prescribed by the Act.

I do not know that the next two paragraphs are very material to this question. Would your Lordships look at page 112 so far as regards the general questions which are of interest to-day. Perhaps I ought to have called attention to page 111.

THE LORD CHANCELLOR: This is a very important judgment, and we shall have to have it read at some time. It might be worth while reading at page 107.

MR. UPJOHN: If your Lordship pleases. Their Lordships proceed thus:—

"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 maybe observed that this paragraph applies in its grammatical construction only to No. 16 of section 92."

VISCOUNT HALDANE: That must be taken as not to be law now; it has been overruled. MR. UPJOHN: I was going to observe that the paragraph at the end of section 92 applies to all the sixteen points in section 92 on the ground that they are all really of provincial concern. I think that was really settled by this Board.

VISCOUNT HALDANE: You may take it that all the subjects enumerated in section 92 are of a local and private nature. MR. UPJOHN: Yes, my Lord. I think in one passage the word "province" is used to indicate the same thing, because there had been an argument ... "local" meant part of a province and not the whole. Their Lordships go on:—

"Notwithstanding this endeavour to give pre-eminence 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 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."

VISCOUNT HALDANE: That is a rash statement of Sir Montague Smith, because the question was raised in a most acute form about three years ago before this Board on the question of the relation of the provisions of sections 91 and 92 to each other. It was decided that Sir Montague Smith was right, but it was very much doubted. MR. UPJOHN: Yes, my Lord, still the ultimate decision was in accordance with this view.

VISCOUNT HALDANE: Yes. MR. UPJOHN: Then the judgment proceeds:—

"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."

VISCOUNT HALDANE: Is that so? I am asking for information. Does the Dominion raise any revenue by taxation? MR. UPJOHN: The Dominion does, but its power of direct taxation does not exclude the old power in the provinces for provincial purposes.

VISCOUNT HALDANE: They are concurrent. MR. UPJOHN: Yes, my Lord, that view was upheld in the case of the *Bank of Toronto* v. *Lambe*, in accordance with this observation of Sir Montague Smith.

VISCOUNT HALDANE: That was the case about the stamps. MR. NESBITT: That was the *Queen* v. *Wright*. MR. UPJOHN: It was a question of direct taxation within the provinces.

THE LORD CHANCELLOR: Was it licenses? MR. NESBITT: No, my Lord, it was based upon capital stock paid up.

VISCOUNT HALDANE: Provincial direct taxation. MR. UPJOHN: Yes, for provincial purposes.

VISCOUNT HALDANE: It was held that that was a direct tax. MR. UPJOHN: Yes, my Lord. MR. NESBITT: The case your Lordship had in mind was *The Queen* v. *Wright*.

THE LORD CHANCELLOR: Was it a special tax on licenses in one of the provinces? MR. UPJOHN: Yes, my Lord, that was the Manitoba case of 1892. I daresay my friend Mr. Nesbitt will agree that the law has been settled on the question in accordance with this view. I think that is right.

VISCOUNT HALDANE: *The Queen* v. *Wright* was a case in which there was one memorable definition given by Lord Selborne of what direct taxation was, and Lord Hobhouse gave another.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: Then there is the third case, which was before this Board about three years ago in which the same definition was given. MR. NESBITT: The Cotton case. MR. UPJOHN: I think the decisions are all consistent, and although it at first sight looks like exclusive power of taxation given to the Dominion, nevertheless it does not exclude direct taxation in the province for provincial purposes. I think that is consistent with them all.

VISCOUNT HALDANE: By overriding he certainly does not mean that the Dominion has not a concurrent power. MR. UPJOHN: No, my Lord, it has and the Provincial Legislature also has the power. They are concurrent, one for the Dominion purposes, the other for provincial purposes. After referring to those two concrete cases Sir Montague Smith proceeds:—

"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."

VISCOUNT HALDANE: In a latter case it was obviously intended that the limitation should be made by the Court. MR. UPJOHN: Yes, my Lord, that particular observation has been mentioned more than once in the judgment of this Board. I think that was the case of *Hodge* v. *The Queen*. Then he proceeds:—

"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 *prima 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 iu 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, namely, '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 (who were contesting the validity of the Act), 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, namely, '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."

Then there is rather a long passage dealing with section 94 as to the difference between the provinces *inter se.*

VISCOUNT HALDANE: I do not think you need read that. MR. UPJOHN: I think, with respect, that has not a very close relation to what is before your Lordships.

VISCOUNT HALDANE: Nearly all that is said about civil rights you might pass over, because it is only with regard to the particular question. MR. UPJOHN: Yes, my Lord, I think so.

VISCOUNT HALDANE: But when you get down to below the middle of page 111 it is important. MR. UPJOHN: Yes, my Lord.

"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.'"

Pausing there for a moment may I point out how the contest arose. It was not a case in which the Dominion Legislature had purported to make a regulation with regard to contracts of a particular description, namely, contracts of fire insurance.

THE LORD CHANCELLOR: That had been taken out of their power. MR. UPJOHN: Yes, my Lord, exactly.

VISCOUNT HALDANE: That is the point. MR. UPJOHN: On that this is what is said:—

> "A question was raised which led to much discussion in the Courts below and this Bar, namely, 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"—

I do not think I need read that. Your Lordships have had the discussion. I will pass on to the next paragraph:—

> "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 shews 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."

VISCOUNT HALDANE: What does he mean by general. Does not that mean trade and commerce so far as the Dominion's interests generally are concerned. MR. UPJOHN: I submit it is trade and commerce which are of Dominion concern and interest as distinguished from merely provincial concern and interest.

THE LORD CHANCELLOR: It rather looks as if he was meaning the other way. It looks as if he was regarding the abstract question of trade and commerce, because he says:—

> "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."

MR. UPJOHN: Yes, my Lord, I quite follow that.

THE LORD CHANCELLOR: It rather looks as if that was what was in his mind, that it was not dealing with specific things.

VISCOUNT HALDANE: Sub-section 2 deals only with the regulation of trade and commerce. The others deal with the whole subject MR. UPJOHN: I quite appreciate what the Lord Chancellor said upon that and apart from Lord Haldane's explanation the reference to banking might give rise to a difficulty, but I think in the very next paragraph one sees that Sir Montague Smith was not really leaning to that interpretation, because he points out that regulation of trade and commerce has been allowed under the Union Acts to extend to the regulation of specific trades. May I read the next paragraph:—

> "Regulation of 'trade and commerce' may have been used in some sense as the words 'regulations of trade' in the Act of Union between England and Scotland, 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."

VISCOUNT HALDANE: There Sir Montague Smith assumes the view that is in great controversy. Some people say that the Articles of Union between England and Scotland have been fragrantly violated. Others say they have not. I do not think you can lay much stress on that. MR. UPJOHN: No, my Lord, I was

reading it as showing that in the early passage he was not really intending to indicate a view that there was no power to deal with a specific trade, but I think the final view is expressed in the next paragraph.

VISCOUNT HALDANE: There is not any doubt, that the legislature could interfere to any extent with the Act which constituted the Union.

SIR ROBERT FINLAY: Having plenary powers. MR. UPJOHN: One does not for a moment doubt that.

VISCOUNT HALDANE: There may have been a fragrant violation of the moral obligation, but that there is power to make a legal violation there is not any doubt. MR. UPJOHN: Of course not, my Lord. I think the general view is expressed at the top of page 113:—

> "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."

I think on the figures that have been mentioned, and indeed apart from the figures from what one knows of business and commerce that is carried on to-day, it cannot be contested that, the insurance business as carried on in Canada is a matter of inter-provincial concern.

VISCOUNT HALDANE: I do not know what he means by "inter-provincial" there; Does he mean a transaction between two provinces, or in which the laws of two provinces are affected? MR. UPJOHN: May I read on. "And it may be that they would include general regulation of trade affecting the whole Dominion."

THE LORD CHANCELLOR: Those words are expressly put in in section 92. MR. UPJOHN: If your Lordship looks at section 92, No. 10, there is an exception of a, b and c, and then, as I understand his decision, the effect is that a, b and c, are to be read into section 91 as another heading or class.

THE LORD CHANCELLOR: It is an interesting thing. It suggests a matter that has been present to your mind, no doubt, and that is this, that under No. 10 of section 91 there is exclusive legislative authority given to the Dominion with regard to shipping. MR. UPJOHN: Yes, my Lord.

THE LORD CHANCELLOR: None the less, in this Article 10 there is a power relating to shipping of a certain class reserved to the Provincial Government, a limited class, works and undertakings other than lines of steamships. MR. UPJOHN: There are lakes entirely within the province. MR. NESBITT: Yes, lakes that would swallow England.

VISCOUNT HALDANE: There are Dominion Railway Acts, which apply to all railways running through the Dominion, but there are also Railway Acts which apply to railways within the province. There is a further complication as regards this exception in section 92 by enumeration 29 of section 91. "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" are brought back to section 91. That is the most extraordinary procedure that you can conceive. MR. UPJOHN: (a), (b) and (c) are really to be read as under 29, or as following 29.

SIR ROBERT FINLAY: 29 anticipates section 92 (10). MR. UPJOHN: Yes, I quite agree. I think what the Lord Chancellor has pointed out shows the truth of what was laid down by the Board here, that there is a great work before the Board every time a case comes before it in reconciling and reading together these two sections, modifying one and sometimes the other, so as to weld them into a consistent whole.

THE LORD CHANCELLOR: It is quite plain, however you read the expression "trade and commerce," whether it is read as an abstract conception, or whether it is read as referring to concrete trades, however you regulate trade and commerce, if you regulate it in the Dominion you are bound to affect civil rights. MR. UPJOHN: Yes, my Lord.

THE LORD CHANCELLOR: You cannot avoid it. MR. UPJOHN: That is so, my Lord. On the other point I was going to ask your Lordships' attention to another decision of this Board which says that contracts and civil rights must be read as subject very much to the same limitations to which the words in section 91,

"peace, order and good government," must be read. You have to reconcile them all together, and you have to find out when each case comes up: Is this really an Act the subject matter of which is civil rights within the province, or is it really an Act for the good government of the Dominion.

THE LORD CHANCELLOR: Is this affecting civil rights in the Dominion, or is it affecting civil rights in the province. MR. UPJOHN: Yes, and the fact that incidentally it does interfere with civil rights in the province does not show that it is not a perfectly good Act of the Dominion for the good government of Canada, because one can hardly think of an Act passed for the good government of the Dominion which will not affect property or other rights within the province. Take an Act about firearms, or the sale of poisons, and so forth. It is of Dominion interest and for the sake of good government, restrictions are placed on the sale of poisons or upon the sale or use of firearms, but when you are doing that you are interfering with the chemists' right in the poisons that they want to sell.

LORD PARKER OF WADDINGTON: Take the direct decision in the John Decre Plow case. There it was decided that companies which were expressly incorporated within the Dominion for the purpose of trading in the Dominion could trade in the province, but the province, no doubt, might legislate with regard to them so long as they were put on the same footing as all other companies, but it could not pass any legislation affecting their status, although the province was interested in the civil rights. MR. UPJOHN: It is very difficult. One has, when each case comes up for decision, to consider very carefully, is this Act an Act, the character of which is to interfere with civil rights in the province, or, on the other hand, is it really and truly an Act of this character, namely, that it provides for peace, order and good government in the Dominion at large, and any interference with civic rights in any province is merely an incidental part of its process.

THE LORD CHANCELLOR: Because the province is part of the Dominion. MR. UPJOHN: Yes, my Lord.

LORD PARKER OF WADDINGTON: Any interference there may be with civil rights would be interference common to the whole of Canada. MR. UPJOHN: Exactly.

LORD PARKER: But of course it would be a different thing if the Canadian Government attempted to impose restrictions on the civil rights in one province. MR. UPJOHN: That may be, but, on the other hand, there are considerations which come into effect there, because one province might be subject to considerations which do not apply to any other, considerations affecting the peace and order of the whole Dominion. You might have a province bordering on the sea or on a lake with a foreign country on the other side of the lake. Therefore one is really bound to wait until the case comes up for decision.

THE LORD CHANCELLOR: You might have a province with certain special rights of fishery and fur trading, which it might be very important to be regulated by the Dominion; with regard to furs especially. MR. UPJOHN: Yes, it is extremely difficult to law down any general proposition. You can only safely proceed by confining your propositions to the case in hand. I am afraid, in the result, the Board here did not give your Lordships to-day a great deal of assistance because, after indicating these three matters, namely, political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and general regulation of trade affecting the whole Dominion, what the Board says is:

> "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."

So that, in the result, I am afraid that is all we get out of it, that, at all events, the power to regulate trade and commerce does not authorise the Dominion Legislature to deal with the provisions of contracts in a particular trade as carried on within a particular province. I am not sure that that helps very much in the present case.

THE LORD CHANCELLOR: Would that mean that it would be competent to the provinces here to impose added conditions beyond those in this Statute with regard to working in their own area? MR. UPJOHN: I think so. I was going to show how all these matters are to be reconciled between the Dominion and the provinces, because that also has been the subject of several decisions.

VISCOUNT HALDANE: The Parsons case is as direct a decision as you can get. MR. UPJOHN: I ought to read the next paragraph:

> "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."

Even that is kept open although in the terms of section 91 the power is exclusive.

THE LORD CHANCELLOR: Page 114 is important. MR. UPJOHN: I was just going to ask attention to the paragraph at page 114 beginning, "It was further argued."

VISCOUNT HALDANE: At the bottom of pags 113, Sir Montague Smith draws the distinction between them. MR. UPJOHN: I will read it.

> "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."

That is what Lord Haldane said just now was also established in the John Deere Plow case. Then at the foot of that page there is a passage dealing with the then law. I think it was the law of 1875, which contained a provision similar to section 4 in the present case.

> "It was further argued on the part of the appellants that the Ontario Act was inconsistent with the Act of the Dominion Parliament, 38 Victoria, chapter 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."

I think that is perhaps a little too broad because there was a large exception as to provincial companies, but it is not material.

> "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."

Then he sets out the section under which the provincial insurance companies might trade without a license. I am not pretending that this was a decision on it:

it was not necessary to decide it, and it was not purported to be decided, but I submit that the view suggested there is the true view of the legislation in the present case that it is a Statute which enacts a general law applicable to the whole Dominion requiring all insurance companies to obtain a license from the Dominion Minister; that is to say, it is a Dominion regulation with respect to trade of Dominion importance of a general character, that is to say, the regulation is not of a number of minute matters, but it is a general regulation: You must get the license of the Dominion Minister. I submit that the language used here that it is "a general law applicable to foreign and domestic corporations" is a true description of the legislation in the present case. I think after that there is nothing of general importance which would assist your Lordships to dispose of the present case.

THE LORD CHANCELLOR: Had he thought that "regulation of trade and commerce" according to the definition he had given excluded the regulation by the Dominion of an insurance company, and he had intended to express that in the former part of his judgment, he could not well have passed by this in this way. MR. UPJOHN: That is true. I think it really indicates, although I do not want to put it too high, the view of the Board in that case that a provision exactly analogous to the provision in question here did come within the general principles laid down in the earlier part of the judgment as to the true meaning of "trade and commerce" within section 92.

THE LORD CHANCELLOR: They did not decide that they were outside at any rate.

SIR ROBERT FINLAY: Sir Montague Smith afterwards said in the reference of 1885 that he expressed no opinion on the point.

THE LORD CHANCELLOR: This decision has not decided it really, one way or the other.

SIR ROBERT FINLAY: I think he was merely acting on the principle that he had laid down, that it was not desirable to say more than was necessary. MR. UPJOHN: I do not want to cite any authority or to make any further argument in respect of this first head of "Regulation of trade and commerce." So far as that may include matters within section 92, some of the authorities, to which I should like to refer, when dealing with the other hand on which we rely, "peace, order and good government," would apply, but I put that as a perfectly simple case. You have got a trade. My friend Mr. Newcombe told your Lordships about a Government report upon the subject which gave the figures. Under the head of insurance you get $6,000,000,000 in the figures of insurance, and that is the Dominion companies alone. Taking that by itself it exceeds by far, I think it exceeds by four times, the next biggest set of figures in the return, which is $1,500,000,000, which is the total assets of the chartered bankers. I submit, when you have got a trade of those dimensions and a trade which is interwoven with all commercial operations in the way in which the different kinds of insurance which are now practised are interwoven to-day with the carrying on of all kinds of commercial operations, that it really is impossible to contend that a regulation which treats this trade as a matter of Dominion concern and imposes the general regulation that it shall not be carried on by individuals, but shall only be carried on by corporations and underwriters who have a license from the Minister of State, is a general regulation of trade and commerce which comes well within any construction that may be suggested as the meaning of those words in section 91.

My Lords, I agree that I have to deal with a much more difficult matter, and that is, if I do not succeed in the view that this comes within "the regulation of trade and commerce," then, I submit, at all events, that it comes within the power which is given in the introductory part of section 91 "to make laws for the peace, order and good government of Canada." I think I can satisfy your Lordships that the two sections are so to be read together that this matter is to be treated as coming within section 91, although from another aspect and subject to the limitation to a given province, it comes within some provision of section 92.

VISCOUNT HALDANE: Your argument involves some ambiguity, when you say, "within section 91." Section 91 consists of two parts: "peace, order and good

government," and the enumerated heads. Without you get it within the enumerated heads, *cadit questio.*

THE LORD CHANCELLOR: The difference is this, in the enumerated heads you have permanent authority and you are at liberty to rely upon it. MR. UPJOHN: Yes, my Lord.

THE LORD CHANCELLOR: In the other you can only make the laws relating to peace, order and good government in relation to matters that do not come within the classes of subjects assigned exclusively to the legislature of provinces. MR. UPJOHN: Yes, my Lord.

THE LORD CHANCELLOR: It is not merely the power that is given to them, but the classes of subjects. MR. UPJOHN: Yes, my Lord.

THE LORD CHANCELLOR: If civil rights are affected by this legislation, that is the class of subject that is expressly assigned to legislature of the province. MR. UPJOHN: That is it exactly. I think one has to bear in mind two or three general proposition, without which this provision giving the Dominion Parliament power to make laws for peace, order and good government would be a dead letter, because as has been pointed out by this Board, it is almost impossible to conceive a subject with regard to which a law is to be passed for peace, order and good government which does not, in its operation, interfere with the property of an individual or the civil rights of an individual.

LORD PARKER: That is so. MR. UPJOHN: That, of course, is a very important matter and I wanted, if your Lordships would bear with me, to submit for your Lordships' consideration two or three general propositions which, I think, are all to be drawn from the decisions of this Board, and, on the strength of those propositions to submit this argument. This is the conclusion I should ask your Lordships, on this part of my argument, to come to. The business of insurance in the year 1910, and to-day, carried on in the Dominion of Canada is one of such vast importance to all the subjects of the Dominion that it, for their safety, requires to be regulated by Dominion Act. I do not know whether your Lordships are acquainted historically with what led to the passing of this 1910 Act. Your Lordships will note that it is the year after our own general Act of 1909, and I think it is common knowledge that there had been certain occurrences in the United States—

VISCOUNT HALDANE: May I ask you a question about your major premise. I will assume that it was of immense importance that legislation should be passed regulating insurance in Canada. I will assume also, for the purposes of this argument, that there is no power in the enumerated heads of section 91 to do it. Do you say, because it was of great importance and affecting all Canada that you could legislate under the words "peace, order and good government" in such a way as to trench on "civil rights" in section 92? MR. UPJOHN: I think the decisions of this Board show that.

VISCOUNT HALDANE: The recent decision in the John Deere Plow case was very carefully guarded on that point, and pointed out that the only way in which you could use the words "peace, order and good government" was that the incorporation of a company was not within section 91 (2). MR. UPJOHN: The John Deere Plow case did not raise the broad question.

VISCOUNT HALDANE: It did not decide anything like what you are arguing.

THE LORD CHANCELLOR: "Peace, order and good government" are the words. MR. UPJOHN: Yes, my Lord.

THE LORD CHANCELLOR: You have to consider order and good government in connection with peace. It is "peace, order and good government."

LORD PARKER: The words are that they may legislate with regard to peace, order and good government in any of the matters not assigned to the Provincial Legislature and particular things, all the things that are enumerated under the peace, order and good government heading. "Peace, order and good government" are common form words which appear in the Constitution of every legislature, but you have not got them here, because it says that peace, order and good government are distributed. MR. UPJOHN: If I may depart a little from the order in which I proposed to make some observations to your Lordships, may I point this out. That would have a most serious effect upon the powers of the Dominion Government for the preservation of peace, for the preservation of order and for the

carrying out of good government. One of your Lordships made an observation yesterday which struck me, if I may say so, and I was trying to get some subject which would not fall within what your Lordship said. Your Lordship said: "I wish we could get away from the drink question." I have been thinking, with the assistance of discussions which have taken place at this Board in other cases which arose, that one gets a good many illustrations from the special report of the arguments and judgments before this Board in the Dominion v. Ontario case of 1896. The illustrations which were given by Lord Herschell, Lord Watson and other noble Lords during the argument are, I venture to think, instructive. For instance, Lord Herschell put the case of sanitary Acts. Perhaps I may just refer to it to show your Lordships the great danger of laying down any rule that, because a particular provision affects civil rights and property within a province all rights must be in the province, because there is no Dominion apart from the provinces.

VISCOUNT HALDANE: I wish I could get quite clearly what your point is. You seem to me to be saying that the things which come within section 92 may be outside "peace, order and good government." I do not so read "peace, order and good government." They are the common words by which legislative power is delegated by the Imperial Parliament. The Dominion has power to legislate under the head of "peace, [illegible] and good government," but not with regard to things over which the Provincial Government has power. MR. UPJOHN: I venture to think that the answer to that, or at all events, the proposition I desire to submit, is this. The question can only be considered with reference to a specific Act. It is not to be considered at large. It can only be considered and dealt with with regard to a specific Act. Let us assume that the Act is an Act of the Dominion Legislature to raise the question. My proposition is this, that in each case the Court to whom the decision of the matter is referred has got to consider the real true character of the legislation in the particular case. It has got to consider what is the true nature and character of the Act, what is the true object and purpose of the Act, and it has not to consider what is some merely incidental effect of the Act. So that the conclusion that I ask the Board to draw is this: A law designed for the promotion of public safety cannot properly be regarded as legislation in regard to property or civil rights within enumeration No. 13 of section 92, although incidentally, in its operation, property or civil rights may be affected. There are a great many authorities to that effect, but I base it particularly upon the decision of the Board in the 1896 case, the Dominion v. Ontario case. The arguments, I think Lord Haldane will remember, were prolonged and exhaustive and a great many questions were put by the noble Lords who then formed the Board for the purpose of seeing how, particularly the 13th subject of section 92, "property and civil rights in the province," was to receive effect consistently with the power of the Dominion Legislature to provide for "peace, order and good government." Such illustrations as these were put. I think it was Lord Herschell who suggested firearms. He said, it is obviously within the powers of the Provincial Legislature, under section 92, and particularly under "property and civil rights," to enact a regulation with regard to the use of firearms within the province (nobody would question that) but he said, it does not follow that the Dominion Parliament also may not deal with that.

VISCOUNT HALDANE: Does he say that the Dominion Parliament could do it under the words "peace, order and good government"? MR. UPJOHN: I think so. Those were the words they were discussing. I will draw your Lordships' attention to the passages. He says the Provincial Legislature may think that all that is required by provincial objects is to lay certain regulations upon the sale of firearms.

VISCOUNT HALDANE: I am not sure that we ought to decide that point, but I can conceive a subject so vast that it is too big to consider under section 92; that it affects Canada so much as an entirety. But then I come back to the concrete question in this case, which is whether an insurance corporation can be restricted in its action in the province, whether its civil right to carry on its business can be restricted by Dominion legislation. That is a long way off. MR. UPJOHN: May I venture to put it that the subject of insurance is so vast, as I

say running into six billions of dollars in the year reported upon, 1914, that the property and the rights of the inhabitants of the Dominion are so largely involved in the proper carrying on of that business that it is really a matter of Dominion, national concern and interest to provide for the regulation of it. May I tell your Lordships what was purported to be done under this Act. You have a Superintendent of insurance business. He has the status of a Deputy-Minister; he is the head of a Department. The duty is laid upon each company of making yearly reports as to its assets, its liabilities, its business and its expenditnre. Those reports have to be considered by the superintendent. Moreover the duty is laid upon the superintendent and the members of his staff, for whom provision is made, of inspecting the accounts of each insurance company every year. Moreover, provision is made that the investments within Canada to answer liabilities are to be of a certain class. and the duty is laid upon the superintendent to see that the investments of the companies are not outside that class, and then the duty is laid upon the superintendent, after each examination, of making a report to the Minister, which I may remind your Lordships is laid before Parliament, and if he reports that the affairs of any company are such that further investigation is required, then a provision is made for the further investigation by the superintendent and by other skilled persons, actuaries and so forth, and, if the result is a report that the company is not in what is called a safe position, but is in the position in which it is not able to answer all its liabilities whcih have to be filed, I should have mentioned by the superintendent, not by the companies, then the Minister has the power, either of suspending or withdrawing the license. That, we say, is an Act, not of law but of regulation. That, I venture to submit, is obviously a matter for the Dominion to carry out. In the first place it would be a great burden on each province if it had to provide a staff of experts, actuaries and people who are accustomed to valuing the risks of an insurance company and to decide whether its assets in Canada are adequate for the discharge of its liabilities. It would be a great burden on each provinc if it had to maintian a staff of officers to make that investigation with respect to companies carrying on business within the province, but, even if the province were to purport to do it, there would be this further difficulty, namely, how are you to determine what are the assets applicable to the discharge of the liabilities in a province. In the first place, before you get to that, there is this great difficulty that a vast amount of insurance business is really inter-provincial. When grain leaves the possession of the person who produces it and is put in an elevator, from that time it goes across railways and gets into steamboats and goes across lakes, or it may go across the ocean to Liverpool, but as soon as it is put on the elevator a policy of insurance is effected, and that policy, of course, is a part of all the transactions which thereafter take place. It is something that is handed to the Bank that makes the advance to the person who produces the grain. I am only saying that that being the character of the business and that being the character of the safeguards which the Dominion thinks fit to impose, as I can show from the decisions of this Board, it may be, and I am not for a moment disputing that there is room in the same field of legislation for the provinces, if they choose, to undertake it, but it is a Dominion matter which, if the Dominion safeguards are adequate, we have a strong suspicion the provinces will leave to the Dominion, as they have done in the past, but I think there is no provincial Act which has been brought to my attention, in which they at all cover this field. All I am going to ask your Lordships to say is this, that this matter, at all events, has grown and become of such dimensions that it is properly a matter of Dominion concern, and, therefore, in accordance with the 1896 case, and with other decisions of this Board, is therefore properly a subject of Dominion legislation.

VISCOUNT HALDANE: According to the 1896 case? MR. UPJOHN: Yes, my Lord.

VISCOUNT HALDANE: That was a decision in favour of the provinces. MR. UPJOHN: Certainly.

VISCOUNT HALDANE: It was the other way. It was argued that the provinces could not prohibit the liquor traffic. MR. UPJOHN: Yes, my Lord.

VISCOUNT HALDANE: And again in the Manitoba case later. MR. UPJOHN: Exactly, but it was also pointed out in the judgment and was more strongly pointed

out in the course of the argument that that did not at all preclude, and the decision says in terms that it did not preclude, any question as to the invalidity of the Dominion legislation, and I think your Lordship will remember with me that the ground of the actual decision was only this, that it was competent to the provincial legislature to legislate as to that, because that ground was not accepted by the then Dominion legislature.

LORD PARKER: Does not your argument really amount to this—I am not saying it is wrong—that everything which is referred under section 92 to the Provincial Legislatures are local and provincial matters, but, if there is an important thing for the welfare of the Dominion, as a whole, which is to be legislated upon, it is not within the power of any Provincial Legislature, because it is important for the Dominion. MR. UPJOHN: I do not go quite so far as that. All that I say is this. I quite accept the view, which indeed I think is quite settled now, that under section 92 it is local matters, in the sense of provincial matters, that are reserved to the provinces. Then I say that the decisions of this Board, beginning with the case of *Russell* v. *The Queen*, and I think it is more emphatically put in the 1896 case with regard to the drink traffic, point out that there may be matters of what are described as unquestionably Canadian importance. That is the expression used. My argument is that these matters may grow and become of Dominion importance. That being the view taken, thereupon it becomes, within the meaning of section 91, peace, order and good government within the legislative power of the Dominion, but it does not follow that within the province it is not also a question of provincial concern so as to leave the field open for provincial legislation, but if you have, and I think the authorities go to this, both Dominion and provincial legislation exactly coincident, covering exactly the same ground, the Dominion legislation prevails and the provincial legislation gives way.

VISCOUNT HALDANE: Apart from the enumerated heads of section 91. MR. UPJOHN: Yes, certainly.

VISCOUNT HALDANE: I can only say that the decision of 1896 is dead in your teeth as to that. MR. UPJOHN: I think it is a decision in my favour.

VISCOUNT HALDANE: If you take it that you have something so great that it does not fall within the heads of section 92, well and good, but if it falls within section 92—MR. UPJOHN: Look at what Lord Watson stated. Perhaps I might state my propositions. I am quite prepared to read the judgment, but I wanted to give some of the illustrations that were mentioned. I mentioned the case of firearms. *Prima facie* the regulation of the trade in firearms is a matter for the Provincial Legislature, but in particular circumstances the regulation of the sale of firearms may become of the highest importance. It may affect peace and order. And, as I understand it, the decision of this Board covers (there is no decision on that in terms) this view, that in that case the Dominion may legislate as to the sale of firearms, leaving the province also with a power of legislation as to matters which are concerned with the province alone. Then Lord Herschell put another class of cases. He put the case of the sale of poisons. He said, "the sale of poisons may be a matter of Dominion concern; it does not at all follow that, because it is of provincial concern, it is not also of Dominion concern.

VISCOUNT HALDANE: It is for that reason that I am anxious to get some light on the words "Regulation of trade and commerce." MR. UPJOHN: I have made my submission as to "regulation of trade and commerce," and I have submitted also that that is the plainest and simplest ground, and I know I am on much more difficult ground now. I am quite conscious of that. Another instance, which was put by Lord Watson, was sanitary legislation. He said, you cannot carry that out without interfering with people's civil rights in their property. *Prima facie* sanitary regulations are the proper subjects of provincial legislation, but, he said, there may be such a state of things in a province that it becomes of Dominion concern; to stamp out some particular epidemic, for instance.

THE LORD CHANCELLOR: Cholera, for instance. MR. UPJOHN: Yes, my Lord. Then the question is: "How are you going so to read sections 91 and 92 together as to give to the Dominion the powers which, as a matter of reasoning, it was held by the noble Lords it was obvious it ought to possess under the words "peace, order and good government," because there is nothing relating to sanitary

legislation in the heads of section 91. How are you going to read the sections together so as to give the Dominion Parliament a power to legislate under the head of "peace, order and good government" for sanitary matters when no such legislation can be passed without interfering with civil rights, the right to shut up an owner's property, for instance. I think your Lordship argued a case against me in the House of Lords not so very long ago where, under sanitary legislation, a man's property was closed with a view to destruction. That was an obvious interference with the man's civil rights.

THE LORD CHANCELLOR: It was an interference which he greatly resented.

MR. UPJOHN: Yes, my Lord, so that you have to reconcile those two things. What is the way of reconciling them? My submission on the authorities, all of them of this Board, is that the conclusion is thus: You have to take the Act in question and consider, now under which head of either of these two sections does this Act really fall; is it an Act, the real object and purpose of which is to affect a man's property, or his civil rights, or is it an Act the real object and purpose of which is to provide for the well being of the people of the Dominion by stamping out a particular epidemic, which, of course, can only be within one or more provinces. There is no Dominion apart from the provinces.

LORD PARKER: That is rather a dangerous way of arguing it, to suppose you have to gather the intention of the legislature otherwise than from the Act itself. It amounts to that, does it not? They say, We are going to make a confederation of States; the Confederation, as a whole, is to have certain powers, but it is not to legislate for the whole in respect of matters specified. Are not you doing that? MR. UPJOHN: No, my Lord, with deference there is a distinction, which I say is established by the authorities. When you are saying that certain regulations shall be carried out in order to say, houses shall be closed and people may have to leave them and be taken to hospitals, in order to stamp out an epidemic you are not legislating with regard to matters of property and civil rights; you are legislating for the order and good government of the Dominion, as a whole, and to prevent a scourge from spreading. Another matter, which is not mentioned in the argument, but which occurred to me, is this. Take vaccination laws. Ordinarily I should accept the view that whether there is to be a vaccination law or not is a matter of provincial concern, and ordinarily the Dominion Parliament would have no power of legislation; at least I am not aware of any head that would include that particular matter, but supposing there is a scourge of smallpox—

LORD PARKER: Then you are giving the Act an interpretation according to certain events. In ordinary circumstances certainly compulsory vaccination would not fall within the Act; you cannot make it fall within the Act because there is a scourge. MR. UPJOHN: I say from the first, upon the true construction of these two sections, the true construction of section 91 as to peace, order and good government, is that if the matter is really of Dominion concern the Dominion Parliament has the power and what is established, as I venture to say, by decision is that it has the power none the less because it has some incidental operation affecting matters which are mentioned in section 92, such as civil rights and property. I venture to think that proposition is intelligible.

LORD PARKER: I should be entirely with your argument as long as it is with respect to matters outside section 92, but is that a matter which you can say is fairly outside section 92. Then the Dominion has the power, and it does not matter, in exercising the power, whether it interferes with the civil rights or not, but you must get it outside section 92 before you can do anything.

THE LORD CHANCELLOR: Let me put to you a simple thing with regard to it. We all know that great importance is attached to the preservation of infant life by the registration of mid-wives. It is obviously of great importance to the Dominion, whatever province it is in, but if you are going to pass an Act and say we will impose the registration of mid-wives, you would interfere with the right of nurses carrying on business in the different provinces, and it would be a very grave interference. MR. UPJOHN: Yes, my Lord.

LORD PARKER: Then every province could pass, if they liked, an Act for the compulsory registration of mid-wives, and then that is a class of thing which

is within section 92, which the Canadian Parliament could not legislate for. MR. UPJOHN: It may be that would answer that particular case.

THE LORD CHANCELLOR: The basis of the hypothesis is that the protection of infant life is of great importance to the whole Dominion. MR. UPJOHN: I think that case would be very much on the line.

VISCOUNT HALDANE: You have another string to your bow if you are interfering with a trade. MR. UPJOHN: What I want to put is this, that the preservation of infant life by the registration of mid-wives is a matter which has only an incidental effect outside the province, whereas, although I freely confess my own view would be that there is a great deal to be said for holding that the Dominion had the power of legislating in such a case, on the ground that it is a matter unquestionably of Canadian importance, if I may venture to say so, there are some more striking cases, such as those I have put, where the effect of a neglect to deal with a matter in one province has a most tangible physical effect on an adjoining province.

THE LORD CHANCELLOR: Your illustration of vaccination is such a case.

VISCOUNT HALDANE: I think it would save time if we read what the Board said in the 1896 case. MR. UPJOHN: If your Lordship pleases. Might I read first what was said in *Russell* v. *The Queen*?

VISCOUNT HALDANE: So far as I am concerned, I know what was said in that case, and I am sure their Lordships do too. I think it would be much more interesting to read what was said in the 1896 case about *Russell* v. *The Queen*. *Russell* v. *The Queen* was a decision of this Board which Lord Watson said, in the prohibition case, had relieved him from the difficult task of coming to a conclusion.

(Adjourned for a short time.)

MR. UPJOHN: My Lords, I was about to ask your Lordships' attention to the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, in 1896 Appeal Cases, at page 348. The head-note conveniently, I think, shows how the question arose, because it was as to provincial legislation there, within a field within which there was already Dominion legislation. It is:—

> "The general power of legislation conferred upon the Dominion Parliament by section 91 of the British North America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance; and must not trench on any of the subjects enumerated in section 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion."

VISCOUNT HALDANE: I am not sure that that head-note is right. MR. UPJOHN: I am not sure that it does not fairly summarise it, but one must look carefully at the language.

VISCOUNT HALDANE: Word for word—what was said. MR. UPJOHN: Then:—

> "Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or Provincial Legislature. Accordingly the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864 (27 & 28 Victoria, chapter 18), was *ultra vires* the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order and good government of Canada: *Russell* v. *Regina* (7 Appeal Cases, page 829), followed; but not as regulating trade and commerce within section 91, sub-section 2, of the Act of 1867; *Citizens' Insurance Co.* v. *Parsons* (7 Appeal Cases, page 98), distinguished, and *Municipal Corporation of Toronto* v. *Virgo*, followed. Held, also, that the local liquor prohibitions authorized by the Ontario Act (53 Victoria, chapter 56), section 18, are within the powers of the Provincial Legislature. But they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886."

VISCOUNT HALDANE: I want to make an observation which I have made before. Lord Watson said the Board were relieved of the difficult task of deciding that the Dominion legislation was *intra vires;* it had been so decided, and they were bound. It is perfectly obvious he declined to commit himself to any theory of how they were bound except that he went on to criticise the validity of such legislation as falling within "regulation of trade and commerce." He did not say they might not have decided it contrary to the view expressed, but he said they were bound by the decision whatever it was. MR. UPJOHN: Yes. I think if I may say so he did either decide or at all events intimate a plain view that the decision in *Russell* v. *The Queen* was not based on regulation of trade and commerce, but on peace, order and good government.

VISCOUNT HALDANE: That, if the question had come before him, he should not have held that it would be based on regulation of trade and commerce, but he did not say they might not have based it. He said he was relieved from the difficult task of deciding how it had come about. MR. UPJOHN: With deference—

VISCOUNT HALDANE: That is why I say you have to read the material parts of his judgment. MR. UPJOHN: That I quite accede to, and, with your Lordship's permission, I will do that.

Would your Lordships look first at the foot of page 348, question No. 7, because No. 7 was that, and it was the only one, with which the Board dealt.

> "Has the Ontario Legislature jurisdiction to enact section 18 of Ontario Act, 53 Victoria, chapter 56, intituled 'An Act to improve the Liquor License Acts,' as said section is explained."

in a later Act. I do not know that I need occupy time in going through all the provisions of the Act, but both the Dominion Act and the Provincial Act were Acts regulating the liquor trade by instituting a system of local option. I think that is a sufficient statement, and in this case the Dominion Act had not been adopted in the province of Ontario. That being so, the province of Ontario itself passed a similar legislation, and the validity of that was in question.

Now, my Lords, the judgment begins on page 355. I think I may pass over the statement of the Statute. I was going to the foot of page 358:—

> "The seventh question raises the issue, whether, in the circumstances which have just been detailed, the Provincial Legislature had authority to enact section 18. In order to determine that issue, it becomes necessary to consider, in the first place, whether the Parliament of Canada had jurisdiction to enact the Canada Temperance Act; and, if so, to consider in the second place, whether, after that Act became the law of each province of the Dominion, there yet remained power with the Legislature of Ontario to enact the provisions of section 18. The authority of the Dominion Parliament to make laws for the suppression of liquor traffic in the provinces is maintained, in the first place, upon the ground that such legislation deals with matters affecting 'the peace, order and good government of Canada,' within the meaning of the introductory and general enactments of section 91 of the British North America Act; and, in the second place, upon the ground that it concerns 'the regulation of trade and commerce,' being No. 2 of the enumerated classes of subjects which are placed under the exclusive jurisdiction of the Federal Parliament by that section. These [illegible] of jurisdiction are in themselves distinct, and are to be found in [illegible] enactments. It was apparently contemplated by the framers of the Imperial Act of 1867, that the due exercise of the enumerated powers conferred upon the Parliament of Canada by section 91 might, occasionally and incidentally, involve legislation upon matters which are *prima facie* committed exclusively to the Provincial Legislatures by section 92. In order to provide against that contingency, the concluding part of section 91, enacts that '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.' It was observed by this Board in *Citizens' Insurance Co. of Canada* v. *Parsons*, that the paragraph just quoted 'applies, in its grammatical construction only, to No. 16 of section 92.' The observation was not material to the question arising in that

case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in section 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of section 92, as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to Provincial Legislatures by these sixteen sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91."

VISCOUNT HALDANE: You observe that for the second paragraph he has confined the restrictions to the enumerative heads of section 91 in the words you have just read, and again in the beginning of the paragraph where he quotes the words about the matters enumerated. MR. UPJOHN: I agree so far as it is the enumerative heads.

VISCOUNT HALDANE: "The due exercise of the enumerated powers." MR. UPJOHN: In the next sentence we come to the general authority:—

"The general authority given to the Canadian Parliament by the introductory enactments of section 91 is 'to make laws for 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 it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation"—

VISCOUNT HALDANE: That is the enumerated subjects in section 91. MR. UPJOHN: I quite accept that—"the exception from section 92, which is enacted by the concluding words of section 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to Provincial Legislatures by section 92."

VISCOUNT HALDANE: These are the important words of this part of the judgment. MR. UPJOHN: Yes, and there are some important words a little further on. "These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92."

VISCOUNT HALDANE: You observe there are two conditions which have to be fulfilled; first of all, the question has to be a question "of Canadian interest and importance," and, secondly, and separately, they are not "to trench upon provincial legislation." MR. UPJOHN: Yes, that matter is the subject of further exposition presently. Then he says: "To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by section 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the Provincial Legislatures."

VISCOUNT HALDANE: I think you will find that is the essence of the judgment. MR. UPJOHN: True, my Lord; but then I think now we come to a paragraph which points out that, on the other hand, if you are going to apply that rigorously, you leave little if anything for "peace, order and good govern-

ment," and it is expounded how the two are to be reconciled. "In construing the introductory enactments of section 91, with respect to matters other than those enumerated, which concern the peace, order and good government of Canada—then there is a reference to section 94—

VISCOUNT HALDANE: It is of some importance. MR. UPJOHN: Certainly: I do not shrink from reading it:—

> "It must be kept in view that section 94, which empowers the Parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick does not extend to the province of Quebec; and also that the Dominion legislation thereby authorised is expressly declared to be of no effect unless and until it has been adopted and enacted by the Provincial Legislature."

There the property and the civil rights were to be the direct object of the legislation.

> "These enactments would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of section 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole. Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion."

VISCOUNT HALDANE: Now he has not said that it applies to things which come within the enumerated heads of section 92. MR. UPJOHN: Unless "in their origin local and provincial," must come within section 92.

VISCOUNT HALDANE: No, not necessarily. MR. UPJOHN: Surely, the whole foundation of this observation is that there are some matters "in their origin local and provincial."

VISCOUNT HALDANE: "In their origin," but they may have become more. MR. UPJOHN: True; originally they are within section 92, and then he says they may "attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion."

VISCOUNT HALDANE: If the plant has grown out of its flower-pot, and its roots are in another flower-pot, it is possible. MR. UPJOHN: This is all under "peace, order and good government."

VISCOUNT HALDANE: That is what he is saying, as I understand. Just as in the John Deere Plow case there are matters which are outside section 92, which can be dealt with competently under these words, here also there are cases in which a subject originally within section 92 may have grown outside it. MR. UPJOHN: With deference, not grown outside it in the sense that it is no longer within section 92, because your Lordship remembers the actual decision in this case was this, that the subject was within both and, therefore, although it was held—when I say "held," it was held on the authority of *Russell* v. *The Queen*—that the Dominion Parliament had jurisdiction and had legislated because the case had grown into the other flower-pot, it was also held it remained within the original section 92 "flower-pot" and therefore the Provincial Legislature still had the power of legislation.

VISCOUNT HALDANE: Lord Watson carefully gives no reason for the decision in *Russell* v. *The Queen*. MR. UPJOHN: I am afraid I cannot quite accept that.

THE LORD CHANCELLOR: Is it quite right to speak of there being two distinct categories, the enumerated 29 classes in section 91, and the classes that come under the "peace, order and good government"? Is not it the fact that those 29 heads are nothing but enumerations of particular cases that all come under "peace, order and good government"? MR. UPJOHN: Exactly, my Lord.

THE LORD CHANCELLOR: You cannot say one is "peace, order and good government," and the other is not. MR. UPJOHN: No, my Lord.

THE LORD CHANCELLOR: They are all equally for "peace, order and good government." MR. UPJOHN: Certainly, my Lord.

THE LORD CHANCELLOR: If they are not under the enumerated heads and you want to bring them under the general words, you must show they are of such

a class as not to come under section 92. Is not that the true position? MR. UPJOHN: Yes, my Lord, but that requires a little exposition.

THE LORD CHANCELLOR: Yes. MR. UPJOHN: You must show that they do not come under section 92 from the aspect from which the legislation ought to be regarded. That has been held. It was held by this Board so recently as this year, I think it was in the John Deere Plow case.

THE LORD CHANCELLOR: The report is this year. MR. UPJOHN: The report is this year, at all events. It was pointed out that a particular Act has to be viewed for some purposes from one aspect, and for some purposes from a totally different aspect. The question in each case is from what aspect ought this particular body of legislation to be viewed?

LORD PARKER: Was not the John Deere Plow case an "enumerated" case? MR. UPJOHN: Yes, my Lord; I do not think the decision has any bearing on this question, at all events.

LORD PARKER: If you apply the John Deere Plow case and the "aspect" notion to the circumstances which exist in this case which you are reading, you would be striking out a great part of that judgment. MR. UPJOHN: I think not, because what I understood this judgment to come to is this—

LORD PARKER: The John Deere Plow case, as I understand the judgment, is this, that where a thing is specified it does not matter if you do incidentally interfere with the "civil rights," or whatever it is which is *prima facie* within section 92. MR. UPJOHN: I think it goes further than that. It does not matter if you do intentionally and as your direct object interfere, because section 92 has no operation on any case which is enumerated in section 91.

LORD PARKER: Because it depends on the aspect of the thing. If a thing is fairly a trade regulation, it does not matter if it interferes with "civil rights," but if it is not, but primarily a "civil right" interference, it will not do? MR. UPJOHN: If it is primarily, that again I accept, but there is a more difficult case than that to be considered, namely, the primary object of the particular Act is the safety, "the peace, order and good government of the people of Canada." Or, if one is more specific take an Act of sanitary legislation or legislation in the time of an epidemic. The primary object of the Dominion Act is to preserve the people of the Dominion from the consequence of the spread of that epidemic through the absence of what they consider to be the adequate preventative measures.

LORD PARKER: If you have a non-specified thing, but of great importance to the Dominion, they may legislate upon it though in so doing they cannot help trenching on the classes? MR. UPJOHN: Yes, my Lord, sanitary legislation is not a specified or enumerated thing. That is the importance of it. With all deference to Lord Haldane, I think, when the whole of this judgment is borne in mind, it does, as well as Russell's case and other cases, establish, the view for which I am contending, namely, you have to consider the true character of the legislation. If the Court comes to the conclusion that the particular legislation is intended primarily and actually to interfere with civil rights in the province—I mean directly and as its principal object—then unless it falls within an enumerated matter in section 91, it is bad on the part of the Dominion; but if the Court should come to the conclusion that the Act is in quite a different category, this Act was not intended primarily or as its main object to interfere with property and civil rights within the province," but was intended to make everybody within the Dominion or everybody in the infected part of the Dominion comply with certain regulations to prevent the spread of an epidemic which is a source of danger to all within the Dominion—if the Court comes to the conclusion that is the true character of the Act, then it does not bring the Act "up against" the thirteenth head of section 92, because the regulations which are made to prevent the spread of the disease involve some interference with property. For instance, closing infected habitations or some interference with "civil rights," namely, compelling infected persons no longer to mingle with their fellow citizens, but to segregate themselves in a hospital or a camp. That I venture to submit on the authorities taken as a whole is the true line; and, remembering what was said in the case of the Insurance Act of 1897, and has been said more than once since, these two sections have got to be read together, sometimes modifying, one sometimes modifying the other, so as to make them on the whole a consistent piece of

legislation. That entirely justifies the view which I am presenting, namely, that you have to consider to what category does the legislation belong, and it is not enough to condemn an Act of the Dominion of Canada passed not under an enumerated head, but under its general power to say the execution of that Act involves interfering with the property of a person living in the province; or it interferes with the "civil rights" of persons living in the province; you have to consider whether that is the main object of the legislation, or whether it is merely incidental in carrying out some main object, which is for the interest of the Dominion.

VISCOUNT HALDANE: If your doctrine were right, the position and status of the provinces would long ago have been swept away. There was a school of thought which thought that the purpose of the Act was to magnify the Dominion and to bring the provinces more and more under control in the interests of unity. It was that very doctrine which was checked—there was countenance for it in some of the earlier decisions—and stopped by this Board in the series of cases to which we are now referring. All I have to say is the checking of it is nowhere more clearly made apparent than in Lord Watson's judgment down to this point. You are now going to show something that contradicts what he said, in earlier cases? MR. UPJOHN: Your Lordship says "contradicts"; that is hardly what I am after.

VISCOUNT HALDANE: I have called attention to two or three passages. MR. UPJOHN: Yes; it has to be read as a whole. Now, this is as to "peace, order and good government": "These enactments would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of section 91"—so that he is not dealing with any enumerated head—"to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole."

VISCOUNT HALDANE: At the bottom of page 360 he points out two conditions; first, that the matters must be of general Canadian interest and importance, and, second, that it ought not to trench on provincial legislation. MR. UPJOHN: Yes, the real question is what is a trenching on the provincial right. "Their Lordships do not doubt that some matters in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion."

VISCOUNT HALDANE: That is the first condition only that he has spoken of. MR. UPJOHN: I am not sure that it does not include both.

> "But great caution must be observed in distinguishing between that which is local and provincial, and, therefore, within the jurisdiction of the Provincial Legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada."

I think that shows, with respect, that he is dealing with both.

> "An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion."

THE LORD CHANCELLOR: That is no longer about a matter of mere civil rights; it is a question involving Canada in war. It may be that is outside altogether the enumeration in section 92. MR. UPJOHN: That is what I am arguing. The object of that legislation would not be interference with civil rights, but the prevention of acts of danger to the common weal.

VISCOUNT HALDANE: That may be, Mr. Upjohn. MR. UPJOHN: Because that is the object of the enactment which his Lordship holds would be good. He allows it to be good although, of course, to regulate traffic in arms is an interference both with "property" and with "civil right." It is an interference with the property of the gunsmith in his arms and also with the civil right both of the gunsmith and of the possible purchaser to make a contract.

VISCOUNT HALDANE: He has not said traffic in arms with possession of them, but it is "under such circumstances as to raise a suspicion that they were to be used for seditious purposes." A man has no right to devote himself to seditious purposes. MR. UPJOHN: Well, he says: "traffic in arms." However, your Lordships have it before you. "The judgment of this Board in *Russell* v. *Regina*, has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886, relates to the peace, order and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament. In that case the controversy related to the validity of the Canada Temperance Act of 1878; and neither the Dominion nor the provinces were represented in the argument. It arose between a private prosecutor and a person who had been convicted, at his instance, of violating the provisions of the Canadian Act within a district of New Brunswick, in which the prohibitory clause of the Act had been adopted. But the provisions of the Act of 1878 were in all material respects the same with those which are now embodied in the Canada Temperance Act of 1886; and the reasons which were assigned for sustaining the validity of the earlier are, in their Lordship's opinion, equally applicable to the latter Act. It, therefore, appears to them that the decision in *Russell* v. *Regina* must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order and good government of Canada."

VISCOUNT HALDANE: "To the extent to which it goes," and no more. MR. UPJOHN: I think if your Lordship read the decision by itself, you would come to no other conclusion, but I do not see there any doubt thrown upon *Russell* v. *The Queen*, or upon its reasoning.

LORD PARKER: I do not follow what Lord Watson says there, because again you turn to the "peace, order, and good government of Canada." It is not a question as far as I can see whether anything is within "peace, order, and good government," because you cannot legislate except for the "peace, order and good government"; all the specified things are within it; the real question is not whether it is within these terms, but whether it is within the unspecified objects. MR. UPJOHN: That is so, but I am afraid the language of the decisions has always gone on the other line, which perhaps is not inconvenient.

LORD PARKER: Yes, only it suggests a fallacy; you say it is very important for "peace, order and good government," that this should be done, therefore it is within the powers. MR. UPJOHN: Yes, my Lord.

VISCOUNT HALDANE: It may be, as Lord Parker says, it was as far as that is concerned a decision on trade and commerce. MR. UPJOHN: But your Lordship will remember—

VISCOUNT HALDANE: I am aware there is another part, but I mean so far as this goes.

LORD PARKER: The real distinction is not between what is specified and what falls under "peace, order, and good government," but between what is specified under section 91, and what is not so specified and not within section 92.

VISCOUNT HALDANE: Yes, that is it.

LORD PARKER: That is the real distinction we have to give our minds to. MR. UPJOHN: Yes. At the same time, when one looks at the exact form which the final provision of section 91 takes, it is a little difficult to avoid—at all events; I do not think it has been avoided in the past—falling into that way of putting the matter; does it fall within an enumerated matter? If so, there is no question about section 92.

LORD PARKER: All this about it becoming so important that it is really of national concern and things like that is suggested by basing on the specified on the one hand, and "good order" on the other. The question is it may be so big that it no longer falls under the class in section 92;—I mean, it may have grown out of the class. MR. UPJOHN: That would not be consistent with the decision in this case and many others, because it is held to fall under both. There is quite a recent judgment of this Board delivered by Lord Dunedin in which he tabulates the decisions and says now then the decisions come to this. There is a field of legis-

lation which is competent both to the Dominion under "peace, order, and good government" and to the provincial legislature under section 92.

LORD PARKER: There, again, you get the difficulty under "peace, order and good government." MR. UPJOHN: One quite appreciates, as a matter of logical statement, your Lordship's point. I do not think that really causes any confusion of thought.

LORD PARKER: I agree there is a large field in which under the words "peace, order and good government" you may legislate on specified subjects; if you legislate on specified subjects, there may be a residuum which you have not dealt with and which the local legislatures can deal with. MR. UPJOHN: No, my Lord, with deference I should not accept that.

LORD PARKER: Whether you accept it or not, it is the result of the decision in this particular case. MR. UPJOHN: No, my Lord, what I should submit is that it is not. What I want, with all respect, to convey is this: "peace, order and good government" no doubt underlies section 92, but it is not mentioned there, and what I apprehend is the distinction made is this: the Dominion Legislature is to make laws for the peace, order, and good government of the Dominion.

LORD PARKER: Except in subject-matters in section 92; those are the words of the section. MR. UPJOHN: Yes, in matters which are not exclusively assigned to the legislatures of the provinces. Then as to some matters coming under "peace, order and good government" it may legislate although they are exclusively assigned. Then in section 92 you find the matters which are assigned; but now comes this which is really the key to the understanding of the decisions, and without it I do not think the decisions can be understood. It is this: you find some wide expressions in section 92, for instance "(13) Property and Civil rights in the province." "(16) Generally all matters of a merely local or private nature in the province." If you are going to understand those absolutely as the words are printed, of course you exclude from the powers of the Dominion legislature outside the enumerated subjects and from what one may call the residuum of the Dominion, "peace, order, and good government," a great many cases which experience has shown must have been intended to be included in them. Therefore, say these decisions, as I respectfully submit, you have got so to read the words, particularly the "property and civil rights" head, you have so to read that that it will not have the effect of unduly curtailing the residuum of the "peace, order and good government" power. The way in which you do that is this: you have to consider what is the main object, the real object of the legislation that is passed, and if you find its real object is to interfere with "property" or "civil rights in a province," then it is incompetent to the Dominion legislature, but if you find that the real object of the Act is to carry out and make provision for matters which are not mentioned in section 92, the mere fact that incidentally in its operation it does come "up against," say, "property" or "civil rights" does not show that the Dominion legislation was incompetent.

LORD PARKER: On that footing you assimilate all the residuum to the enumerated powers. MR. UPJOHN: No, with deference.

LORD PARKER: You bring in by inference the same proviso with regard to the residuum as you have not expressed. MR. UPJOHN: No, my Lord, because the powers of the province are excluded as to the enumerated heads—

THE LORD CHANCELLOR: May I just understand if this is your argument? I think this is what you mean, that under the general words of section 91—by that I mean what you pass by the residual product of "peace, order, and good government"—it is possible to affect civil rights within the Dominion. MR. UPJOHN: Yes.

THE LORD CHANCELLOR: If the affecting of civil rights within the Dominion incidentally affects, as it must do, some civil rights within the province, it is not therefore necessarily bad. MR. UPJOHN: No, my Lord.

THE LORD CHANCELLOR: Because if you affect civil rights in the Dominion, as the Dominion is composed of the provinces, you must affect some of the rights in the provinces. MR. UPJOHN: Yes, my Lord.

THE LORD CHANCELLOR: I am not saying that this is my view, but as I understand your argument you say it necessarily follows that the legislation

must be, according to you, directed to "civil rights" as against a person as a member of the Dominion. MR. UPJOHN: Well, I would not even put it so high as that. For the purpose of my argument I want to limit it more than that. I am not contending that there is a power directly to interfere with civil rights. I say the legislation must be of a different category. For instance, it must be a legislation in the case of what we should call a sanitary Act, in the case of an epidemic disease, or legislation with regard to levying war—I do not know quite what one would call it—at all events, external legislation with regard to fire arms. Then the fact that a person in a province is affected either in his property if he is the owner of infected property, or in his person if he himself is infected and subject to the disease does not show that the Dominion Parliament has interfered with the exclusive jurisdiction of the Provincial Parliament over "property and civil rights."

THE LORD CHANCELLOR: I understand. MR. UPJOHN: The question is as to the character of the legislation and whether the "property" or the "civil right" is the direct object or is it merely incidentally affected? I think if the contrary of that be held it would be inconsistent at least with a great deal that I want to draw attention to in the authorities, and I think also would revolutionize a considerable existing body of legislation, I mean existing to-day.

Then my Lords, I think I was reading from page 362. Your Lordships see at the end of that paragraph that *Russell* v. *The Queen* there is put upon the ground that it is a valid enactment relating to peace, order, and good government, and, as I understand it, there is not the slightest criticism of it on that ground.

LORD PARKER: I do not understand what it means, but it must be that, because that is the only power of legislating; the only point is, is it enumerated or not enumerated? MR. UPJOHN: It is not enumerated.

THE LORD CHANCELLOR: It means by that, related to the general words. MR. UPJOHN: Yes, my Lord. One must put up with the way in which we find it. It is no good being too critical about it, if I may say so. When you find that you must understand it as meaning not enumerated in section 91.

LORD PARKER: Meaning not enumerated? MR. UPJOHN: Not enumerated. VISCOUNT HALDANE: Or not enumerated in section 92. MR. UPJOHN: No, my Lord, that I will not accept.

THE LORD CHANCELLOR: I do not think that Mr. Upjohn will like that.

MR. PARKER: The general words are only in respect of what is not enumerated. MR. UPJOHN: If I may put this before you, I think your Lordships will see it goes on: "That point being settled by decision, it becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886 as being an Act for the 'regulation of trade and commerce' within the meaning of No. 2 of section 91." Of course the importance of that was that if it was under No. 2 of section 91, it would exclude all provincial legislation, whereas if it was under "peace, order and good government," not enumerated, it would not exclude.

LORD PARKER: As I understand, if it falls under head 2 of section 91, it must be legislation generally affecting a trade or trades within the Dominion—if it is that, there is power to do it notwithstanding it affects "civil rights" which are *prima facie* left in section 92. MR. UPJOHN: Certainly, my Lord.

LORD PARKER: That is the point of it. MR. UPJOHN: I think, with deference, one must remember what was the point in this case. It was not a case in which an individual was personally concerned; it was between two Governments, and the question was whether inasmuch as *Russell* v. *The Queen*, had decided that the Dominion legislation was valid, the Provincial Legislature had any power to pass an Act—

LORD PARKER: I understand the decision is, it is unlike "banking"; if it had been banking, the whole subject is under the disposition and order of the Dominion Government. MR. UPJOHN: That is all I was saying, my Lord.

LORD PARKER: But it was not; it was regulation of trade. MR. UPJOHN: No, my Lord.

LORD PARKER: "Regulation of trade and commerce" may incidentally affect "civil rights" within the province, but in so far as it does not affect "civil

rights" within the province, section 92 is still operative. MR. UPJOHN: With deference, my Lord, that was not the point dealt with here. The point was this. If the power of the Dominion Legislature to pass that Act was under No. 2, "regulation of trade and commerce," the power of the Provincial legislation was excluded, and then the decision of the case would have followed at once. All I can say is Lord Watson goes on to say so. Then the case could have been answered at once, but if the Dominion Legislature had acted under "peace, order and good government," not specified, that did not necessarily exclude the Provincial Legislature, and therefore Lord Watson now goes on to say: We must consider whether this is under trade and commerce in order to get that out of the question before we further consider the position of the Provincial legislature. I must read on, my Lords, and I think your Lordships will see.

> "If it were so, the Parliament of Canada would, under the exception from section 92 which has already been noticed, be at liberty to exercise its legislative authority, although in so doing it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of section 91 were discussed by this Board at some length in *Citizens' Insurance Company* v. *Parsons*"—(that is in 7 Appeal Cases, page 96)—"where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trad Their Lordships do not find it necessary to reopen that discussion in the present case. The object of the Canada Temperance Act of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally, if not necessarily, assumes unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view, their Lordships are unable to regard the prohibitive enactments of the Canadian Statute of 1886 as regulations of trade and commerce."

Then he gives the reason quoted from Lord Davey. So that your Lordships see this Board then arrived at the conclusion that it was not under an enumerated head, and therefore rested on the unenumerated "peace, order, and good government."

LORD PARKER: You will see he puts the case, if it is under the enumerated head, then—though it may interfere with "civil rights"—if it does not, the Ontario Government or the Provincial Government may still go on legislating, and he quotes in favour of that the decision in Parsons' case. MR. UPJOHN: In Parsons' case it was held not to be in No. 2 "regulation of trade and commerce."

VISCOUNT HALDANE: If it was under "peace, order, and good government" and not under enumerated heads, as Lord Parker says, the Dominion could have legislated assuming the field to be occupied, but when the province legislated, having "civil rights" it could displace the Dominion legislation—that is the doctrine of the occupied field. MR. UPJOHN: I see, my Lord, that I shall have to read some more authorities.

VISCOUNT HALDANE: Since you speak of authorities, I should like to read one thing which I found in the discussion in the argument in the 1895 case. Mr. Newcombe, who argued it for the Dominion, used the argument you are using, at page 205: "But the decision in *Russell* v. *The Queen* . . . proceeds on the point of uniformity," and then he quotes a passage. Then

> "That assumes this, that the Dominion Parliament has considered this matter, and come to the conclusion, that for the peace, order and good government of Canada it is necessary that there should be uniform legislation in order to promote temperance. They have effected a uniform system. (Lord Herschell):—Anything less like a uniform system than a system to be adopted or not at the will of a particular part of the Dominion I cannot conceive. If that was necessary for the judgment in *Russell* v. *The Queen*, I should be in doubt whether the judgment in *Russell* v. *The Queen*, is right."

MR. UPJOHN: That is not the point I am arguing. Now would your Lordship look at page 247 where Lord Herschell states the point that I am arguing. Lord Herschell, in answer to counsel who says he cannot find the overriding power of the Federal Parliament, says:

> "I will tell you where it strikes me it is found. At present the Dominion Parliament has power to make laws for the purpose of the order and good government of Canada in relation to all matters, not within the classes of subjects. Now if a matter can only be found in section 92, under sub-section 16"—that is the power to legislate for matters of local interest in the province—"if you can shew that there is a Dominion purpose to be served by dealing with something existing throughout the Dominion, then I should say that it comes within the general Dominion power and would not be within the class of subjects prescribed"—that is to say, prescribed in section 92—"because it would not be merely of a local nature, but yet it might deal with the same subject matter which the province could deal with itself as being merely local."

That is what I am contending for here.

VISCOUNT HALDANE: That is if it comes within one of the classes of subjects enumerated in section 91. MR. UPJOHN: No, with deference, section 92.

VISCOUNT HALDANE: No, section 91, I think. MR. UPJOHN: No, my Lord. He says matters not within the classes of section 91. He says peace, order and good government—

VISCOUNT HALDANE: Where do you find "not within the classes of section 91"? MR. UPJOHN: "At the present the Dominion Parliament has power to make laws for the peace, order and good government of Canada in relation to all matters not within the classes of subjects."

VISCOUNT HALDANE: Which classes are those? MR. UPJOHN: Surely that is section 91.

VISCOUNT HALDANE: No.

SIR ROBERT FINLAY: Oh, no, section 92.

LORD SUMNER: "Peace, order and good government" qualify all. MR. UPJOHN: At all events, if your Lordship would be good enough to turn on to the next page, about the middle of page 248 Lord Herschell says:

> "Supposing this matter had been dealt with by the Provincial Legislature as merely a local matter, and that then the Dominion Parliament had considered that it was a matter to legislate on for the whole Dominion"—that must be something not enumerated in section 91 because if it were the Provincial Legislature would not have power to legislate—"supposing that is so, and it passed a law with reference to it, of course the Provincial Legislature then could not contravene that Dominion legislation; but does the fact that the Dominion can so legislate prove that the Provincial Legislature never had the power to pass the legislation which it had passed?"

VISCOUNT HALDANE: That is only dealing with "matters of a merely local or private nature in the province" (Head 16). There was a great distinction in the judgment you are quoting between section 16 and the others. MR. UPJOHN: If I establish my point with regard to section 16, it really does carry me the whole way, because for this purpose no distinction can be drawn between sub-section 16 and, say, sub-section 13, as to "property and civil rights." Exactly the same argument applies, namely, the Dominion cannot legislate directly for matters of merely provincial interest, that is to say local within a province—it cannot legislate directly with regard to "property and civil rights" within the province; but if the subject-matter of the legislation is a matter of Dominion concern, and not directly matters of merely local provincial interest or directly property or civil rights, the same reasoning applies to head 13 as applies to head 16 that the Dominion legislation prevails, because it is a matter of Dominion interest.

LORD PARKER: But you see then you get exactly contrary to what Lord Watson says: if your argument were right, the Dominion Government might always say it is necessary in our opinion, necessary to the Dominion, that there should be a uniform system of law throughout the provinces. MR. UPJOHN: I do not think they could possibly say that because there is section 94 in the first

place. Section 94 would prevent that. One cannot assume that the legislature of a great Dominion like Canada would deliberately go outside its powers. If it did, the Court has always power to look into the facts of the case and say: This is not a matter of Dominion interest, this is only a matter of local interest; or they can pass upon the particular Act.

LORD PARKER: Then you get the objection, that the Court who decides these matters and to whom they are referred has in each case to consider what is of importance to the Dominion. If I may use the expression, the beauty of the section is that in form at any rate it leaves it quite clear that if the things are enumerated in section 92 there is no power under section 91. The only question the Court has to decide is, is this particular thing which is going to be done within the terms of section 91 or is it not? MR. UPJOHN: Is that consistent with the decisions? Let us take the drink legislation: that is not mentioned in section 91 at all.

VISCOUNT HALDANE: I think Lord Watson said it had been decided that it was somewhere in it.

LORD PARKER: It seems to me the origin of the matter is that the Court who decided this case, which you are reading, was convinced in their own minds that the prior decision of this Board was wrong: that prohibition was not the same as regulation; they had to justify the decision, therefore, and they went out of their way to justify the decision, and personally at present I do not follow the argument by which they did it.

VISCOUNT HALDANE: I do not follow it because Lord Watson says: "It is decided," then he takes the ground on which it might have been decided, and says "That will not do." MR. UPJOHN: With deference, I am sure your Lordship wants to be just—

VISCOUNT HALDANE: You see, Mr. Upjohn, your real difficulty is that you are putting on Lord Watson on your hypothesis a doctrine which he has already contradicted and negatived in the earlier part of his judgment. MR. UPJOHN: I contend that I am doing nothing of the sort.

THE LORD CHANCELLOR: I think the difficulty is that you are causing us to forget your very cogent argument on "regulation of trade and commerce," which appears to me to be by far the most cogent. I do not say that for a moment for the purpose of preventing you continuing it. MR. UPJOHN: It puts me in a difficulty.

THE LORD CHANCELLOR: It was not meant to do that. MR. UPJOHN: I quite agree that the other is my best point, my clearest point and my simplest point, and I do feel a little afraid that I may be blurring it by having to insist on a more difficult point.

THE LORD CHANCELLOR: Yes. I did not mean in any way to hinder you. Of course, you cannot leave out any point. MR. UPJOHN: It would be very serious indeed for the Dominion if it went forth that it was the view of the Board that *Russell* v. *The Queen* is wrong.

THE LORD CHANCELLOR: You must not assume that. The Board has followed *Russell* v. *The Queen*.

VISCOUNT HALDANE: We never said that.

THE LORD CHANCELLOR: In the particular case you are quoting, I think it is Lord Watson says that *Russell* v. *The Queen* must be accepted as an authority as far as it goes. MR. UPJOHN: Lord Watson said that it was good as relating to "peace, order and good government."

SIR ROBERT FINLAY: I do not think he did. He said it had been decided, but he said it could not be supported under "trade and commerce"; he does not say on what ground it could be supported. MR. UPJOHN: My friend wrong. At page 362 at the end of the long paragraph he says:

> "It must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886. when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order, and good government of Canada."

Then he negatives the only enumerated head under which it could come.

THE LORD CHANCELLOR: Yes.

VISCOUNT HALDANE: Because when you come to the enumerated head, he discusses not whether you could have justified the Scott Act, I think it was, passed in 1878, the Canada Temperance Act, but a new Act which is in substantially the same terms—he says there is no difference, but it is not the same Act. He says: Now when I am asked whether the new Act can be justified under the "regulation of trade and commerce" I say no. MR. UPJOHN: Exactly the same reason would apply to the old Act of 1878.

VISCOUNT HALDANE: It may be so, but it was not before him. It was *res judicata*; he had not to consider it; he had to consider it in the second case; if it was "regulation of trade and commerce," then Sir Oliver Mowatt's Government had legislated inaptly. MR. UPJOHN (having conferred): My Lords, I have conferred with the Attorney-General and he rather accepts my view that as far as the appellants are concerned, they will rest it on the "regulation of trade and commerce."

THE LORD CHANCELLOR: I hope that a somewhat unguarded remark of mine has not interfered with your argument. MR. UPJOHN: Not at all. I think what we feel is this, if it is not necessary, we do not want to invoke a decision on the point.

VISCOUNT HALDANE: I think you are very wise. You relieve us perhaps from the necessity of making observations on *Russell* v. *The Queen*.

SIR ROBERT FINLAY: May it please your Lordships. I shall have presently to call your Lordships' attention somewhat more particularly to the scope and effect of the Statute to which this discussion relates, the 1910 Insurance Act, but, before doing that, I desire to make some observations of a general character with regard to the course which my friends' argument has taken. It appears to me that a very great part of the argument for the appellants would be very much in its place if it were directed to the point as to the propriety of amending the Canadian Constitution. My friends have said that it is extremely desirable that matters of general importance in Canada should be controlled by the Dominion Parliament. My friend Mr. Upjohn put the case of sanitary regulations, compulsory vaccination and matters of that kind, and, if I rightly understood him, he seemed to suggest that during the prevalence of an epidemic the Dominion Parliament might have powers which it would not have when there was no epidemic.

THE LORD CHANCELLOR: That was with regard to the part of his argument which he does not press now.

SIR ROBERT FINLAY: At the same time I think the two parts of his argument are a good deal mixed up together.

THE LORD CHANCELLOR: I understood he rested his case upon the ground that this is to be justified as a regulation of trade and commerce.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Sanitary laws have not much to do with that.

SIR ROBERT FINLAY: Not much. I should not have referred to that except for this reason, that whenever my friend was proceeding with regard to trade and commerce he referred to the enormous magnitude of insurance, and suggested that the magnitude of insurance was a reason for bringing it within the scope of the second head of section 91, which relates to "The regulation of trade and commerce." That is why I referred to that.

THE LORD CHANCELLOR: That is rather the motive of the Act than its justification.

SIR ROBERT FINLAY: Yes, my Lord. Your Lordship will see that while he has abandoned that as a substantive part of his argument, that the matter had become of great importance by the growth of insurance, and therefore fell under what I may call the residual portion of section 91 as to the legislative power of the Dominion, he brings in considerations of the same kind in arguing that it falls within the scope of the power to regulate trade and commerce.

LORD PARKER: I quite agree that we have not to consider whether it would be an advantage for the Dominion Government to have this, that or the other power, or whether it should be left to the provinces. We have to consider whether this is a regulation of trade and commerce.

SIR ROBERT FINLAY: Yes, my Lord. My suggestion to your Lordships is that this Act, if you look at its terms, is an Act for the regulation, in great detail, of a particular business—I use a neutral term. It relates to matters which were decided in Parsons' case were to fall within the jurisdiction of the Provincial Parliament and it relates to matters which were held by this Board in 1886 to be *ultra vires* of the Dominion Parliament. I am referring, my Lords, not to a reported case in that last observation, but to the argument to which reference has been made more than once, I think particularly by my Lord Haldane on the McCarthy Act in 1885, on which the Report of the Board was made, I think, early in 1886.

VISCOUNT HALDANE: I was in that case.

SIR ROBERT FINLAY: Yes, your Lordship argued along with Sir Horace Davey, for the respondent.

VISCOUNT HALDANE: There was no judgment.

SIR ROBERT FINLAY: No, my Lord, but the Board reported that the Act was *ultra vires*. I am going to submit to your Lordships that no practical distinction can be drawn between that case and the present. That was a case providing for the regulation of the liquor traffic. I am not going to pause at the moment to refer to the details of the provisions; I shall do that presently when I refer to the report of the argument, which is very instructive, taken along with the observations which were made by the Members of the Board, and to the ultimate decision.

VISCOUNT HALDANE: My recollection is that the Board gave no reasons at all.

SIR ROBERT FINLAY: None.

VISCOUNT HALDANE: I trust that it is nothing that I said as counsel for the province that you are going to use against me.

SIR ROBERT FINLAY: No, my Lord. Anything that your Lordship said happens to be in my favour, but I am not going to cite the argument of counsel as an authority.

VISCOUNT HALDANE: You have an example of that being done in this case.

SIR ROBERT FINLAY: Yes, my Lord. It seems an extraordinary thing. The same reason might be given for citing your Lordship's argument as that which may have influenced the citation of Sir Farrer Herschell's argument, because he afterwards became a member of this Board.

THE LORD CHANCELLOR: It is cited really only as illustrating common knowledge, just as we cite Lord Halsbury's book on the Laws of England as an admirable statement.

SIR ROBERT FINLAY: I thought it went a little further than that. What I was about to say is that Sir Farrer Herschell's very elaborate argument is devoted to defending an Act containing regulations with regard to the liquor traffic, detailed regulations with regard to the liquor traffic as detailed as the regulations in this Act with regard to insurance. Sir Horace Davey's argument on the other side was: No, the regulation of any particular trade is for the province, and he relied upon Parson's case. His argument for the respondent was, as far as one can judge from the result, adopted by the Board, because while there was the decision in *Russell* v. *The Queen* with regard to the 1878 Act which related to prohibition, yet it was held that an Act regulating a trade did not fall within the power of "regulation of trade and commerce." I submit to your Lordships that the decision in 1886 in that case is decisive of the present, and that effect could be given to my friend the Attorney-General's argument only by overruling the decision of the Board in that case.

VISCOUNT HALDANE: Did not the Dominion, flushed with this victory in *Russell* v. *The Queen*, proceed to pass licensing Acts?

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: They proceeded to go one better still, and they began to regulate by insisting on licenses.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: For the whole of Canada.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: Was not the question simply this: Has the Dominion power, on the ground either that it is for the good of the community, or that it

is regulation of trade and commerce, to license the liquor trade throughout Canada? That was the point.

SIR ROBERT FINLAY: Yes, my Lord. One provision was that a license was to be taken out. No one was to carry on business without a Dominion license, and there were a number of other provisions to which I will refer.

VISCOUNT HALDANE: There were many provisions which came very close to regulation. One was that every liquor shop was to have the shutters made so that they could not come across more than the upper part of the window in order that especially at night the public might see who it was who was drinking at the b . I think that was decided to be within the power of the province. It was su gested it would not be within the right of the Dominion.

SIR ROBERT FINLAY: The truth is that the real ground on which *Russell* v. *The Queen* is to be supported must for ever remain in obscurity. It is settled as being law, and Lord Watson says it must be accepted. Lord Watson says it cannot be justified on the ground of the regulation of trade and commerce, but with all deference to my friend I do not think that the sentence at the foot of one of the pages where he refers to it as being a measure for the peace, order and good government of Canada indicates that he thought it could be supported under the power of section 91. My Lords, the course of the argument has very much simplified my task in dealing with the case on behalf of the respondents, because the four reasons on which they applied for the reversal of the judgment are now reduced to one. There was first the point about aliens. I always regarded that point as one of those touches of humour with which it is always pleasant to have a somewhat dull case enlivened. I do not propose to add anything whatever to what my learned friend Mr. Newcombe said about that.

My Lords, the second point, was the point as to its being criminal law. Everything might be brought within that head if you only had a penalty clause. Then it would be criminal law, and the whole legislative activities of the provinces would be overriden at once by the action of the Dominion Legislature.

My Lords, the fourth point is that which has just been expressly abandoned as a substantive point, although it was always cropping up in the course of my friend's argument, with regard to the regulation of trade and commerce, and the point with which I have to deal is whether this can be justified with regard to trade and commerce. That is the real question, and the only question that is left.

In the first place I should like, as I said, to bring before your Lordships a little more in detail (I will not go more into detail than I can help), the terms of the Act. It is in the book which has been handed to your Lordships, at page 249. Your Lordships have read the third section, which defines the exceptions from the scope of the Act. I am going now to page 251. Section 3 contains the exceptions from the Act. What I am anxious to bring home to your Lordships is the detailed character of the regulations which this Act prescribes for the business of insurance throughout the whole of Canada. I think it is necessary to read section 4 to see its true scope. It says: "In Canada, except as otherwise provided by this Act, no company or underwriters or other persons"—that means any other person. My friend said it was to be a person *ejusdem generis* with a company, or *ejusdem generis with* an underwriter. Really I do not understand that. "Or other person," means that it applies to all persons.

THE LORD CHANCELLOR: We are considering an insurance Statute to regulate the business of carrying on the occupation of insurance, and it cannot mean that any person shall not grant an annuity?

SIR ROBERT FINLAY: It says so my Lord.

THE LORD CHANCELLOR: It says so in an Insurance Act.

SIR ROBERT FINLAY: It says so for this reason; that the granting of annuities was a business largely carried on by insurance companies; and I submit that the terms of the section are absolutely clear and specific, and that it cannot be limited by saying that the person prohibited must be a provincial underwriter.

LORD SUMNER: Is the point that this is more than regulation; that it is prohibition; or is it that it is regulation, but very harsh and bad regulation?

SIR ROBERT FINLAY: It is regulation of such a kind as manifestly and flagrantly trenches on the domain of property and civil rights.

THE LORD CHANCELLOR: Do you say it is not trade or commerce?

SIR ROBERT FINLAY: That is so.

THE LORD CHANCELLOR: Even assuming that insurance was?

SIR ROBERT FINLAY: I shall deal with that presently. I am desirous of dealing with the broad point first.

THE LORD CHANCELLOR: You say even assuming against yourself that insurance work is a work of trade or commerce, yet none the less this goes beyond that altogether?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Because it prevents a person from granting an annuity which might be for the benefit of his wife, or an employee in his business, or anything else.

SIR ROBERT FINLAY: Yes, my Lord. It is an absolutely clear and definite statement which forbids any one from doing any of the things specified in the section unless he be a company or underwriter holding a license from the Minister.

THE LORD CHANCELLOR: It is an Insurance Act, an Act respecting insurance?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: The granting of an annuity by a man to his wife, or an employee in his business, is really nothing whatever to do with insurance?

SIR ROBERT FINLAY: No, my Lord; but inasmuch as insurance companies are the chief grantors of annuities they thought right to enact that no one should grant an annuity without a license.

LORD PARKER: It is a monopoly really to companies or underwriters holding licenses?

SIR ROBERT FINLAY: Yes, my Lord. I do not wonder that from some points of view some insurance companies may be strongly in support of this Act. It is intended really to restrict the granting of annuities in the most absolute way to those who hold the license.

> "In Canada, except as otherwise provided by this Act, no company, or underwriters or other person shall solicit or accept any risk or issue, or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action, or proceeding"—

LORD PARKER: I think probably the intention was to put those words in slightly differently; "or carry on in any other way the business of insurance."

SIS ROBERT FINLAY: I think they wanted to hit a man who held himself out. They wanted to cover any case where he could be said to be carrying on business as an insurer, apart from proving the specific act. It is to hit his holding himself out as carrying on that business.

LORD SUMNER: The words are "or otherwise carrying on the business of insurance."

SIR ROBERT FINLAY: Yes.

LORD PARKER: That is right.

SIR ROBERT FINLAY: It is to hit anything not covered by the particular words.

VISCOUNT HALDANE: "Other person" must be read *ejusdem generis* with "company or underwriter."

SIR ROBERT FINLAY: Take the prohibition of granting an annuity. That is absolute.

VISCOUNT HALDANE: I think it comes in there again. The "other person" surely does not apply to a man who provides an annuity by his will for his wife?

SIR ROBERT FINLAY; No, my Lord; I do not say that. This relates clearly only to transactions *inter vivos*, but it would prohibit absolutely (to take a simple case), any man granting an annuity for some consideration, and I submit there is no getting out of the words.

THE LORD CHANCELLOR: Is it not really this: "No company, or underwriter, or other person shall carry on any business or insurance, or do any of these things"?

SIR ROBERT FINLAY: With deference I submit that those words are not there.

THE LORD CHANCELLOR: If you put in, as Lord Sumner suggests, the word "otherwise," after the word "or" they do come in at once.

SIR ROBERT FINLAY: What they do is this. They take a number of Acts which are commonly done by insurance companies. Then they say: "No person without a license shall do any of those acts," and then they add: "Nor shall a person without a license in any way carry on the business of insurance"; but all those specific acts are, I respectfully submit to your Lordships, absolutely prohibited. That, of course, is my submission on the construction of the section. I put it to your Lordships that taking the general scope of the section on the construction most favourable to my friends, that advocated by my friend Mr. Upjohn, this is most certainly trenching on the civil rights of the people of the province. I submit it is really not arguable.

THE LORD CHANCELLOR: Under the regulation of trade and commerce that does not so much matter.

SIR ROBERT FINLAY: If it falls within trade and commerce.

THE LORD CHANCELLOR: That is the only question.

SIR ROBERT FINLAY: Yes, my Lord. I am going presently to deal with the point in detail. For the moment I only want to bring home to your Lordships the true character of this Act as an Act regulating all the details of the business of insurance. They begin with a license being necessary.

LORD PARKER: The words of this clause are so doubtful that it would be very undesirable to express an opinion as to how far it restrains anybody from doing anything. The important point is whether it is valid with regard to these companies.

SIR ROBERT FINLAY: Whether the imposition of the necessity of a Dominion license is valid?

LORD PARKER: Whether it was legal for the Dominion to legislate with regard to companies carrying on the business of insurers other than those which are excepted.

SIR ROBERT FINLAY: And also individuals, the underwriters; because your Lordships will remember that with this section 4 must be read section 12, and section 12 provides that no license is to be granted to individuals, so that it cuts out underwriters from this business. I will read section 12, and your Lordship will see that the proviso is really nugatory in practice.

THE LORD CHANCELLOR: It says that they shall not be granted to individuals?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: That has already been affected by section 4, because section 4 excludes an individual from carrying on the business at all.

SIR ROBERT FINLAY: That is not quite so, because it says: "No person shall carry on the business of insurance unless by or on behalf of a company, or underwriters."

THE LORD CHANCELLOR: But not "underwriter." It says no person shall carry it on at all.

SIR ROBERT FINLAY: Without section 12 I apprehend that you could have a license granted to an underwriter.

THE LORD CHANCELLOR: Not to one underwriter.

SIR ROBERT FINLAY: "Underwriters," the plural, would include the singular.

THE LORD CHANCELLOR: In this context section 12 might have prevented the possibility?

SIR ROBERT FINLAY: It has.

THE LORD CHANCELLOR: In one way or the other the individual cannot do it?

SIR ROBERT FINLAY: No, my Lord.

THE LORD CHANCELLOR: I think that is right.

SIR ROBERT FINLAY: And your Lordships will see the proviso about an association formed upon the plan known as Lloyds seems to have been based upon some misconception of the nature of Lloyds' business. Lloyds is merely a sort of insurance exchange where underwriters underwrite what they please.

LORD SUMNER: The idea of this appears to be that if you get a Lloyds policy you can recover from the whole body of the members of Lloyds.

SIR ROBERT FINLAY: Yes, my Lord.

LORD SUMNER: I do not know what Lloyds may mean in Canada. It does not seem to fit the practice of Lloyds in London.

SIR ROBERT FINLAY: The Lloyds' referred to is the London Lloyds I take it.

VISCOUNT HALDANE: Are there no local Lloyds? MR. NEWCOMBE: Yes.

LORD SUMNER: They mean each subscribing member is liable although he may have nothing whatever to do with it?

SIR ROBERT FINLAY: I do not think that proviso means that. I am afraid the proviso was based upon a radical misconception of what Lloyds is. What they say is: "Provided that association of individuals formed upon the plan known as Lloyds, whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy may be authorized to transact insurance other than life insurance in Canada in like manner and upon the same terms and conditions as insurance companies." That is to say no license be be granted to an individual underwriter at all, but you may grant a license to an association of underwriters, where each member of the association becomes liable for his quota. That, I submit, is the effect of it.

LORD PARKER: Does it necessarily mean that? Does not it mean that with regard to individuals who form members of an association like Lloyds they may transact the business without a license, a license given to the association being sufficient to cover them?

SIR ROBERT FINLAY: I am afraid not, because they say: "Provided that associations of individuals formed upon the plan known as Lloyds, whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy may be authorized." That is to say the association may be authorized, because the framers of this section were under the impression that you could get a Lloyds policy from the association, and that each member became liable for a proportionate part. MR. NEWCOMBE: They could only become liable by subscription.

SIR ROBERT FINLAY: What the section says is, apparently a different thing Now, my Lords, I am going on with the question of regulation. Section 7 provides that the license must be renewed year by year; it is an annual license. Then section 8 is an enactment against the combination of life insurance with other insurance business. I need not read section 8. Then, passing on rapidly, section 14 provides for the deposit of securities with the Dominion Minister. Then section 22 and the following sections provide for the filing of certain documents before a license can be granted. One of these is to be a power of attorney. Then section 23 provides that such power of attorney shall declare at what place in Canada the head office is. Then (*b*):—

> "Expressly authorize such attorney to receive service of process in all suits and proceedings against such company in any province in Canada in respect of any liabilities incurred by the company therein, and to receive from the Minister and the superintendent all notices which the law requires to be given."

Then section 30 provides for annual statements of the company's business being made. Section 39 provides for inspection visits being paid to the companies. Section 41 gives a power to cancel a license if the assets are deemed insufficient. Then section 45, sub-section 2, provides that the license may be withdrawn if there is any breach of the Act. Then there are a group of sections, 53 to 57, dealing with commissions, and forbidding the paying or taking of commissions. They are very detailed provisions. In some respects they may be good. In others they may go too far. That is not the point I am upon. Your Lordships have most minute directions with regard to the payment of commissions. Section 58 deals with investments. Then section 69 is the penalties clause, and that is supplemented by section 187, which imposes a penalty for any infraction of the Act. It is a general clause. Then we come to section 84, to which I shall direct your Lordships' attention. Your Lordships will recollect that the Parsons case was a case where the Legislature of Ontario had provided the form of all policies that were to be entered into within the province, and that was held to be within the scope of their authority. Section 84 provides this:—

"Every policy delivered in Canada by any life insurance company under the legislative jurisdiction of the Parliament of Canada, or licensed to carry on the business of life insurance within Canada shall be deemed to contain the whole contract between the parties, and no provision shall be incorporated therein by reference to rules, by-laws, application, or any other writing, unless they are endorsed upon or attached to the policy when issued."

THE LORD CHANCELLOR: Have we anything to do with any of these later sections? Is not the whole question for us whether section 4 is *ultra vires* or not?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Section 4 is entirely independent of all these other sections.

SIR ROBERT FINLAY: Section 4 is only part of the complete scheme of the Act, which is for the regulation of these insurance companies.

THE LORD CHANCELLOR: All these other regulations might or might not be good. It would not necessarily follow it was wrong that a company should be licensed before it began to trade. These are the conditions under which it is to trade.

SIR ROBERT FINLAY: I submit it is of some importance if you find the provision as to the necessity for a license in an Act which deals in great detail with the regulation of insurance throughout the Dominion.

THE LORD CHANCELLOR: That will not help us to construe it, will it?

SIR ROBERT FINLAY: As my friend points out the Statute goes on to provide that you must comply with all these conditions in order to get a license.

THE LORD CHANCELLOR: It may be that the conditions under which you are going to get the license may be good or bad, but it does not necessarily follow that it is bad to say that the company that is going to carry on the business of insurance must have a license.

SIR ROBERT FINLAY: Must have a license under this Act, and that license is one which can only be obtained by undertaking to comply with all the regulations of the Act; and that brings in the question whether the Dominion had authority to impose that.

(Adjourned to to-morrow at 10.30.)

THIRD DAY.

SIR ROBERT FINLAY: My Lords, I was about to say I had called attention to section 45, but it is so directly relevant to the point to which the Lord Chancellor called my attention shortly before your Lordships adjourned yesterday that I think I ought to return to it. Will your Lordships look at section 45:

"For the purpose of carrying out the provisions of this Act the superintendent is hereby authorized and empowered to address any enquiries to any insurance company licensed under this Act, or to the president, manager, actuary, or secretary thereof in relation to its assets, investments, liabilities, doings, or condition, or any other matter connected with its business or transactions, and it shall be the duty of any company so addressed to promptly reply in writing to any such enquiries. The superintendent may in his discretion embody in his annual report to the Minister the enquiries made by him under this sub-section, and the answers thereto."

That is a provision for full information as to the details of what is being done by the company. Then sub-section 2:

"In the case of any violation of any of the provisions of this Act by a company licensed thereunder, to carry on business within Canada, or in the case of failure to comply with any of the provisions of its charter or Act of incorporation by any Canadian company so licensed it shall be the duty of the superintendent to report upon the same to the Minister, and thereupon the Minister may in his discretion withdraw the company's license, or may refuse to renew the same, or may suspend the same for such time as he may deem proper."

Then sub-section 3:—

"The issue by a company of policies not authorized by its license shall be deemed a violation of the provisions of this Act within the meaning of the preceding sub-section."

So that your Lordships see that the license being granted is granted on the terms that it may be withdrawn, or suspended, or not renewed if there is any infraction of any one of the provisions of the Act.

VISCOUNT HALDANE: Do you say, on the assumption that there is power to regulate by granting a license, which is the condition of carrying on business, that what you have read is anything more than something naturally ancillary to such a power?

SIR ROBERT FINLAY: What I mean is this; that the license is made the means of saying that the company observes in every detail all the regulations prescribed by this Act, and I am going to submit to your Lordships that these regulations relate to the very matters which in Parsons' case were held to be competent to the Provincial Legislature?

VISCOUNT HALDANE: Is it not rather the other way? Are not these provisions made the means of a company obtaining and keeping its license?

SIR ROBERT FINLAY: It does not matter which way it is put. It comes to this: that by the machinery of this license the Dominion takes the most effective steps to ensure obedience of every company in the province to the regulations laid down by the Dominion Parliament. In short, my Lord, when one takes the 4th section together with the rest of the Act it comes to this, that the Dominion Parliament has assumed to regulate in every detail the business of life insurance.

THE LORD CHANCELLOR: I cannot find anything in section 45 other than the duty of the company to promptly reply.

SIR ROBERT FINLAY: That is merely by way of giving power to make enquiries, and compelling the company to answer them: Then comes sub-section 2:

"In the case of any violation of any of the provisions of this Act by a company licensed thereunder to carry on business within Canada, or in the case of failure to comply with any of the provisions of its charter or act of incorporation by any Canadian company so licensed it shall be the duty of the superintendent to report the same to the Minister, and thereupon the Minister may in his discretion withdraw the company's license, or may refuse to renew the same, or may suspend the same for such time as he may deem proper."

So that you have in this Act the imposition of the will of the Dominion with regard to all the details of the business of life insurance, including the very matter that was dealt with in Parsons' case by the Provincial Legislature, the form of the policy. I hope I have made my meaning clear. Section 4 cannot be taken by itself; It is part of a whole, and the power of withdrawing the license in case any regulation is infringed shows that the license is the most effective means of securing obedience to every detail of the regulations which the Dominion makes.

VISCOUNT HALDANE: Is there any section in this Act enabling the Dominion to control the form of the insurance companies' contracts?

SIR ROBERT FINLAY: Yes, my Lord. I will go on to it at once. It is sections 84 and 95. I think I read section 84 to your Lordships. That is the section which provides that:

"From and after the first day of January, 1911, every policy delivered in Canada by any life insurance company under the legislative jurisdiction of the Parliament of Canada, or licensed to carry on the business of life insurance within Canada, shall be deemed to contain the whole contract between the parties, and no provision shall be incorporated therein by reference to rules, by-laws, application, or any other writing, unless they are endorsed upon or attached to the policy when issued. This section shall not apply to the business of industrial insurance."

THE LORD CHANCELLOR: If as a fact there is a power to regulate the business of insurance, if that is enjoyed by the Parliament of the Dominion, the manner in which the power is exercised will never be questioned by this Board.

SIR ROBERT FINLAY: The question of how far the Dominion Parliament may go in prescribing regulations for the business of insurance is before the Board. My submission is that this regulation clearly trenches upon what was settled by this Board in Parsons case was for the province.

THE LORD CHANCELLOR: The real question we have to consider is, is it not, whether under the power to regulate trade and commerce the Dominion Parliament has power to regulate the affairs of insurance companies throughout the Dominion. That is the real question?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: If they have power to regulate the affairs of insurance companies throughout the Dominion the manner in which they exercise that power is entirely for them?

SIR ROBERT FINLAY: If they have unlimited power, undoubtedly. I am going to submit to your Lordships that on the true construction of the power to regulate trade and commerce they have not power to make regulations for any particular branch of trade and commerce.

THE LORD CHANCELLOR: That is the big general question?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: If that were answered against you then the way in which they exercised the power would not become a matter of consideration before this Board, would it?

SIR ROBERT FINLAY: It may in this sense. Parsons case decided that the province may regulate the form of the policy, and I was about to complete my answer to my Lord Haldane's question as to whether there is in this Act anything that empowers the Dominion to deal with the form of the policy.

THE LORD CHANCELLOR: I thought I saw that myself somewhere.

SIR ROBERT FINLAY: It is section 95.

VISCOUNT HALDANE: It is quite conceivable that it may be for the province to determine questions relating to the contract so far as this depends upon the general law as to civil rights within the province, and at the same time that the Dominion may have power to regulate the form so far as the general question of insurance being a subject of Dominion interest is concerned. They need not necessarily conflict. If the province and the Dominion are both trying to interfere with the contract, then you would have to determine what was the nature of the interference, and which was to prevail, but the mere fact that both are trying to interfere is not conclusive.

SIR ROBERT FINLAY: The effect of section 95 is really to cut deep into what was decided in Parsons' case, to be a matter of property and civil rights for the province to determine.

VISCOUNT HALDANE: Let us look at the section.

SIR ROBERT FINLAY: It says:

> "On and after the 1st day of January, 1911, no policy of life insurance shall be delivered in Canada by any company licensed under this Act until a copy of the form of such policy has been mailed by prepaid registered letter to the superintendent"—that is the superintendent under the Act—"and unless it contains in substance the following provisions."

I need not go through all these. They are very long and detailed. The first is that there are to be days of grace for payment of premiums. The second is that the insured may engage in the service of the militia. The third is that the policy shall be incontestible after not later than two years from its date, except for fraud, non-payment of premiums, or for violations of the conditions of the policy relating to engaging in military service. The 4th is that the policy and endorsement are to be the entire contract.

VISCOUNT HALDANE: We are now getting into one of those questions which illustrate the difficulty of giving abstract answers. It seems to me that we may very well answer, assuming we take a certain view, that regulation is within the competence of the Dominion, and it may very well be true that particular things are not regulation. These will arise when they come up in the concrete case under section 95, or some other section, and then we shall decide them. Does that prevent us from answering the only question put?

SIR ROBERT FINLAY: The only question put here is whether section 4 was *intra vires*. Section 4 must be taken, of course, as relating to a license with the effects prescribed by the rest of the Act.

VISCOUNT HALDANE: I am not quite sure. Section 4 may lay down a general principle, and it may be that section 95 goes beyond it.

SIR ROBERT FINLAY: Surely it is impossible to deal with section 4 *in vacuo*. Section 4 is a specific enactment, and it has certain specific effects, and by far the most important effect is that it compels obedience, as is contained in section 95; and I most respectfully submit to your Lordships that it is impossible to deal with section 4 as if it stood by itself without reference to the effects which the granting of the license and the power to suspend or cancel the license on the part of the Dominion Government have upon it.

LORD PARKER OF WADDINGTON: Is that really so? Supposing we were to decide that section 4 and section 70 are *intra vires*, is there any reason why the Board should not subsequently decide that section 95 in one of its results was *ultra vires*?

SIR ROBERT FINLAY: If it be decided that section 4 is *intra vires* it is a decision that the license may be cancelled on breach of section 95.

LORD PARKER OF WADDINGTON: I do not see that.

VISCOUNT HALDANE: That is not section 4. All that section 4 says is that the business of insurance is not to be carried on without a license from the Dominion Minister?

SIR ROBERT FINLAY: Yes, but it cannot be taken as if it stood by itself. You must take that with the rest of the Act which gives the effect to section 4 of enabling the Dominion to ensure obedience to the conditions contained in the rest of the Act.

LORD SUMNER: I suppose you might put it in this way: Unless it be done by a company holding a license from the Dominion, such a license as is required by law and the Dominion is empowered to grant?

SIR ROBERT FINLAY: Yes, my Lord.

LORD SUMNER: That would be a license which obliged the holder to comply with all the conditions of the Act?

SIR ROBERT FINLAY: Yes, and a license for a year, renewable annually, and which may not be renewed if there has been any breach whatever, and which may be suspended if there is any breach. I submit to your Lordships that section 4 cannot be taken apart from the rest of the Act.

LORD PARKER OF WADDINGTON: Supposing we were to declare that this particular section was *ultra vires* it would not follow that some of the other sections of the Act were not *intra vires*?

SIR ROBERT FINLAY: Possibly they might be.

LORD PARKER OF WADDINGTON: This is an abstract question. It seems rather undesirable that we should have to decide as to every section because we are asked a question with regard to one.

SIR ROBERT FINLAY: The form of the question implies that we must deal with the law under this Act, with its effects, and with the powers which such law commits to the Dominion.

THE LORD CHANCELLOR: Your point is that section 4 says that a company cannot trade without the license which this Statute prescribes?

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: And this Statute prescribes a license which is bound by certain conditions. If any of the conditions are broken the license is cancelled?

SIR ROBERT FINLAY: That is my point exactly.

THE LORD CHANCELLOR: It is not any license; it is the particular license.

SIR ROBERT FINLAY: It is this license section 95. I have run through the various provisions that are to be in the policy, the provision as to understatement of age, the provision as to lapsed policies, the provision as to loss on policy, which is (g); then (h) is as to table of surrender and loan values, (i) is a table of instalments, (j) is as to the renewal of the policy, and then there are the exceptions. There is a most detailed provision and that comes in because the license to which section 4 relates is a license which is not to be renewed if there is a breach of any

provision. I am not going to inflict all the provisions of this Act upon your Lordships.

THE LORD CHANCELLOR: You have probably called our attention to enough. You have called our attention to the question of the forms.

SIR ROBERT FINLAY: Yes, my Lord, and that is material, because it was on the question of the forms that Parsons' case was decided. In section 85 there is a provision that the agent of the company is not to be the agent of the assured.

THE LORD CHANCELLOR: Then there is a provision about the employment of employees. They must only employ them for five years. It is section 56:

> "No Canadian life insurance company shall make any agreement with any of its officers or trustees, to pay for any services, rendered or to be rendered, any salary, compensation or emolument extending beyond a period of five years."

SIR ROBERT FINLAY: I am much obliged to your Lordship. I suppose that is intended to include every life insurance company carrying on business in the Dominion; not merely companies incorporated by the Dominion. I am told there is a definition in section 2 (c) which shows that that is so. Then section 86 is:

> "No such life insurance company, and no officer, director, or agent thereof, shall issue or circulate, or cause or permit to be issued or circulated in Canada any estimate, illustration or statement of the dividends or shares of surplus expected to be received in respect of any policy issued by it."

Then section 87 forbids rebates, discrimination and so on. Then section 89 provides for a quinquennial distribution of surplus.

VISCOUNT HALDANE: You will remember that in Parsons' case, at page 114, it was said by this Board that the legislation by the province and by the Dominion, both of which were, I take it, substantially the same as what we have before us now, does not really conflict or present any inconsistency.

SIR ROBERT FINLAY:

> "The Statute of the Dominion Parliament" says Sir Montague Smith, "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,"

and I take it that the Act was not unlike this; this is an Act which prescribes conditions:

> "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. The Dominion Act contains the following provision, which clearly recognizes 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 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.'"

VISCOUNT HALDANE: "Hereinafter mentioned" are the words. Is there anything of that kind here?

SIR ROBERT FINLAY: There is, as your Lordships will observe. I am going to deal with that passage. It will be necessary for me to recur to Parsons' case, because I do not think in the argument of my learned friend the judgment in Parsons' case received as much attention on this point as it deserves. Your Lordships will observe that in that passage Sir Montague Smith avoids altogether expressing any opinion as to whether the Dominion legislation that he is referring to was *intra vires* of the Dominion. He says, assuming that it was *intra vires* of the Dominion, there is no real conflict, but that does not say it is *intra vires*, and he merely says we need not go into it because we do not think that there is

any conflict between this legislation as to the form of the contract, and the legislation in that Act of the Dominion.

VISCOUNT HALDANE: It is the last statement which is the important one for the present purpose.

SIR ROBERT FINLAY: The question which Sir Montague Smith avoided discussing there, on the principle that he had laid down very early in the judgment would be or might be important, because the question of how far the Dominion could prescribe conditions applicable to the business of insurance throughout the whole of Canada is the question which has emerged here.

VISCOUNT HALDANE: If we come to the conclusion that there is no inconsistency between the two Statutes, the one of the Dominion, the other of the province, then you have got a long way towards clearing the ground.

SIR ROBERT FINLAY: Here your Lordships have got interference with the very form of the policy.

VISCOUNT HALDANE: I should like to know what was the Dominion Statute which Sir Montague Smith refers to.

SIR ROBERT FINLAY: I will deal with that very fully, I propose to take all the cases which are in any way relevant to the one point which is left here, and I promise your Lordships that I shall go very fully into them and deal to the best of my ability with all of them. I have called attention to section 89 which prescribes for a quinquennial distribution of surplus. MR. NEWCOMBE: Is it suggested that the provinces have legislated at all with respect to the form or conditions of life insurance policies. MR. NESBITT: Yes, they have in Ontario.

SIR ROBERT FINLAY: What the provinces feel is that there has been a gradual encroachment by the Dominion and it has now come to a point at which a stand must be made and I shall ask your Lordships to say that in this matter the Dominion has clearly out-stepped its rights. I will just mention section 96, which provides for the keeping of separate accounts by life insurance companies of participating and non-participating business. Then section 99 deals with the withdrawal of the license for non-payment of undisputed claims. Section 117 deals with what is called the assessment system; that is, raising each year enough to meet the claims that will emerge on behalf of those who belong to the Society. The assessment system is like the mutual system here. Then there is a group of sections 118, 119, and 120, which deal with details connected with the policy, the notice as to the reserve, the obligations to pay out of a certain fund and a clause stating where the action is to be brought. Then section 122 provides that "The words 'assessment system' shall be printed in large type at the head of every policy and every application for a policy, and also in every circular and advertisement issued or used in Canada in connection with the business of an assessment company." Then section 133 provides that a fire policy is not to be for a longer period than three years. Section 135 contains a provision as to fire insurance companies, as to capital and payment of dividends, and section 139 restrains insurance in unlicensed companies. I think I ought to call your Lordships' attention to that.

> "Notwithstanding anything in this Act contained, any person may insure his property, or any property in which he has an insurable interest, situated in Canada with any British or foreign unlicensed insurance company or underwriters, and may also insure with persons who reciprocally insure for protection only and not for profit; and any property insured or to be insured under the provisions of this section may be inspected and any loss incurred in respect thereof adjusted: Provided such insurance is effected outside of Canada, and without any solicitation whatsoever directly or indirectly on the part of such company, underwriters or persons by which or whom the insurance is made; and provided further that no such company, underwriters or persons shall within Canada advertise their business in any newspaper or other publication or by circular mailed in Canada or elsewhere, or maintain an office or agency therein for the receipt of applications or the transaction of any act, matter or thing relating in any way to their said business."

That is an extraordinary provision. It makes it impossible for insurance to be made if there has been any solicitation by the British or foreign insurance company.

THE LORD CHANCELLOR: That would be perfectly competent to the provincial Parliament.

SIR ROBERT FINLAY: Yes, my Lord. I say this is such an infringement of property and civil rights in each province that I submit that the section will deserve consideration in seeing whether it can possibly be justified under the head of "Regulation of trade and commerce."

VISCOUNT HALDANE: It does not go to the condition of the license. It affects the assured, but not the insurer.

SIR ROBERT FINLAY: That is so. I quite agree with regard to that, but it does show that undoubtedly the Dominion in this Statute is interfering with the business within the province.

VISCOUNT HALDANE: If you took proceedings for the recovery of the penalty, you might have a concrete case on that.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: This is not associated with the license is it?

SIR ROBERT FINLAY: No, my Lord; I assent to that.

LORD PARKER OF WADDINGTON: It incapacitates people generally from entering into such contracts as they please, and it might be said that that is an interference with civil rights and not within the powers of the Dominion Parliament.

SIR ROBERT FINLAY: I suppose it might be associated with the license, because if any licensed company was connected with any such transaction they, in point of fact, would be subject to the forfeiture of their license. Supposing a licensed company reinsured with a British or foreign insurance company not in the terms prescribed by this section which I have just read, then I suppose it would be connected with their license. "Carrying on business" relates to the insurer, but you may have an insurance company itself re-insuring, and then the effect of this section would be that they would forfeit their license.

LORD PARKER OF WADDINGTON: Cannot a British company obtain this license?

SIR ROBERT FINLAY: I suppose they can.

THE LORD CHANCELLOR: I think so. "Company" is defined as a company incorporated anywhere. It is in contrast with a Canadian company which is incorporated in Canada.

SIR ROBERT FINLAY: Yes, my Lord, but they obtain a license to carry on business in Canada and this restrains persons in Canada from entering into any contract of insurance or re-insurance with a British company.

LORD PARKER OF WADDINGTON: Does that apply where a British company is licensed in Canada?

SIR ROBERT FINLAY: No, my Lord, I do not think it does.

THE LORD CHANCELLOR: Really I do not seen how this section comes before us. It does not seem to me it is associated with the license; it is an independent provision.

SIR ROBERT FINLAY: It is an independent provision, but it might apply in the case of re-insurance by a licensed company, a British company. If they re-insured with a British Company which had solicited or advertised then they would be guilty of an infraction of this section. My Lords, I have called attention, I hope at not too great a length, to the scope and effect of the Act, and I say that the license on which your Lordships have to determine is the license under this Act, with the consequences which this Act annexes to any breach of any of the regulations contained in it.

My Lords, the next point that I wish to call attention to is this. It is perfectly true that if you get a subject under one of the enumerated heads of section 91 you may disregard any clashing with any of the enumerated subjects in section 92, because it prevails, but it is a most important question how you are to construe such a head as "The regulation of trade and commerce." On one meaning you make very great inroads on "property and civil rights"; on the other meaning, which I contend for, you make no inroads whatever upon "property and civil rights in the province," and what I am going to submit to your Lordships is that, when you have got a head in such terms as "The regulation of trade and commerce," you must put upon those words, which may be read in different ways,

a meaning which will not virtually swallow up a great part of what is given to the provinces by section 92.

VISCOUNT HALDANE: Have you a definition which you have framed in your mind for the purposes of your argument of "regulation of trade and commerce"?

SIR ROBERT FINLAY: I do not think I can give a better definition than that which was suggested by Sir Montague Smith in Parsons' case. There is nothing that would cover what is done here. What he says is this, that this provision relates to the regulation of trade and commerce in general. He refers to the Act of Union with Scotland. We speak of the regulations as to trade being the same for Scotland and England. That, of course, refers to regulations as to trade with foreign countries, or with the plantations. It had no reference whatever to trade in Scotland and trade in England, and he says that the meaning to be attached to those words must be the larger meaning; it is in the large that the control over trade and commerce is given, and that it does not extend to the right to regulate any particular branch of trade and commerce.

LORD PARKER OF WADDINGTON: Only in a particular province.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: He says: "It may be that they would include general regulation of trade affecting the whole Dominion."

SIR ROBERT FINLAY: Yes, but where he says a particular province, I suppose he means this: "Supposing the Dominion, by a general enactment, affects a particular branch of trade or commerce in each province of the Dominion it is affecting it in each. It is not merely affecting it in the aggregate. The question is whether the term "regulation of trade and commerce" will bear that meaning. I am coming, my Lords, almost directly to Parsons' case, which I wish to consider very carefully, but what I desire in the first instance to call your Lordships' attention to is what was said by this Board recently in the Montreal Railway case, reported in 1912 Appeal Cases. The judgment was delivered by Lord Atkinson. The case begins at page 333. The question that arose there was with regard to the power of control possessed by the Dominion over a local railway which had effected a junction with a Dominion railway. I will read the head note. It is very short and it shows what the Court were dealing with.

> "Held, that section 8, sub-section (b) of the Railway Act of Canada (1906, Revised Statutes of Canada, chapter 37), which subjects any provincial railway (although not declared by Parliament to be a work for the general advantage of Canada) to those of its provisions which relate to through traffic, is *ultra vires* of the Dominion Parliament. An Order dated May 4th, 1909, of the Board of Railway Commissioners for Canada (created by Dominion Railway Act, 3 Edward VII, chapter 58, and beyond the jurisdiction and control of any province) directed with regard to through traffic over the Federal Park Railway and the provincial street railway, both within and near the City of Montreal, that the latter should 'enter into any agreement or agreements that may be necessary to enable' the former company to carry out its provisions with respect to the rates charged so as to prevent any unjust discrimination between any classes of the customers of the Federal line: Held, that the said Order so far as it related to the provincial street railway was made without jurisdiction." That was the point that the Board were dealing with. The observations that I wish to call attention to begin at the bottom of page 342, and run on to page 344, where the effect of the Act generally is considered.
>
> "It has accordingly been strongly urged on behalf of the respondents that if it be desirable in the interest of the Dominion to place the through traffic on a provincial line, such as the street railway, under the control of the Railway Commissioners, owing to its nature, character, or amount, the proper course for the Dominion Parliament to take, and the only course it can legitimately take, is by statutory declaration to convert the provincial line into a federal line, thus removing it from the class of subjects placed under the control of the legislature of the province."

VISCOUNT HALDANE: Was it under the section which enabled the Dominion to declare that a certain railway was for the benefit of the Dominion?

SIR ROBERT FINLAY: Yes, my Lord, I am going to refer to that presently as showing that it was contemplated that where a thing was to be treated as for the benefit of the Dominion, and throughout subject to Dominion legislation, that specific provision is made for such a declaration, which would not cover the present case, and I am going on that to base an argument against the contention of my friends that anything can be brought in under "regulation of trade and commerce" merely because it is an important thing and affects a great part of the Dominion—

> "and placing it amongst the classes of subjects over which it has itself exclusive jurisdiction and control. And further, that there is nothing in the British North America Act to show that such an invasion of the rights of the Provincial Legislature, as is necessarily involved in the establishment of this embarrassing dual control over their own provincial railways, was ever contemplated by the framers of the British North America Act. It has, no doubt, been many times decided by this Board that the two sections, 91 and 92, are not mutually exclusive, that the provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a Provincial Legislature over a field of jurisdiction common to both the former must prevail; but, on the other hand, it was laid down in *Attorney-General of Ontario* v. *Attorney-General of the Dominion* "— that is the 1896 case; the reference with regard to liquor—"(1) That the exception contained in section 91, near its end, was not meant to derogate from the legislative authority given to Provincial Legislatures by the 16th sub-section of section 92, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in section 91; (2) That to those matters which are not specified amongst the enumerated subjects of legislation in section 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the Provincial Legislature by section 92; (3) that these enactments, sections 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in section 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in section 92; (4) That to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by section 91, would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in section 91, namely, the regulation of trade and commerce. Taken in their widest sense these words would authorise legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in section 92, would seriously encroach upon the local autonomy of the province. In their Lordships' opinion these pronouncements have an important bearing on the question for decision in the present case, though the case itself in which they were made was wholly different from the present case, and the decision given in it has little if any application to the present case. They apparently established this, that the invasion of the rights of the province which the Railway Act and the order of the Commissioners necessarily involve in respect of one of the matters enumerated in section 92, namely, legislation touching local railways, cannot be justified on the ground that this Act and Order concern the peace,

order and good government of Canada, nor upon the ground that they deal with the regulation of trade and commerce."

That comes to this, that in construing a provision like section 91, sub-section 2, you ought to give the words a meaning which will not eat into the powers conferred by section 92 upon the provinces.

VISCOUNT HALDANE: He says the considerations about the general interests of Canada, and the peace, order and good government, moreover, apply to section 91, that is to say, it must be a regulation of a matter that concerns the Dominion generally. If you get that you may eat very much into property and civil rights at every turn, but you have limited the sphere within which you are regulating.

SIR ROBERT FINLAY: Yes, my Lord, but more than that, what Lord Atkinson says here, delivering the judgment of the Board, is that you must construe the proviso as to the regulation of trade and commerce in such a way as to reconcile it with the power given to the local legislature by section 92.

VISCOUNT HALDANE: I do not think he says that, what he says is that you must construe it in such a way that it affects the interests of the Dominion generally.

SIR ROBERT FINLAY: On page 344, he says:—

"The same considerations appear to their Lordships to apply to two of the matters enumerated in section 91, namely, the regulation of trade and commerce. Taken in their widest sense these words would authorize legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in section 92, and would seriously encroach upon the local autonomy of the province."

LORD PARKER OF WADDINOTON: It seems to me that the words "peace, order and good government" apply equally to enumerated as to un-enumerated things, and, that being the case, the question is whether certain things are excepted or not.

SIR ROBERT FINLAY: What Lord Atkinson is dealing with is "regulation of trade and commerce." It is not a residual power that he is dealing with.

VISCOUNT HALDANE: I can understand that with regard to things that are not specified in either of the sections, in order to give the Parliament of Canada any jurisdiction at all, you must say it is peace, order and good government, and there may be all sorts of things which are outside "peace, order and good government," as to which nobody had any power. That would let in an argument as to whether it was meant or not in all the circumstances of the case.

SIR ROBERT FINLAY: It is very difficult to conceive any enactment relating to Canada which has not to do with the peace, order and good government of Canada. The words are the general words which are used in every Statute, and they are intended to sweep in everything that relates to the colony.

LORD PARKER OF WADDINOTON: If you admit that all the powers are somewhere, and that they are all for peace, order and good government, then the sole question is, where a thing is not enumerated in section 91, whether it is enumerated in section 92.

SIR ROBERT FINLAY: The question we are on is what the scope of section 91, sub-section 2, is.

LORD PARKER OF WADDINOTON: I cannot conceive how the size of the question makes any difference.

SIR ROBERT FINLAY: Not the slightest.

LORD PARKER OF WADDINGTON: I could understand, if it were the argument that it was so small that it was not within "peace, order and good government," but it seems to me that the argument as to the size of the question has nothing to do with it.

SIR ROBERT FINLAY: I accept that absolutely, and I protest against the doctrine which was advanced by the other side that, because something has become very big, therefore, it has become of Canadian importance. That may be a very good reason for altering the Constitution, but it is no reason whatever for construing the Constitution in a way that the words do not bear out. The question must be dealt with, whether the thing is little or big.

LORD PARKER OF WADDINOTON: I understood one of Lord Atkinson's points to be that it had been decided that, in matters not enumerated in either sub-

section, the Dominion, in exercising their powers, ought to confine the exercise of their powers to big questions. That is what I cannot follow.

SIR ROBERT FINLAY: I do not think he says that. What I desire to concentrate upon is what Lord Atkinson says about the "regulation of trade and commerce," and he says that where you have general words of that kind you must select something which will not trench upon matters which are confined to the exclusive jurisdiction of the province by section 92.

VISCOUNT HALDANE: It must be the regulation of trade and commerce in a sense which concerns the peace, order and good government of the Dominion as a whole.

SIR ROBERT FINLAY: It must be regulation of trade and commerce in general. I think your Lordship used the phrase yesterday in the abstract, but I prefer to speak of it as the regulation of trade and commerce in general.

VISCOUNT HALDANE: There might be regulation of a particular trade that might immensely effect the general interest.

SIR ROBERT FINLAY: The question is: In what sense was the regulation of trade and commerce given to the Dominion; it is not that it has been empowered to deal with trade if it has become important. There is no provision similar to that contained in section 92 with regard to any works done wholly in a province which have become of Dominion importance, that they are to be brought within the jurisdiction of the Dominion. Then the question comes to be: What is the meaning to be put upon this term, "regulation of trade and commerce"?

VISCOUNT HALDANE: Take a case of this kind: Canada has become anxious, let us assume, to keep as large an accumulation of gold as possible; within the confines of one of the provinces there is a gold industry; while it is very small, Canada does not interfere, but when it gets very large, Canada may say: It is to our interest to buy up all gold produced in the Dominion. Is not that a case where the magnitude would make all the difference?

SIR ROBERT FINLAY: It must be brought under one of the heads of section 91.

THE LORD CHANCELLOR: I did not follow what you said just now. Do I understand that your view of "the regulation of trade and commerce" is this, that it would have been competent to the Parliament of the Dominion to have passed a Statute providing that nobody should trade anywhere in any business without a license, but that they are not competent to say that nobody shall be at liberty to trade in a particular business?

SIR ROBERT FINLAY: I think they might have passed a regulation of that kind, but I do not think that can come into consideration.

THE LORD CHANCELLOR: That comes to the origin of the Act. It seems to me that with that we have no concern at all; the only question is the question of jurisdiction.

SIR ROBERT FINLAY: Your Lordships are very much concerned with the origin of the Act in this sense, that you want to see what it was that the legislature were aiming at.

THE LORD CHANCELLOR: I quite agree that the motive may be the very best, but that has nothing to do with it.

SIR ROBERT FINLAY: They may have been wholly mistaken or well founded. It makes no difference. The question is, what is the true meaning.

THE LORD CHANCELLOR: Then you are brought up against this question: Is it your view that "regulation of trade and commerce" enables restrictions to be put upon all the traders in the Dominion, but not upon a trader in a particular trade?

SIR ROBERT FINLAY: That is so.

LORD SUMNER: Is there any one of these 29 enumerated heads of which it can be said that the power must be exercised universally and not in particular instances. If you are to say that "trade and commerce" is interdependent as a subject of regulation, and there must be universal regulation and not particular regulation, is there any one of these of which the same thing can be said, or are they not all cases in which the power may be exercised distributively as well as collectively?

SIR ROBERT FINLAY: I do not wish to say that generally with regard to sections 91 and 92 for this reason. If you take what was said in the Parsons case as to power to regulate oversea trade, no doubt regulations may be made with regard to a particular branch of an oversea trade. I do not for a moment say that the Dominion Legislature would be bound, on laying down a regulation of that kind, to apply it to every branch of oversea trade.

LORD SUMNER: Would "the regulation of trade and commerce" be satisfied by the regulation of wholesale trade, supposing a regulation was passed that all wholesale traders' transactions over such and such an amount shall be evidenced in a particular form?

SIR ROBERT FINLAY: They could not do that.

LORD SUMNER: That would be incompetent?

SIR ROBERT FINLAY: That would be incompetent.

LORD SUMNER: Because it is not all trade; it is only wholesale trade?

SIR ROBERT FINLAY: Not for that reason, but because they would be dealing with the details of how provincial trade should be carried on. That would apply to sales in the provinces.

LORD SUMNER: All their trade must be in some province.

SIR ROBERT FINLAY: Yes, my Lord, or between two provinces, and trade between two provinces is one of the heads which Sir Montague Smith suggested this was intended to cover, and I desire your Lordships to take that larger meaning of the words "regulation of trade and commerce," which was clearly indicated by the Board in the judgment in the Parsons case.

LORD SUMNER: I cannot get in my own mind any definition. I quite follow the proposition that if there are two possible meanings the true one is the one which least cuts down property and civil rights. How do you formulate that without saying that it must be regulation of all trades, not some trades?

SIR ROBERT FINLAY: I do not desire to accept that as a general guide to the construction of this provision, because in dealing with matters properly within "the regulation of trade and commerce." I do not doubt that different regulations may be made with regard to these branches of trade beyond all question, but I think one had better take it in the concrete, and, if I may, I should like to read what was said on this very head in Parsons case.

LORD PARKER OF WADDINGTON: May I ask you one more question. Take, for instance, enumeration No. 19 of section 91, which is "interest," do you say that it would be impossible to pass something like the Money Lenders' Act in this country under that?

SIR ROBERT FINLAY: No, I do not say that. I do not like to make an admission on a point of that kind, which may be of far-reaching importance, but I am in no way concerned to say that it would be impossible. I very much doubt whether the business of a money lender would be within the scope of the enactment.

THE LORD CHANCELLOR: The question is whether the power to regulate interest under section 91 is confined to the regulation of interest in all transactions, in which money lending is involved, or whether it can be applied to a particular trade, the trade of money lending.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Is it general?

SIR ROBERT FINLAY: I think the power as to interest would need to be general.

THE LORD CHANCELLOR: They must regulate the interest on the loan, whoever lends the money.

SIR ROBERT FINLAY: There may be great ramifications on this subject. I do not want to rashly lay down any general proposition.

VISCOUNT HALDANE: It is a declaration of the Imperial Parliament that "interest" is one subject.

SIR ROBERT FINLAY: It would be very wrong of me to advance, on the spur of the moment, a general proposition.

THE LORD CHANCELLOR: It certainly would be wrong if you were bound by it. It was merely put to illustrate what was in my mind, that the "regulation of trade and commerce" necessarily involves the regulation of all trade and commerce collectively.

LORD SUMNER: If one came to the conclusion, reading the whole list, that they could not be worked unless each one was applied generally, it would be a reason for putting them in section 92.

SIR ROBERT FINLAY: They might legislate with regard to different kinds of trade, but the matters which are within those are not the prosecution within the provinces of the Dominion of particular industries. It was never intended, and I submit to your Lordships that the words do not bear the meaning, that the Dominion may prescribe the conditions on which a trade of an obscure kind is to be carried on throughout the Dominion of Canada. What it related to was inter-provincial trade and trade with countries beyond the seas. This matter is considered at page 112, and the following pages in Parsons case. The passage is of so much importance that I do not apologize for reading it, although some parts of it, at all events, have been read:—

> "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."

Your Lordships will see head 1 is:—

> "The Public Debt and Property," head 2 is "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," and so on.

I submit to your Lordships that that is quite enough to show that "regulation of trade and commerce" was never intended to apply to a particular business carried on in any one or all of the provinces.

> "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."

I think that is a very cognate observation; I think it was made by Lord Parker on the first day of the argument.

VISCOUNT HALDANE: Your proposition is that, according to Parsons case, the words were never intended to cover a particular trade carried on in one or even in all the provinces.

SIR ROBERT FINLAY: No, my Lord, if they mean that, how can they be controlled. They would enable the Dominion Legislature to legislate with regard to every trade in every province, merely by saying that the Act was to apply to all the provinces, or to more than one of them.

LORD PARKER OF WADDINGTON: It may well be that the Dominion Parliament has the right to regulate bankers in Ontario as apart from bankers throughout the Dominion, but it may also be that they have power to pass general regulations with regard to bankers.

SIR ROBERT FINLAY: They have power to pass a regulation for bankers in Ontario; a regulation for bankers in Quebec; a regulation for bankers in Manitoba; a regulation for bankers in Alberta, and a regulation for bankers in Saskatchewan.

LORD PARKER OF WADDINGTON: They must be general. At page 113 Sir Montague Smith says this:—

> "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."

SIR ROBERT FINLAY: It would not help it that they legislated with regard to the business in each of the provinces, because, if legislating with regard to trade in a particular province is incompetent, how can it be competent for them to legislate with regard to the whole of the provinces?

THE LORD CHANCELLOR: That is the whole difference.

SIR ROBERT FINLAY: If the matter is one of the details of a particular trade, that is not covered by the words "regulation of trade and commerce;" it is not a regulation of trades and branches of commerce. "Trade and commerce" is used as denoting the subject with which the regulation is to deal. It is a subject of trade and commerce, and the fallacy of a great part of my friends' argument was in treating the word "trade" as if it occurred by itself. What you have to deal with is the regulation of trade and commerce. Taken in the sense that my friends wish to attach to that, the only limitation that I have heard suggested, as I understand it, is that it must be a matter of great national concern. MR. NEWCOMBE: A matter of common interest.

SIR ROBERT FINLAY: "Common interest," my friend says; but grown so big as to be a matter of common interest.

LORD PARKER OF WADDINGTON: I do not think really you are dependent upon the words: "Regulation of trade and commerce," to exclude the legislation for a particular trade in a particular province, because that would not be for the good government of Canada. "Canada" there is used as a whole. It is something done for the Dominion in the interests of the Dominion.

SIR ROBERT FINLAY: What is suggested on the other side is that it is for the interests of the Dominion that a particular trade in each and all of the provinces should be conducted in a particular way. I say that was left to the legislature of each of the provinces.

VISCOUNT HALDANE: I do not see that in the least. It may be that the aspect of that trade which is being dealt with is one of vital general importance to Canada, but it may have another aspect, an aspect in which it might possibly be a matter for provincial dealing.

SIR ROBERT FINLAY: That comes back to this: Has the thing become so big that it can be regarded as of national importance?

VISCOUNT HALDANE: There may be cases like the gold industry, which I mentioned to you, where the national importance depends upon the size of it, but I do not think the size is decisive.

SIR ROBERT FINLAY: It is not the test, but it would be one great element, and it is.

VISCOUNT HALDANE: That may be. The point relied upon here is this: There may be a subject in which the Dominion has an interest as a whole; if that is so it is a matter of national concern. Why should not the trade of insurance be regulated?

SIR ROBERT FINLAY: It cannot be more important than the baking of bread, and on that argument the Dominion might prescribe regulations for bakehouses in each and every province of the Dominion. Then the same thing would apply to butchers, wine merchants and everybody; there would be nothing left on that view. What I submit to your Lordships is this, that a meaning must be found for these words which will not make such an inroad upon the domain of the provinces under section 92, and that is indicated, as I submit correctly, by Sir Montague Smith in the passage I am about to read.

VISCOUNT HALDANE: Is it your case that no trade or business which does not come within one of the expressly enumerated heads can come within "the regulation of trade and commerce"?

SIR ROBERT FINLAY: I should not care to put it in that wide way. What is meant by "the regulation of trade and commerce," as this judgment says, is the regulation of trade and commerce inter-provincially and with other countries, and possibly the regulation in a general way of trade, but not laying down regulations for a particular trade.

LORD PARKER OF WADDINGTON: For any particular trade.

SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER OF WADDINGTON: Poisons, munitions or any other trade at all.

SIR ROBERT FINLAY: With regard to poisons and munitions, such a subject as the control of dynamite, conceivably it might be so. That was one of the illustrations put in *Russell* v. *The Queen*, that the control of dynamite might be a matter for the Dominion. That would be related to the Criminal Law.

VISCOUNT HALDANE: Lord Herschell put the illustration of an Arms Act. The same question had arisen with regard to arms.

SIR ROBERT FINLAY: Yes, my Lord, he did. May I come to closer quarters with it.

THE LORD CHANCELLOR: Your case is that no particular trade can be regulated under sub-head 2.

SIR ROBERT FINLAY: Inter-provincial trade, and what I might call a particular branch of inter-provincial trade, but no trade in a province can be regulated, and it does not mean that you prescribe the regulations for all the provinces, because you are dealing with essentially provincial matters. Your Lordships see what I mean to convey, that if it is a matter affecting intercourse in the way of trade and commerce between two provinces, or intercourse between the Dominion and countries beyond the seas, either the British Dominions or foreign countries, that is a matter which this covers. That is the meaning which anyone, I venture to say, would attribute to the expression "regulation of trade and commerce." It is the idea that occurs to one. It is not the regulation of trade, it is the regulation of trade and commerce, and the idea that is at once suggested to one is what is elaborated by Sir Montague Smith in the portion of his judgment that I am just coming to.

VISCOUNT HALDANE: I cannot see how you would get an Arms Act in.

SIR ROBERT FINLAY: The Arms Act, if it came in at all, would come in under "Militia, Military and Naval Service and Defence."

VISCOUNT HALDANE: An Arms Act is nothing to do with militia. I mean the kind of Arms Act which deals with revolvers, etc.

SIR ROBERT FINLAY: Head 7 is: "Militia, Military and Naval Act Service and Defence."

VISCOUNT HALDANE: That is nothing to do with the kind of arms that Lord Herschell is speaking of.

SIR ROBERT FINLAY: It may be necessary to refer to what was said by way of discussion in *Russell* v. *The Queen* on this subject. I do not wish to trench unnecessarily upon matters so combustible as *Russell* v. *The Queen*, but some of the discussions there may throw some light upon some of the questions which your Lordships have put. May I say that no answer has been attempted to Lord Parker's question, which is identical in substance with what is put in the sentence which I have just read on page 112.

> "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."

Then the judgment goes on:—

> "'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, chapter 11)."

That, in Ruffhead's edition of the Statutes, is 5 Anne, chapter 8.

> "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.'"

If your Lordships would look at the schedule to the Act which contains the Treaty of Union the articles are set out in the Statute.

VISCOUNT HALDANE: I thought it was 7 Anne.

SIR ROBERT FINLAY: No, it is either the 5th or 6th.

VISCOUNT HALDANE: The Act of Union, I thought, was passed in 1707.

SIR ROBERT FINLAY: Yes, my Lord. I forget when Queen Anne came to the throne.

THE LORD CHANCELLOR: 1702.

SIR ROBERT FINLAY: According to the different editions of the Statute it is either the 5th or 6th of Anne. In Ruffhead's edition it is the 5th Anne, chapter 8. Sir Montague Smith cites the 6th Anne, chapter 11, but it is the same Statute. Now if your Lordships would kindly turn to these two Articles that are there referred to, the 5th Article which Sir Montague Smith refers to is:

> "That all ships or vessels belonging to Her Majesty's subjects of Scotland, at the time of ratifying the Treaty of Union of the two Kingdoms in the Parliament of Scotland, though foreign built, be deemed, and pass as ships of the build of Great Britain; the owner, or where there are more owners, one or more of the owners, within twelve months after the 1st of May next, making oath,"

and so on, that the same belong[ed] to him. Then Article VI.:

> "That all parts of the United Kingdom for ever, from and after the Union, shall have the same allowances, encouragements, and drawbacks, and be under the same prohibitions, restrictions and regulations of trade, and liable to the same customs and duties on import and export; and that the allowances, encouragements, and drawbacks, prohibitions, restrictions and regulations of trade, and the customs and duties on import and export, settled in England when the Union commences, shall, from and after the Union, take place throughout the whole United Kingdom; excepting and reserving the duties upon export and import of such particular commodities, from which any persons, the subjects of either Kingdom, are specially liberated and exempted by their private rights, which, after the Union, are to remain safe and entire to them in all respects, as before the same. And that from and after the Union no Scots cattle carried into England, shall be liable to any other duties, either on the public or private accounts, than those duties to which the cattle of England are or shall be liable within the said Kingdom."

Then it goes on to refer to the rewards granted on the exportation of certain kinds of grain, giving some details with regard to them.

THE LORD CHANCELLOR: The best way of devising the importation of food into the country.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: You are taking prohibitions as the same as regulations of trade. To take the instance of the provision in the Forbes Mackenzie Act—

SIR ROBERT FINLAY: The regulations of trade there referred to are regulations of trade with regard to oversea trade. I do not think it has ever been suggested that the Forbes Mackenzie Act or any other local provision in Scotland with regard to the liquor trade infringed the Articles of Union.

VISCOUNT HALDANE: I see nothing to confine it to oversea trade.

SIR ROBERT FINLAY: It would be saying that the Treaty of Union provided that the regulations of trade were to be the same, and therefore you could not have one law for bakers in Scotland and another law for bakers in England. That is not what the article means at all. May I illustrate my meaning by reading the next sentence in the judgments of your Lordships' Board in Parsons' case, after referring to these articles:

> "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."

VISCOUNT HALDANE: If you asked me I should say the Imperial Parliament, being omnipotent in the matter, had over and over again disregarded the Treaty of Union.

SIR ROBERT FINLAY: One well known case is that of the disestablishment of the Irish Church. In the case of the Treaty of Union with Scotland the same

question has been mooted in connection with the disestablishment agitation in Scotland. That would clearly be contrary to the Treaty of Union, but the answer is Parliament is omnipotent and the Imperial Parliament is supreme and sovereign and may enact anything, whether contrary to the Treaty of Union or not. Whether it is right to do so is another matter. It has never been suggested—as Sir Montague Smith said that the regulations of trade referred to in Article VI. had anything to do with trade except overseas. Among the many objections to the Forbes Mackenzie Act I never heard it said that it was contrary to the Treaty of Union.

VISCOUNT HALDANE: I do not think that Sir Montague Smith is right. It may be that the aversion to whisky of the Scots people got the better of their patriotism.

SIR ROBERT FINLAY: I am very glad to hear of the "aversion to whiskey."

VISCOUNT HALDANE: On Sunday.

SIR ROBERT FINLAY: The reading of the article, coupled with Article V., is, I submit, perfectly clear, it is dealing with the trade with the colonies and foreign countries, and the regulations of trade there referred to must be taken in connection with their context.

VISCOUNT HALDANE: It does not say so.

SIR ROBERT FINLAY: Surely it says so implicit, but not explicit.

> "That all parts of the United Kingdom for ever, from and after the Union, shall have the same allowances, encouragements and drawbacks, and be under the same prohibitions, restrictions and regulations of trade, and liable to the same customs and duties on import and export."

Could it be said, taking the words in that connection, that meant that the trade of a baker was to be regulated in Scotland the same way as in England? I submit not. Then it goes on:

> "and that the allowances, encouragements, and drawbacks, prohibitions, restrictions and regulations of trade, and the customs and duties on import and export, settled in England when the Union commences, shall, from and after the Union, take place throughout the whole United Kingdom."

THE LORD CHANCELLOR: The difficulty of applying it to this case is that it may well be that all those words you have read with regard to customs and duties and prohibitions and drawbacks and restrictions show what is meant in that Statute, but it does not help us to see what is meant in this Statute, where there are no such words.

SIR ROBERT FINLAY: Only to this extent, there you have the expression "regulations of trade" occurring in a context which shows what it referred to.

THE LORD CHANCELLOR: Here we have not them occurring in that context.

SIR ROBERT FINLAY: No, we have "regulation of trade and commerce," and in looking about for a meaning I submit the Board were justified in referring to the Treaty of Union with Scotland and saying "regulations of trade" may be used in some such sense, I submit it is the correct sense, regulations of trade and commerce, one combined whole. "Regulations of trade and commerce," my Lords, I submit means you are dealing with the trade of the Kingdom as a whole, not the internal trade of any particular province but with interprovincial trade, say with other countries beyond the seas.

LORD PARKER: It is the same argument, is not it, which is emphasized by Lord Watson with regard to the general powers. He says:

> "To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by section 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the Provincial Legislatures."

Every word of that seems to apply if you give a very broad construction to the regulation.

SIR ROBERT FINLAY: Yes, my Lord, and it is that head of consideration that is referred to in the judgment of the Board delivered by Lord Atkinson in the Montreal Railway case.

LORD PARKER: If you can regulate any one trade you can proceed and regulate them all, one after the other. Then where would be the right which the provinces had power to exercise?

SIR ROBERT FINLAY: It would be absolutely gone. Then it is said they could not do it in the case of one province. If they do it in the case of each of the nine provinces that makes it all the worse; it does not make it a bit the better, they have infringed the autonomy of each of the nine provinces instead of infringing the autonomy of only one. By multiplying the wrong you do not change its nature. You are interfering with matters provincial in their nature: the fact that you do it in nine cases instead of only in one does not mend matters at all. The passage which your Lordship quoted was from the report of the argument in the 1896 case.

LORD PARKER: Yes. It seems to apply to your argument.

SIR ROBERT FINLAY: Yes, with only this difference, your Lordship sees that power to the Dominion to legislate for peace, preservation and good order is qualified by saying that it is not falling under the enumerated heads. There is another passage in which Lord Herschell in that same argument, I think, drew attention to the fact that the words are "trade and commerce," and based an argument upon that. The reference to the report in 1896 Appeal Cases is page 348. I was going to read this a little later, but I should like to find the particular passage which relates to this head. May I, while I am finding the passage in the report in the 1896 Appeal Cases, just refer to what Lord Herschell said in connection with the observation of Lord Watson to which my Lord Parker has called my attention. It is at page 294 of the report of the argument, and he says:

> "I think it is open to doubt whether the words, regulation of trade and commerce, do naturally and properly cover regulations which may affect prescribed conditions of a particular trade. It it very broad. It is not 'trade or commerce,' but it is 'trade and commerce'—very broad words, (Mr. Blake): Yes, of course they are broader.

Then Lord Watson says this:

> "The word 'general' was meant to exclude the right to deal with the particular trade and make general regulations for it."

VISCOUNT HALDANE: Where does he get "general"?

SIR ROBERT FINLAY: Mr. Blake says:

> "I do not think there is any word 'general' in the Act. It is the regulation of trade and commerce.
>
> (Sir Richard Couch): There is no word 'general' in the judgment?
>
> (Mr. Blake): I rather think not.
>
> (The Lord Chancellor): Yes, the word 'general' is in the judgment.
>
> (Lord Davey): But it is not in the Act.
>
> (Mr. Blake): No, my Lord."

It is in the judgment and he was quoting from that, but I do submit to your Lordships that is a very important observation made by Lord Herschell and followed up by Lord Watson where it is "trade and commerce." He says: "I think it is open to doubt whether the words, regulation of trade and commerce" —Then " (Lord Watson) The word 'general' was meant to exclude the right to deal with the particular trade and make general regulations for it."

VISCOUNT HALDANE: Where is that?

SIR ROBERT FINLAY: At page 294 of the report of the argument on the Liquor Prohibition Appeal, 1895.

VISCOUNT HALDANE: That is only an observation. You can only take the report. Lord Watson was very careful in the choice of his language. What did we decide, for better or for worse, in the John Deere Plow case on this point? We said you could legislate under the "peace, order and good government" words because the matter was not one provided for in section 92. Then we said, having

the power so to legislate, you could "regulate." That was the only way I think in which we brought that in.

SIR ROBERT FINLAY: No, my Lord, I am going to rely very much on what your Lordship said in the John Deere Plow case on this point. I think what was really decided there was this, that where the Dominion Parliament has the power of incorporating a company, the province cannot by imposing a term on a Dominion company as such in any way hamper the action—

VISCOUNT HALDANE: That is what we said.

SIR ROBERT FINLAY: That is the decision.

VISCOUNT HALDANE: That is all the decision?

SIR ROBERT FINLAY: That is all the decision.

VISCOUNT HALDANE: We did refer to the "regulation of trade and commerce" as ancillary to the power to legislate which existed because section 92 did not apply there, what we said you will see when you come to the judgment.

SIR ROBERT FINLAY: I will deal fully with that case.

VISCOUNT HALDANE: I think we said incorporating companies was one thing; regulating when incorporated was another; and being Dominion companies it seemed appropriate to use the head of "regulation of trade and commerce" as giving power to regulate Dominion companies.

SIR ROBERT FINLAY: There are observations relating to the field of which the question there formed part, but the real point was it was held illegal for a province to impose a restriction upon a Dominion company as such.

VISCOUNT HALDANE: That was it, and so far as the "regulation of trade and commerce" came in it related not to any particular trade but to this, that there were Dominion companies operating and it seemed proper to call in aid that power in laying down the conditions that regulated.

SIR ROBERT FINLAY: Yes, my Lord, by and by I shall read a passage in the judgment in which your Lordship, I think, said that you agreed with what was said in Parsons' case about the meaning of "regulations."

VISCOUNT HALDANE: Some things that were said in Parsons' case.

SIR ROBERT FINLAY: I do not mean everything that was said in Parsons' case.

THE LORD CHANCELLOR: In the Liquor Prohibition Appeal, at page 360, is the passage that deals with the question of the right to carry weapons, it is rather an instructive passage. There the learned Judge says:

> "An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province, would be within the authority of the Provincial Legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion."

It seems to me to suggest this, that if by that is meant that the Act restricting the right to carry weapons of offence within the province would be within the authority of the Provincial Legislature and therefore could not be dealt with by the Dominion Parliament it would follow that the Dominion Parliament would not be able to make a law in which they said in none of the provinces shall weapons be sold to young persons.

SIR ROBERT FINLAY: They could not, and that is a very good illustration of the proposition I ventured to advance, that the matter is not mended at all by their interfering with provincial matters in each and all of the provinces; you are exactly on the same basis where you are dealing with one province and where you are dealing with all.

THE LORD CHANCELLOR: That you do not represent the Dominion because you represent all the provinces? Yet, when dealing with the trade of all the provinces together it must make up the Dominion. It is a question of area.

SIR ROBERT FINLAY: Yes, but you are really committing a nine-fold wrong.

THE LORD CHANCELLOR: Because you are doing in one Statute what you could not do in nine separate ones.

VISCOUNT HALDANE: This is an interesting passage, because first of all an Act restricting the right to carry weapons or their sale to young persons is a clear interference with "civil rights," but when you come to "traffic in arms," for instance, the sale of revolvers, there you are dealing with a particular trade.

SIR ROBERT FINLAY: That is a matter closely connected with criminal law or possibly national defence.

VISCOUNT HALDANE: No. The reason is that the Statute has proceeded upon the footing that it is not desirable that people should be allowed to buy revolvers without a license. That is the nature of the thing. You cannot sell arms—it is regulating a particular trade in the general interest.

SIR ROBERT FINLAY: Very nice questions might arise as to which particular head this fell under.

VISCOUNT HALDANE: I do not say Insurance is on the same footing.

SIR ROBERT FINLAY: No, I think that stands by itself. In *Russell* v. *The Queen*, dealing with drink, I think they a little assimilated it to a law dealing with explosives and things of that kind. I do not desire at the moment to anticipate this passage; it occurs in the judgment which I was going to take a little later in the 1896 case—the passage is not in the argument but in the judgment. We rather stopped to look for a passage in the judgment in the 1896 case carrying out the view expressed in the dictum in the course of the argument by Lord Herschell and Lord Watson. Your Lordship, I think, has referred to the bottom of page 360?

VISCOUNT HALDANE: Yes.

THE LORD CHANCELLOR: I do not think we are dealing with the same book.

SIR ROBERT FINLAY: This is on page 360 in the Appeal Cases, and the passage is:

> "The general authority given to the Canadian Parliament by the introductory enactments of section 91 is '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 it is declared but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from section 92, which is enacted by the concluding words of section 91, has no application."

These concluding words provided that any matter coming within the classes enumerated in section 91

> "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" in section 92—then it goes on "and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to Provincial Legislatures by section 92."

VISCOUNT HALDANE: Under "peace, order and good government"?

SIR ROBERT FINLAY: Yes, my Lord, and "peace, order and good government," in the passage to which Lord Parker referred related to a non-enumerated head, but the same conditions come in in another form when you have to construe such words as "regulation of trade and commerce."

VISCOUNT HALDANE: Here comes in the importance of the John Deere Plow case. If that had not been the principle then though the Provincial Legislature could not have incorporated a company with general objects, it might, under the power to legislate under "property and civil rights" have interfered with the operations of Dominion companies. We said in the John Deere Plow case that the importance of "regulation of trade and commerce," was that it enabled the Dominion Parliament to legislate exclusively in respect of general companies which belonged to the Dominion because the province had no jurisdiction over them under the "regulation of trade and commerce."

SIR ROBERT FINLAY: I think that the actual decision is confined to the narrower point, that the Provincial Legislature could not by any enactment

directed distinctively against Dominion companies put any [illegible] upon their exercise within the province of the Dominion right.

VISCOUNT HALDANE: Could that have been so but for [illegible] of head 2 of section 91? I am taking this very principle here. Under "peace, order and good government," the province might have interfered with "civil rights"—if you only incorporated a company under the "peace, order and good government" words, the provinces might have interfered under the guise of "civil rights."

SIR ROBERT FINLAY: In the following cases the question of the right to incorporate companies arises directly, and I do not wish to anticipate the argument, but in the John Deere Plow case it was assumed—it had never been contested in the Courts in America, and was not raised in the cases on appeal as to whether the Dominion Company was properly incorporated, it was a company incorporated to carry on business in any province.

THE LORD CHANCELLOR: It was.

SIR ROBERT FINLAY: Then your Lordships treated that company as properly incorporated, and then said it cannot be legal for the Provincial Parliament to do anything except to subject the Dominion Parliament in the province to the law that applies to all companies; any laws directed against Dominion Parliament companies specifically, such as requiring them to take out a license, are *ultra vires*.

VISCOUNT HALDANE: I want to know why we said that—I am confining myself simply to the language used in the judgment—unless it was that the Dominion had exclusive power to legislate and make the legislation in question under head two.

SIR ROBERT FINLAY: I am trenching upon what will come up in the subsequent cases, but I am only submitting, I do not think it could be said that the power of incorporating companies fell under the "regulation of trade and commerce." That is my submission to your Lordships.

VISCOUNT HALDANE: We never said that, but we said the restriction of provincial power to interfere may be affected.

SIR ROBERT FINLAY: Yes, my Lord, and your Lordships decided they could not hamper the action of these companies validly incorporated. I will finish the passage which I was reading at page 360 in the 1896 case:—

> "and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to Provincial Legislatures by section 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92."

Both things are essential, first that in the general power for the peace, order and good government of Canada you must be dealing with matters of Canadian interest; secondly you cannot in so dealing trench upon the provincial matters.

> 'To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by section 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the Provincial Legislatures."

MR. NEWCOMBE: That, of course, has no relation to "trade and commerce."

SIR ROBERT FINLAY: That, of course, relates to the "peace, order and good government," but what I say is that the considerations which are put forward there by Lord Watson are directly applicable when you have to construe the scope of section 91 (2); you ought to construe the words "regulation of trade and com-

merce" in such a way as will not affect an inroad upon the specific matters conferred on the provinces by section 92.

THE LORD CHANCELLOR: Yet at the bottom of that page there is a passage which forms part of the judgment and really seems to contradict the argument you base on the earlier part of the judgment: "Their Lordships do not doubt that some matters"—this must be some matters of trade and commerce—"in their origin local and provincial," that must mean that they are particular trades; it cannot be general—

SIR ROBERT FINLAY: I do not think that refers to trade and commerce particularly. It is very important; I have noted it, I was going to refer to it, and I will give your Lordships the references at once. I had better begin a little higher up:—

> "In construing the introductory enactments of section 91, with respect to matters other than those enumerated, which concern the peace, order and good government of Canada, it must be kept in view that section 94, which empowers the Parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick does not extend to the province of Quebec; and also that the Dominion legislation thereby authorized is expressly declared to be of no effect unless and until it has been adopted and enacted by the Provincial Legislature. These enactments would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of section 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole. Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion."

I do not think his Lordship is there referring to the "regulation of trade."

VISCOUNT HALDANE: I do not know.

THE LORD CHANCELLOR: What else could he be referring to?

SIR ROBERT FINLAY: The general words "peace, order and good government."

THE LORD CHANCELLOR: He exemplifies about revolvers later on.

SIR ROBERT FINLAY:—

> "But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the Provincial Legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons within the province would be within the authority of the Provincial Legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which their Lordships conceive, might be competently dealt with by the Parliament of the Dominion."

Now Lord Macnaghten made some observations in the Manitoba case to which I should like to draw attention in which he seems to have thought that Lord Watson, where he referred to some matters in their origin local and provincial attaining dimensions so as to affect the body politic of the Dominion, referred to matters within section 92 (16). The Manitoba case is reported in Law Reports, 1902, Appeal Cases, and the passage is at page 78.

VISCOUNT HALDANE: The judgment there was delivered by Lord Macnaghten?

SIR ROBERT FINLAY: Yes, my Lord, it is a very important case. The case begins at page 73.

VISCOUNT HALDANE: I think that case held in substance, did not it, that a law going beyond local option amounting to out and out prohibition was within the powers of the province?

SIR ROBERT FINLAY: Exactly. The head-note puts it in a sentence:—

> "The Manitoba Liquor Act of 1900 for the suppression of the liquor traffic in that province is within the powers of the Provincial Legislature, its subject being and having been dealt with as a matter of a merely local nature

in the province within the meaning of British North America Act, 1867, section 92, sub-section 16, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly at least with business operations outside the province."

At page 77 Lord Macnaghten, in delivering the judgment of the Board, says something which touches upon what was said by Lord Watson in the passage which has just been read:—

"The drink question, to use a common expression which is convenient if not altogether accurate, is not to be found specifically mentioned either in the classes of subjects enumerated in section 91 and assigned to the Legislature of the Dominion, or in those enumerated in section 92 and thereby appropriated to Provincial Legislatures. The omission was probably not accidental. The result has been somewhat remarkable. On the one hand, according to *Russell* v. *Regina*, it is competent for the Dominion Legislature to pass an Act for the suppression of intemperance applicable to all parts of the Dominion, and when duly brought into operation in any particular district deriving its efficacy from the general authority vested in the Dominion Parliament to make laws for the peace, order and good government of Canada. On the other hand, according to the decision in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*," (that is the 1896 case), "it is not incompetent for a Provincial Legislature to pass a measure for the repression, or even for the total abolition, of the liquor traffic, within that province, provided the subject is dealt with as a matter 'of a merely local nature' in the province, and the Act itself is not repugnant to any Act of the Parliament of Canada. In delivering the judgment of this Board in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, Lord Watson expressed a decided opinion that provincial legislation for the suppression of the liquor traffic could not be supported under either No. 8 or No. 9 of section 92."

8 and 9 are: "(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."

"His Lordship observed that the only enactments of that section which appeared to have any relation to such legislation were to be found in Nos. 13" (Property and civil rights in the province), "and 16" (which is generally all matters of a merely local or private nature in the province), "which assigned to the exclusive jurisdiction of Provincial Legislatures (1) 'property and civil rights in the province,' and (2) 'generally all matters of a merely local or private nature in the province.' He added that it was not necessary for the purpose of that appeal to determine whether such legislation was authorized by the one or by the other of these heads. Although this particular question was thus left apparently undecided, a careful perusal of the judgment leads to the conclusion that, in the opinion of the Board, the case fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion. In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of a local evil, rather than the regulation of property and civil rights—though, of course, no such legislation can be carried into effect without interfering more or less with 'property and civil rights in the province.' Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter." That shows that in the judgment of Lord Macnaghten it was under the head of "peace, order and good government," that that legislation, if at all, was to be justified. He could not have said that if he thought it fell within section 91 (2) because, if an enumerated subject, then the fact that the province has jurisdiction under section 92 is immaterial. It really shows that Lord Macnaghten regarded that legislation as relating to the "peace, order and good government." Now, my Lords, I think I may return to the judgment which I was reading in Parsons's case in 7 Appeal Cases. I had got to the top of page 113:—

"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. 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." My learned friends laid great stress upon the words "to regulate by legislation the contracts of a particular business or trade such as the business of fire insurance in a single province." It is not mended by its being done in nine single provinces.

LORD PARKER: Is that quite so—it is not mended so far as the "civil rights" clause is concerned by being so done, but is not it mended with regard to the matters of "local" interest clause, No. 16? According to Lord Watson a thing might be of local interest at one moment and then grow so big by spreading over the whole of the provinces that it becomes of general importance.

SIR ROBERT FINLAY: So as to bring it within "peace, order and good government."

LORD PARKER: So as to bring it outside section 92.

SIR ROBERT FINLAY: That it has got so big that it has "put away" the "childish things" of section 92 and risen into the higher region of the Dominion control.

LORD PARKER: I think that is what Lord Macnaghten meant in the passage you have read, did not he?

SIR ROBERT FINLAY: No, I think what Lord Macnaghten points out is that—

LORD PARKER: The question is whether it is in either No. 8 or No. 9 of section 92. Then he says:—

"The better opinion appears to be that it is within Nos. 13 or 16."

VISCOUNT HALDANE: A local institution in the province.

SIR ROBERT FINLAY: Yes, and he says it must be head 16; inasmuch as it was on the ground of "peace, order and good government," if at all, that it could be justified, that ground being a ground which does not apply if there is anything in section 92 inconsistent with it, the legislation would be *ultra vires*—he says that it really refers to head 16 as a matter of local concern.

LORD PARKER: He must mean if the Dominion legislate on the liquor traffic it is because it has become so great an evil that it is a matter of Dominion concern; that is to say it is no longer head 16. You could not take it out of head 13, because it would be "civil rights," but you must take it out of 16 because it might cease to be local. That is how I understand: "Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter." But I understand he means if it is in No. 16, then according to what is said it is so big an evil that it is of Dominion concern.

SIR ROBERT FINLAY: I am not sure that any attempt that has ever been made to explain *Russell* v. *The Queen* has been successful.

THE LORD CHANCELLOR: I cannot help thinking that the illustration by Lord Haldane yesterday is the most formidable thing in your way. It was with regard to the gold mining industry. The gold mining industry may well be confined to one province; yet further discoveries might extend it. It might be of enormous importance that you should regulate the whole industry throughout the Dominion. Is it your argument that it would be incompetent to the Dominion

Parliament to do it because they would have selected a particular industry for their control, and not have made "general regulations"?

SIR ROBERT FINLAY: I think for that you would require an amendment of the Constitution.

THE LORD CHANCELLOR: It seems to me that that must be the necessary corollary of your argument.

SIR ROBERT FINLAY: I submit it would be so.

THE LORD CHANCELLOR: It is a very striking illustration.

SIR ROBERT FINLAY: If it had occurred to them it may be that they might have put it in the Constitution.

THE LORD CHANCELLOR: You mean if they had thought of it as they did of "banking," they might have put in "gold mining"?

SIR ROBERT FINLAY: They might or might not.

VISCOUNT HALDANE: It is an illustration of a principle which has been recognized in what is called the higher logic—that increase of quantity may give rise to change in quality.

SIR ROBERT FINLAY: It may—that you cannot by simply putting together nine "provincial purposes" make a "Dominion purpose," because the provincial purpose remains provincial. You have nine instead of one. Take the gold mining which your Lordship put, a gold mine in a particular province; there the supply of gold from that may become a matter of Canadian importance.

VISCOUNT HALDANE: Yes, just as to increase your household expenditure beyond a certain point may change your status and make you a bankrupt.

SIR ROBERT FINLAY: Yes, my Lord, or the supply of gold may be affected in Canada.

VISCOUNT HALDANE: It is not enough to say that it is merely quantity, because quantity may change quality.

SIR ROBERT FINLAY: But I was going to point out that a heavy blow is dealt at the whole theory put forward by my friends about the growth of a particular industry by the provision of head 10 of section 92. Your Lordships recollect that section 91 reserves to the Dominion any heads of subjects excepted from the enumeration. In section 92 (10) you have this, there are assigned to the province: "Local works and undertakings other than such as are of the following classes: (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 steam ships between the province and any British or foreign country;" then "(c)" and this is the head on which I desire to comment, "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."

VISCOUNT HALDANE: I think you are quite entitled to make that observation; it is a point that where the legislature intended that Canada should have power to change the character of the industry—its quality—it has said so.

SIR ROBERT FINLAY: Yes; and what the Dominion is claiming is that where that power is not conferred upon it it may exercise an analogous power, and by treating the matter as one of Canadian importance give itself jurisdiction. I say it cannot do it.

VISCOUNT HALDANE: I can conceive abuses coming in, but I can conceive that it is absolutely necessary for a great country like Canada to be able to act as a whole with regard to particular things.

SIR ROBERT FINLAY: Yes, it may be that as time goes on the Constitution may be amended so as to extend the powers of the Dominion company, but in the meantime they must work within the limits of the Constitution.

VISCOUNT HALDANE: Yes.

THE LORD CHANCELLOR: Then there is another difficulty. Take local works and undertakings which you are referring to; that contemplates this, that any work or undertaking which is not strictly local is within the control of the Dominion Parliament. We know that section 92 is the section which gives the power to the Provincial Parliament, and it gives them power over "local works and undertakings other than." "(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." Then see what that means, that directly you have an undertaking which is not strictly confined to the province it instantly comes under the control of the Dominion Parliament.

SIR ROBERT FINLAY: Through lines of railway.

THE LORD CHANCELLOR: An "undertaking" is a separate thing; it might be an electric light concern, or a telephone concern.

SIR ROBERT FINLAY: I agree, my Lord, but the words are perfectly clear. The province has jurisdiction over "local works and undertakings other than such as are of the following classes."

THE LORD CHANCELLOR: Let me take the telephone. The telephone might be reasonably called an "undertaking." If the undertaking of the telephone extended beyond the province it would not be within (10).

SIR ROBERT FINLAY: It would not.

THE LORD CHANCELLOR: Then it would be within the power of the Dominion Parliament.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Yet it would be a "trade" or "industry."

SIR ROBERT FINLAY: Yes, my Lord, but it would be under this express enactment.

THE LORD CHANCELLOR: Which express enactment?

SIR ROBERT FINLAY: Section 92 (10) coupled with the provision in section 91.

THE LORD CHANCELLOR: As to "peace, order and good government."

SIR ROBERT FINLAY: No, my Lord, under an assigned head it is section 91 (29). The power conferred on the Dominion Parliament, and the exclusive power conferred on the Dominion Parliament extends to "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." That enactment that the Dominion Parliament shall have exclusive power with regard to through railways, telegraphs, telephones, extending into more than one province—

LORD PARKER: But surely, Sir Robert, head 29. "Such classes of subjects as are expressly excepted," brings in, as if they had been repeated there, all the exceptions in section 92 (10)?

SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: Supposing you have an undertaking not within the exceptions and not local, you fall back on the general powers of section 91, and not the specified powers.

SIR ROBERT FINLAY: "Local works and undertakings," I suppose means works and undertakings in the province.

LORD PARKER: Suppose you have an insurance company which extends beyond the province?

SIR ROBERT FINLAY: Head 10 could not have any application whatever.

Lord Parker: I do not think it could, it is not within (10); it is not within the exceptions; it is not within all matters of purely local interest—where is it? It can only come within the general power, or "regulation of trade and commerce."

SIR ROBERT FINLAY: The "general power" I understand is abandoned. MR. NEWCOMBE: No.

LORD PARKER: I did not understand that the "general power" was abandoned; I thought all that was abandoned was that, if the general power applies, you could infringe provincial rights expressly reserved.

VISCOUNT HALDANE: That is all.

SIR ROBERT FINLAY: Then I must deal with that head. I understood my friend to rely, and I said yesterday, that I understood that they relied, now only on trade and commerce.

VISCOUNT HALDANE: Oh, no, I did not understand that. MR. NEWCOMBE: Certainly not.

VISCOUNT HALDANE: I understood them to say they no longer contended that under "peace, order and good government," you could legislate so that you could trench on the enumerated heads of the provincial powers.

SIR ROBERT FINLAY: I think they went a good deal further. MR. NEWCOMBE: Might I explain my position, because I put my case that a matter of legislation might not fall, by reason of its magnitude or for other reasons, within any of the enumerations of section 92; it might also not fall within any of the enumerations of section 91. Then the Dominion could legislate for that under the words "peace, order and good government." I did not submit, as my learned friend Mr. Upjohn argued, that if you have a subject which is confessedly within the enumerations of section 92, therefore, in that case, you can regulate that by force of Dominion legislation.

VISCOUNT HALDANE: In other words, you cannot "trench," under the general words of "peace, order and good government." It is impossible that Mr. Newcombe should have intended to make such a submission, Sir Robert, as you put, because of the character of the Canadian Constitution. It differs from the Constitution of the United States and also from the Constitution of the Australian Commonwealth, as we pointed out in the judgment in the Sugar Refining case, by this, that all the non-enumerated powers are not as in the other two Constitutions delegated to the provinces, but are reserved to the Dominion. It is residuary legatee of all constitutional powers; it is not a true Federal Constitution at all. We pointed that out of the Canadian Constitution in the Australian case. It was a coming together of the various provinces, some which belonged to Canada, others which did not, and they passed resolutions at the Quebec meeting, and on those resolutions they made a new Constitution altogether, the Imperial Parliament being the instrument that fashioned it, and it gave all the residuary powers to the central Government. If that is so, the words "peace, order and good government" are clear words, they cover the residuary powers.

SIR ROBERT FINLAY: Yes, my Lord, so long as they do not trench on any of the enumerated heads.

VISCOUNT HALDANE: It is said in the beginning of section 91 that you cannot trench on these heads.

SIR ROBERT FINLAY: It is, in terms. I am very glad that my misunderstanding of my friend's admission yesterday has been cleared up, because I had proposed to confine my argument entirely to the head of "trade and commerce."

THE LORD CHANCELLOR: I was under the misapprehension too, and I may have misled you. I certainly understood that the position was this: No one doubts that the whole of the Dominion powers are due to the powers being exercised for the "peace, order and good government of Canada." That is quite plain. The only distinction between the two classes is the enumerated sections control section 92, and the unenumerated powers do not; if, therefore, interference has anything whatever to do with a "civil right" in the province it clearly cannot be legislated for by the Dominion Parliament under the residuary powers of the "peace, order and good government," and must be legislated for under the enumerated powers. I understood, as the result of that, they claimed that it was legislated for under sub-head (2) and that they did not urge any further that it was no interference with "civil rights." I understood that, I may be wrong.

VISCOUNT HALDANE: That is what I understood too, but the two are consistent; you can use "peace, order and good government" to base the legislation, but not to "trench." You pray in aid of "peace, order and good government," the enumerated case of "trade and commerce," to enable you—

THE LORD CHANCELLOR: That is quite right. If it is a misunderstanding I may have helped to mislead you, because I shared the same view.

SIR ROBERT FINLAY: I will not for a moment seek to confine my friend to it.

THE LORD CHANCELLOR: After all the only thing it comes to is this: an argument whether legislation affecting insurance affects "civil rights"? MR. NEWCOMBE: As to whether this Act is an Act regulating insurance or an Act with respect to "property and civil rights in the province." What is the character of the legislation: is it "property and civil rights in the province," or "regulation of trade"?

SIR ROBERT FINLAY: It is regulating insurance; therefore, it affects "property and civil rights in the province."

LORD PARKER: Put it by way of a concrete instance. Suppose you take an insurance company which does not carry on business solely in one province; it is not a local matter; it is not a local undertaking. If anybody has any power with regard to it, to regulate it, it must be the Canadian Government. That power may arise under the express words or under the general power. If it arises under the express words, the enumerated subjects, like "trade and commerce," the whole Act is valid in this case. On the other hand if it does not arise under that it may be partly valid, it may be valid so far as it does not infringe upon "civil rights," and so far as I can see in looking at section 4, the only materiality of that construction is this section 4 incapacitates not only companies carrying on business in more than one province, but persons who carry on business wholly in one province, as far as they are concerned, it might be void, but it might be good under the general powers as to all companies carrying on business in more than one province.

SIR ROBERT FINLAY: I shall deal with both heads, and I shall submit in the first place it certainly does not fall within "regulation of trade and commerce," and secondly my friend cannot justify it under "peace, order and good government."

LORD PARKER: Not wholly.

SIR ROBERT FINLAY: Not at all, I shall submit.

VISCOUNT HALDANE: Why not at all?

SIR ROBERT FINLAY: For this reason that, taken as a whole, the Act does trench upon "civil rights in the province," and it is therefore an infringement that is to say the Dominion Government has assumed to itself the right to say that a number of people who before could carry on business in the province shall not do it without a license.

VISCOUNT HALDANE: I think there are a good many points in the Act which might be the subject of most serious argument if it is only within "peace, order and good government," you do interfere by this Act. All this shows the enormous difficulty of answering an abstract question with regard to this Act, How we are to guard ourselves I do not know at present.

SIR ROBERT FINLAY: What was said by the Board in the reference on the McCarthy Act was simply that the legislation was *ultra vires*, and I invite your Lordships to come to that conclusion. How far reasons are to be given is another matter. Your Lordships after the argument has taken place, will probably desire to go to some extent into the principle on which the conclusion reached rests, but that is, of course, entirely for your Lordships. I was only saying that I shall deal with both heads, of course, now I understand what my friend meant. I understand that my friend's admission had reference only to the particular argument my friend Mr. Upjohn was submitting about magnitude, but I took it as meaning something more.

THE LORD CHANCELLOR: I was certainly under the same misunderstanding.

VISCOUNT HALDANE: You are coming to the John Deere Plow case; there is a point on that.

SIR ROBERT FINLAY: Yes, my Lord.

LORD HALDANE: There the Board held that "property and civil rights" could not be construed literally following the principle I think laid down before by Lord Watson, when you got incorporation of companies with provincial objects excluding incorporation of companies which had not provincial objects, that showed that "property and civil rights" did not extend to the incorporation of companies with other than provincial objects. You see what I mean?

SIR ROBERT FINLAY: Yes, my Lord.

LORD HALDANE: In other words there is a complete disjunction, and a limitation in one head may also show another head must be read in a restricted sense. Lord Watson, I understood—and Lord Macnaghten, too, in the Manitoba case—followed the same principle.

SIR ROBERT FINLAY: Yes, my Lord, and in the second and third cases which are coming before your Lordships which directly raise that sort of question, all sorts of questions will emerge as to what amounts to carrying on business entirely within a province. For instance, suppose the only place of business of the com-

pany is in the province, it gets a great many offers for insurance from people outside the province.

VISCOUNT HALDANE: Applying that principle of construction if it be a true one practically it means that you can incorporate a company, acting through the Dominion Legislature in doing so, with more than provincial objects although thereby you have done what *primâ facie* trenches on "property and civil rights;" by reason of the exclusion in the other section as to provincial objects of companies it must be read in a restricted fashion and not encroached on.

SIR ROBERT FINLAY: I will deal with that, I will take the cases in order. I think there is something on page 114 in Parsons' case that I ought to read. This relates to a matter to which my Lord Haldane called attention earlier in my argument:

> "It was further argued on the part of the appellants that the Ontario Act was inconsistent with the Act of the Dominion Parliament, 38 Victoria, chapter 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. The Dominion Act contains the following provision, which clearly recognizes the right of the Provincial Legislature to incorporate insurance companies for carrying on business within the province itself."

I need not read that enactment again. Your Lordships will observe that the Court carefully avoid passing any opinion upon the question of the validity of that Dominion Act and for this very sufficient reason, that the only way in which it came in was it was said to be inconsistent with the regulations laid down in Ontario with regard to the form of the policy of insurance. They say there is no such inconsistency; therefore it is not necessary for them to consider, and they did not want to enter into an intricate question of that kind which was not necessary, and which moreover would have opened up issues of vast importance which did not arise in the case before them; they simply said assuming it to be within. What was said there about that Act could not be said about the present Act which does interfere with the rights of the province for the simple reason that a license must be taken out as a condition of carrying on business, and that license is withdrawable on infraction of any one of the regulations.

VISCOUNT HALDANE: Supposing you were right and that an insurance company incorporated within the province could carry on business throughout Canada, would not that be completely inconsistent with what is laid down here?

SIR ROBERT FINLAY: That an insurance company could be formed by the Dominion?

VISCOUNT HALDANE: No, the province.

SIR ROBERT FINLAY: What we shall argue in the next case and the third case is this, that every province has capacity to constitute the corporation, that it can confer the right to carry on business not only in the province itself, but it can confer the capacity to carry on business elsewhere, only that carrying on business elsewhere can be exercised merely if the other province allows it, or in a foreign country if the law of that country allows it.

VISCOUNT HALDANE: But the Dominion has no say in that according to you—the other province or foreign country—not the Dominion because it is a provincial matter. I am only wanting to see where you are inviting me to go.

SIR ROBERT FINLAY: It is not precisely in this case that my argument in answer to your Lordship's question really arises, I only said what I did because your Lordship invited me to express my view.

VISCOUNT HALDANE: All I mean is one must test this on both hypotheses.

SIR ROBERT FINLAY: I quite agree, and what your Lordship has said is enough to show how desirable it is that these cases should all be argued before judgment is given in one of them, because the considerations which arise are a good deal connected.

Now I think I may refer in illustration of what I have been saying to what was said in the *Bank of Toronto* v. *Lambe*, it is a case which I think has been just mentioned to your Lordships, it is reported in 12 Appeal Cases, page 575, the passage I am going to read is a passage at pages 585 and 586. Of course the question there was whether the Quebec Act of 45 Victoria imposing direct taxes on certain commercial corporations carrying on business in the province was *intra vires* of the Provincial Legislature. It was a tax imposed upon banks carrying on business within the province varying in amount with the paid up capital and the number of offices and so on, and it was held that was direct taxation within their competency whether or not the principal place of business was in the province or not. Into the discussion of what is direct or indirect taxation I need not go.

VISCOUNT HALDANE: Was the point here that the company was incorporated to carry on business in other parts of Canada and that coming into the province the province was entitled to tax it?

SIR ROBERT FINLAY: It was the Toronto Bank, and it had a branch at Quebec or Montreal.

VISCOUNT HALDANE:—Was it a question of whether the taxation was direct or not?

SIR ROBERT FINLAY: Yes. This is the case your Lordship referred to.

VISCOUNT HALDANE: First Lord Selborne in *The Queen* v. *Read*, second Lord Hobhouse in this case, and third Lord Moulton in *The King* v. *Cotton*.

SIR ROBERT FINLAY: Yes, my Lord, I hope that some day some of these cases about direct and indirect taxation may be reconsidered, but it is altogether remote from the present question.

VISCOUNT HALDANE: At the time that these judgments were given Mr. Mill was even a greater authority than he seems to be to-day.

THE LORD CHANCELLOR: If they wait long enough he will become an authority again.

SIR ROBERT FINLAY: At page 584 Lord Hobhouse has sufficiently cleared the ground for dealing with the matter on a general basis. "The next question is whether the tax is taxation within the province."

VISCOUNT HALDANE: He has quoted "John Stuart Mill" at great length.

SIR ROBERT FINLAY: Yes, my Lord.

> "It is urged that the bank is a Toronto corporation, having its domicil there, and having its capital placed there; that the tax is on the capital of the bank; that it must therefore fall on a person or persons, or on property, not within Quebec. The answer to this argument is that class 2 of section 92 does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any person found within the province may legally be taxed there if taxed directly. This bank is found to be carrying on business there, and on that ground alone it is taxed. There is no attempt to tax the capital of the bank any more than its profits. The bank itself is directly ordered to pay a sum of money; but the legislature has not chosen to tax every bank, small or large, alike, not to leave the amount of tax to be ascertained by variable accounts or any uncertain standard. It has adopted its own measure, either of that which it is just the banks should pay, or of that which they have means to pay, and these things it ascertains by reference to facts which can be verified without doubt or delay. The banks are to pay so much, not according to their capital, but according to their paid-up capital, and so much on their places of business. Whether this method of assessing a tax is sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for as it does not carry the

taxation out of the province it is for the legislature and not for Courts of law to judge of its expediency.

"Then is there anything in section 91 which operates to restrict the meaning above ascribed in section 92? Class 3 certainly is in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the Provincial Legislatures exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two sections was noticed by way of illustration in the case of Parsons. Their Lordships there said: '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.' Their Lordships adhere to that view, and hold that, as regards direct taxation within the province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the Provincial Legislatures."

VISCOUNT HALDANE: That was a remarkable case, both Dominion and province may impose direct taxation and they may conflict.

THE LORD CHANCELLOR: Is it a conflict? One is for Dominion purposes, another for provincial purposes. It is not a conflict. A man is rated to house duty for Imperial purposes and taxed on his house for local purposes.

SIR ROBERT FINLAY: Obviously the power of the Dominion Parliament can be exercised only for Dominion purposes.

THE LORD CHANCELLOR: There is no conflict is there?

VISCOUNT HALDANE: Supposing the Dominion said because of the great war we must take 60 per cent. of a man's income, and the province said, we will take 60 per cent. too, there would be a conflict.

LORD PARKER: If the Dominion taxed directly for the benefit of the province?—Just as the Imperial Legislature here taxes motor cars and hands money over to the local authorities, so that it is for the benefit of the local authorities. There might be a conflict.

SIR ROBERT FINLAY: Yes, the body of the taxpayer may be torn to pieces if the taxation becomes excessive.

THE LORD CHANCELLOR: He has his remedy as a voter, he can change the Government that is the real answer.

SIR ROBERT FINLAY: Yes, my Lord, but it is a remedy which is not always applicable. Then at the bottom of page 585:

"It has been earnestly contended that the taxation of banks would unduly cut down the powers of the Parliament in relation to matters falling within class 2, viz., the regulation of trade and commerce; and within class 15, viz., banking, and the incorporation of banks. Their Lordships think that this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks. The words 'regulation of trade and commerce' are indeed very wide, and in Severn's case it was the view of the Supreme Court that they operated to invalidate the license duty which was there in question."

THE LORD CHANCELLOR: That was a local license question; it must have been.

SIR ROBERT FINLAY: Yes, it must have been so.

"But since the case was decided the question has been more completely sifted before the Committee in Parsons' case, and it was found absolutely necessary that the literal meaning of the words should be restricted, in order to afford scope for powers which are given exclusively to the Provincial Legislatures. It was there thrown out that the power of regulation given to the Parliament meant some general or interprovincial regulation. No further

attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions as was found necessary in Parsons' case, they would be straining them to their widest conceivable extent."

The value of that is that they adopt the view which is put forward in Parsons' case by your Lordships' Board, that the power of regulation given to the Parliament meant general or interprovincial regulations, and did not include any particular matter.

Now, my Lords, I think I ought to say just a word upon *Russell* v *The Queen*.

THE LORD CHANCELLOR: Perhaps it will be more convenient to say that afterwards.

SIR ROBERT FINLAY: If your Lordship pleases.

(Adjourned for a short time.)

SIR ROBERT FINLAY: My Lords, I was going to make a very few observations with regard to the case of *Russell* v. *The Queen*, reported in 7 Appeal Cases at page 829. At page 835 is the judgment of this Board, delivered again by Sir Montague Smith. At the bottom of the page he says:

"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."

Then His Lordship refers to the terms of the 91st section and then goes on:

"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*. 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 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 Lordship's 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."

VISCOUNT HALDANE: What is the meaning of that sentence: "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."

SIR ROBERT FINLAY: I think that is right.

VISCOUNT HALDANE: Yes, I think it is right; it is a double negative.

SIR ROBERT FINLAY: Yes, my Lord. Then he refers to the three classes of subjects under which it was contended it fell. These were:—

"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 Fredericton 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.

"It appears that by Statutes of the province of New Brunswick authority has been conferred upon the municipality of Fredericton 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 appellant's 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 sub-section 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.

"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. 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 sub-section 13."

So far the ground seems to be that intoxicants are of a dangerous nature, and, from the point of view of public safety there may be a right to deal with them as affecting the common weal.

VISCOUNT HALDANE: What you have read is very important, because it shows that Sir Montague Smith's real ground was this. He thought that the subject-matter did not fall within any of the heads of section 92, and, therefore, the Dominion had it exclusively.

SIR ROBERT FINLAY: Yes, on this ground that it was in *para materia* with laws about dynamite.

VISCOUNT HALDANE: That is quite consistent with what Lord Watson is saying that in *Russell* v. *The Queen* it was decided conclusively that, although in his view the subject-matter could not fall within "the regulation of trade and commerce," still the Dominion Parliament could enact it. That would be true. It was impossible to maintain that that view is quite consistent with what was afterwards decided by Lord Watson himself.

SIR ROBERT FINLAY: It is not, but I think that what I have read is enough to show that substantially the ground on which the Board proceeded in the Russell case was that the drink was a matter of public danger with reference to which the Dominion Parliament might take such action as they might with regard to dynamite or other dangerous substances.

THE LORD CHANCELLOR: Lord Macnaghten said in the Manitoba case, that it was purely a local matter, because it was confined to the province.

SIR ROBERT FINLAY: I think what Sir Montague Smith meant was that the point of view from which the Dominion Parliament was dealing with the subject,

although no doubt it affected the right of dealing with drink, yet they were dealing with drink just as they might have with dynamite or contagious diseases in cattle or anything of that kind. That was the point of view from which the matter was approached by the Board in the Russell case. Then his Lordship goes on at page 840:—

"It was lastly contended that this Act fell within sub-section 16 of section 92—'Generally all matters of a merely local or personal 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 *Baker v. Canada (Prohibition)*, 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 authorizes 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 section 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.

"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 legislature 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 in 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."

With regard to that last passage Sir Montague Smith, in the course of the argument in the McCarthy case, which your Lordships have in the form of a pamphlet, at page 42 says that in the last paragraph which I have read from the judgment they did not in the least mean to indicate that they approved of the reasons; they simply pass it by, and Lord Watson, of course, in the liquor case in 1896, said, that the legislation could not be supported on the ground of trade and commerce, so that I think it boils down to this, that *Russell* v. *The Queen* is put on the ground that the traffic in drink is traffic in a dangerous article and would be dealt with by the Dominion Parliament just as they might deal with contagious diseases in cattle, with traffic in dynamite or any other source of danger which might extend to the whole Dominion. That is the ground on which the decision is put and it is not rested at all upon "regulation of trade and commerce."

My Lords, the next case which I ought to say just a word about is *Hodge* v. *The Queen*. That was the case about local regulations. It is reported in 9 Appeal Cases at page 117. The question under consideration was as to the validity of an Ontario Statute which made regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, and so on, and it was held that it did not, in respect of those sections interfere with the general regulation of trade and commerce, but came within Nos. 8, 15 and 16 of section 92. They also quote the observations in Parsons' case to the same effect. Then, near the bottom of page 128 it says:

"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 mis-application 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.' That is the primary matter dealt with.

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, chapter 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 authorizes the appointment of License Commissioners to act in each municipality, and empowers them to pass, under the name of resolutions, what we know as by-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.

"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,"—

THE LORD CHANCELLOR: Is this anything to do with the point?

SIR ROBERT FINLAY: No, my Lord, I think I may pass over this. I do not think I need read any more.

Then my Lords, the next case is one of some importance, which is not reported in any of the Law Reports, but it is reported in the pamphlet which your Lordships have giving the argument on the McCarthy Act.

VISCOUNT HALDANE: I do not think we can get much help from the dicta in that case.

SIR ROBERT FINLAY: I think it might be useful just to refer to the general course of the argument in that case and the ultimate result.

VISCOUNT HALDANE: What was the point?

SIR ROBERT FINLAY: The point there was that the Act was one for the regulation of the liquor traffic.

VISCOUNT HALDANE: In the province?

SIR ROBERT FINLAY: Throughout the Dominion, and in the province.

VISCOUNT HALDANE: Was it an Act to supersede the Scott Act?

SIR ROBERT FINLAY: I do not think so. It was a licensing Act. As my friend says, it was very similar to the Act in *Hodge* v. *The Queen*, which was passed by the province, only it applied to the whole of the Dominion. The Act is set out in the pamphlet *in extenso*. It was an Act of 46 Queen Victoria, chapter 30. It is an Act of the year 1883. There were some amendments by an Act of 1885, but the argument turns substantially on the Act of 1883. The preamble to that Act was this. It is very short.

"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."

Your Lordships see how closely that followed upon the lines indicated as the reasons for the judgment in *Russell* v. *The Queen*. Then there followed provisions for the license district, license commissioners, license inspectors, and all the details are given, applications for licenses, the ascertainment of the fitness of the applicant, and so forth.

THE LORD CHANCELLOR: What was the decision?

SIR ROBERT FINLAY: The decision was that it was *ultra vires*.

THE LORD CHANCELLOR: That it was outside the power of the Dominion Parliament.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: In the meantime the province occupied the field.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: Was the doctrine of the occupied field discussed?

SIR ROBERT FINLAY: I do not think it was very much mentioned. I have looked through the report and I have made a short abstract of the argument.

Sir Farrer Herschell argued for the Dominion that the Act was *intra vires*. I have said enough about the terms of the Act to show that it was a regulating Act.

THE LORD CHANCELLOR: I am not quite sure that you will gain much advantage from the argument. There are sure to be things to be found in it against you as well as in your favour. Lord Davey who was then arguing against the power of the Dominion Parliament, says:

"It is quite possible that the right to prevent adulteration was within the power of the Dominion Parliament."

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Supposing it was adulteration with regard to bread it would be regulation of trade with regard to bread.

SIR ROBERT FINLAY: I think there is one thing that is said by Sir Montague Smith at page 43, which is important. He says this: "The 1878 Act"—that is the Act in *Russell* v. *The Queen*—"was to prohibit: this is to regulate." He draws the distinction.

THE LORD CHANCELLOR: He puts it in this way: "The difference seems to me that this is a sort of regulating Act instead of a prohibitory Act." Sir Farrer Herschell says, "It is, to a certain extent regulative."

SIR ROBERT FINLAY: Yes. That was when Sir Farrer Herschell was referring to *Russell* v. *The Queen*, and Sir Montague Smith points out the distinction, and Sir Farrer Herschell says: "The object is the same, it is to promote temperance. It was prohibition in the one case, here it is regulation." Then Sir Farrer Herschell referred to *Hodge* v. *The Queen*, and at page 67 and the following pages he quotes from Parsons' case and makes a number of comments upon it. Then Lord Davey's argument begins at page 103 and on that page he says: "Section 91, by its very terms, does not apply to matters assigned to the provinces in section 92." That is the general terms at the beginning of the Act. I really need not follow the course of the whole argument. No reasons were given, but the Board reported that the legislation was *ultra vires* of the Dominion. MR. NEWCOMBE: Except as to adulteration, which they thought could not be supported.

SIR ROBERT FINLAY: Yes. So that your Lordships see that a measure of this kind for the regulation of a particular business was held to be *ultra vires* of the Dominion Parliament, even though the business was a business of the nature of trade in intoxicating liquor, which had been treated in *Russell* v. *The Queen* as one that might be a matter of public danger.

THE LORD CHANCELLOR: It leaves me in a state of complete bewilderment. I understand you to say that the Statute was held to be good so far as it affected adulteration.

SIR ROBERT FINLAY: I think they said so in the report.

THE LORD CHANCELLOR: That is, so far as it affected adulteration of the liquor.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: If it was not a provision that regulated the particular liquor industry, it is difficult to see what it was.

SIR ROBERT FINLAY: It is dealing with an offence, the adulteration of liquor.

LORD PARKER OF WADDINGTON: Why is adulterating liquor an offence, apart from making it an offence?

SIR ROBERT FINLAY: It is a subject with regard to which a great many Statutes have been passed in all countries, making it an offence.

LORD PARKER OF WADDINGTON: If the Canadian Parliament has power to make it an offence it must be some power given by section 91.

SIR ROBERT FINLAY: It is criminal law. It has been a constant subject of legislation from a criminal point of view. It is separable really from the rest of the Act, which was for the regulation of the trade and I do put it to your Lordships that that decision that a measure by the Dominion Parliament for regulating a particular trade throughout the Dominion is a decision which shows that regulation of a particular trade is beyond the powers of the Dominion.

LORD PARKER: Why was not the Act in the McCarthy case?

SIR ROBERT FINLAY: It was a regulation; not a prohibition. That is the distinction that is taken.

THE LORD CHANCELLOR: According to that the less is greater than the greater.

LORD PARKER: Lord Watson's criticism on the case of *Russell* v. *The Queen* was that it was not regulation because it was prohibition.

SIR ROBERT FINLAY: Your Lordships will see that, rightly or wrongly, the ground taken in the Russell case was: this is a dangerous matter with regard to which the Dominion may legislate just as it could with regard to the indiscriminate use of firearms, or something of that kind. That is the ground that is taken. I do not say that that ground can be considered as satisfactory by anybody; I think it is extremely difficult to follow. What I desire to emphasize is that with regard to trade of that description, when the attempt was made as Sir Farrer Herschell put it, to achieve the same object, the promotion of temperance by regulating a trade, the Board reports that the legislation is *ultra vires* of the Dominion.

LORD PARKER OF WADDINGTON: If you could prohibit it altogether, why could not you prohibit it subject to certain regulations?

SIR ROBERT FINLAY: Because it would be a matter affecting civil rights in the province.

LORD PARKER: Surely you could not call that Act an Act for the regulation of property and civil rights. It is an Act to regulate the liquor trade.

SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: Why should that be bad?

THE LORD CHANCELLOR: I do not understand it. It seems to me the result is this, that you may pass a Statute which will prohibit the sale of liquor altogether, but, if you pass a Statute that prohibits the sale of liquor on Sunday that is outside the power of the Dominion.

SIR ROBERT FINLAY: Yes, my Lord, because that is a local matter. However unsatisfactory the decision in *Russell* v. *The Queen* appears when one tries to analyse it—

LORD PARKER OF WADDINGTON: The unfortunate thing is that we have none of the reasons of the Board who decided it.

SIR ROBERT FINLAY: The only ground on which it could be decided was that regulation was not competent to the Dominion.

LORD PARKER OF WADDINGTON: It would be within their power unless it fell within one or other of the classes in section 92. Which was it held that it fell within?

SIR ROBERT FINLAY: They do not say, my Lord. That can only be gathered from the argument.

VISCOUNT HALDANE: I think the real explanation of *Russell* v. *The Queen* is what I have said. They came to the conclusion that the liquor traffic did not come within any of the heads in section 92.

THE LORD CHANCELLOR: We only know the fact.

SIR ROBERT FINLAY: The fact is this, that an Act for the regulation of the liquor traffic was held to be *ultra vires*.

THE LORD CHANCELLOR: Yes.

SIR ROBERT FINLAY: I say that that is fatal to the contention of the other side, that the power to regulate trade and commerce would carry with it the power to regulate any particular trade. My friend Mr. Nesbitt has been good enough to hand me the judgment in the case of *The Corporation of Toronto* v. *Virgo*, which is the case referred to by Lord Watson in the 1896 liquor case in the same volume.

VISCOUNT HALDANE: That is the case which he had referred to about regulation out of existence not being regulation.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: They may have decided the McCarthy case on that footing.

SIR ROBERT FINLAY: There it was regulation; not prohibition, and they say it is *ultra vires* of the Dominion to regulate a particular trade. The McCarthy case, I submit, could not have been decided as it was unless they had held that section 91 (2) did not apply to the regulation of a particular trade. My friends

must contend that it does. They do not contend that. I say that the decision in 1886 is inconsistent with that contention.

LORD PARKER OF WADDINGTON: I have great sympathy with your argument so far as it desires to narrow the meaning of "trade and commerce." Anything you have said which would prevent the Canadian Government legislating with regard to particular trades would be equally applicable to the local legislature legislating under the words "civil rights." You could not call it civil rights in the liquor trade in the particular province. Then, if it is got at all, it is got under the last part. "Local and private."

VISCOUNT HALDANE: So they held in the Manitoba case.

SIR ROBERT FINLAY: That case I have already cited.

LORD PARKER: Then the only question is: Is it exclusively in the provincial interest that the liquor trade should be regulated, or is it in the Canadian interest that the liquor trade should be regulated? As soon as you get it that it is in the Canadian interest that the liquor trade should be regulated, you get outside section 92 immediately.

SIR ROBERT FINLAY: The effect of the decision of the Reference in 1885 was that the Board could not have reported against the validity of this Act regulating the liquor traffic if section 91 (2) carried with it the power to regulate any particular trade.

LORD PARKER: You cannot accept both; you have to choose between the two; the argument in the Russell case and the decision in the McCarthy case, because they are entirely contradictory.

VISCOUNT HALDANE: I am not quite sure, because in the Russell case it was prohibition.

SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: Surely you cannot say that while it is in the interests of Canada that the whole of the trade should be prohibited, it is not in the interests of Canada to have proper regulation of the liquor trade.

SIR ROBERT FINLAY: I admit the difficulty in dealing with *Russell* v. *The Queen*. In any view it is rather an anomalous decision, but there it is, and it must be accepted as a fact.

THE LORD CHANCELLOR: I think all we can do with the McCarthy case is to accept it as a fact.

SIR ROBERT FINLAY: The McCarthy case is a decision which must be wrong if my friends' argument as to the meaning of section 91 (2) is right, because they say they have the power to regulate trade and commerce and that includes the regulation of any particular trade throughout the Dominion. That is the very thing they had done in the case under the McCarthy Act, and this Board held that it was *ultra vires*. They could not have held that it was *ultra vires* unless they rejected the contention that the power to regulate trade and commerce carried with it the power to regulate any particular trade. I respectfully submit that that case is really conclusive on that point.

VISCOUNT HALDANE: I do not know. It may be that they thought it was really in the nature of prohibition. It was a licensing Act of a very stringent kind.

SIR ROBERT FINLAY: I do not think they could have held that. Your Lordship took part in the argument. I am not going to read the argument to your Lordships. You have intimated that you do not want to hear it read, but I think the whole tendency of the argument was: This is regulation; not prohibition, and, if there was power to regulate a particular trade under section 91 (2) the Board could not have reported against the validity of that regulation.

My Lords, I was about to read a passage from the case of the *Municipal Corporation of the City of Toronto* v. *Virgo*, which is reported in 1896 Appeal Cases, beginning at page 88. It is on the question of prohibition and regulation. It is in the same volume as the 1896 liquor case. It is at page 93:

> "It appears to their Lordships that the real question is whether under a power to pass by-laws 'for regulating and governing' hawkers, &c., the Council may prohibit hawkers from plying their trade at all in a substantial and important portion of the city, no question of any apprehended nuisance being raised. It was contended that the by-law was *ultra vires*, and also in

restraint of trade and unreasonable. The two questions ran very much into each other, and in the view which their Lordships take it is not necessary to consider the second question separately. No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shows that when the legislature intended to give power to prevent or prohibit it did so by express words."

THE LORD CHANCELLOR: They refer there to a provincial Statute, a municipal Statute.

SIR ROBERT FINLAY: It was really a by-law.

THE LORD CHANCELLOR: A by-law made under a provincial Statute.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: There were totally different considerations there.

SIR ROBERT FINLAY: Yes, my Lord. It is only on the difference between prohibition and regulation, and I do most respectfully submit that, whereas *Russell v. The Queen* had held that prohibition is a matter of policy or a *quasi* matter of policy which is within the competence of the Dominion, that regulation, it was held in the Reference of 1885, was not and that decision could not have been arrived at if there was any reality in my friends' argument that section 91 (2) confers on the Dominion the right to regulate a particular trade.

My Lords, I have already referred your Lordships to the Montreal case, and I desire to go next to the John Deere Plow case, which is reported in the Law Reports, 1915 Appeal Cases, in the February number. This is a most important case. I will read the head note before reading the material parts of the judgment.

"The authority of the Parliament of Canada to legislate for 'the regulation of trade and commerce' conferred by section 91, enumeration 2, of the British North America Act, 1867, enables that Parliament to prescribe the extent and limits of the powers of companies the objects of which extend to the entire Dominion; the status and powers of a Dominion company as such cannot be destroyed by a Provincial Legislature.

The last sentence is really the point that was decided in the case; the earlier part of the paragraph goes a little beyond what the judgment says:

"Part VI. of the Companies Act of British Columbia (R. S. B. C., 1911, chapter 39) which in effect provides that companies incorporated by the Dominion Parliament shall be licensed or registered under that Act as a condition of carrying on business in the province or maintaining proceedings in its Courts, is therefore *ultra vires* the Provincial Legislature under the British North America Act, 1867."

There were in that case two proceedings. A shareholder in the company had taken proceedings to get an injunction to restrain the company from carrying on business in the province without being registered in manner prescribed by Act of British Columbia. The second proceeding was an action brought by the plaintiff for the price of goods sold, and the defence was that they could not recover the price of the goods that they had delivered because they were not licensed or registered under the provincial Act. It was in that state of facts that the case came before your Lordships. Lord Haldane delivered the judgment, beginning at page 334. He states, in the first instance, the facts of the proceedings as I have stated them. He proceeds thus at the top of page 335:

"The appellants are a company incorporated in 1907 by letters patent issued by the Secretary of State for Canada under the Companies Act of the Dominion. The letters patent purported to authorize it to carry on throughout Canada the business of a dealer in agricultural implements. It has been held by the Court below that certain provisions of the British Columbia Companies Act have been validly enacted by the Provincial Legislature. These provisions prohibit companies which have not been incor-

porated under the law of the province from taking proceedings in the Courts of the province in respect of contracts made within the province in the course of their business, unless licensed under the Provincial Companies Act. They also impose penalties on a company and its agents if, not having obtained a license, it or they carry on the company's business in the province. The appellant was refused a license by the registrar. It was said that there was already a company registered in the province under the same name, and section 18 of the provincial Statute prohibits the grant of a license in such a case. The question which has to be determined is whether the legislation of the province which imposed these prohibitions was valid under the British North America Act.

"The Companies Act of the Dominion provides by section 5 that the Secretary of State may, by letters patent, grant a charter to any number of persons not less than five, constituting them and others who have become subscribers to a memorandum of agreement a body corporate and politic for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, with certain exceptions which do not affect the present case. The Interpretation Act of 1906, by section 30, provides, among other things, that words making any association or number of persons a corporation shall vest in such corporation power to sue and be sued, to contract by their corporate name, and to acquire and hold personal property for the purposes for which the corporation is created, and shall exempt individual members of the corporation from personal liability for its debts, obligations, or acts, if they do not violate the provisions of the Act incorporating them.

"Section 10 of the Companies Act makes it a condition of the issue of the letters patent that the applicants shall satisfy the Secretary of State that the proposed name of the company is not the name of another known incorporated or unincorporated company, or one likely to be confounded with any such name, and section 12 gives him large powers of interference as regards the corporate name. Section 29 provides that on incorporation the company is to be vested with, among other things, all the powers, privileges, and immunities requisite or incidental to the carrying on of its undertaking, as if it were incorporated by Act of Parliament. Section 30 enacts that the company shall have an office in the city or town in which its chief place of business in Canada is situate, which shall be the legal domicil of the company in Canada, and that the company may establish such other offices and agencies elsewhere as it deems expedient. By section 32 it is provided that the contract of an agent of the company made within his authority is to be binding on the company, and that no person acting as such agent shall be thereby subjected to individual liability.

"Turning to the relevant provisions of the British Columbia Companies Act, these may be summarized as follows: An extra-provincial company means any duly incorporated company other than a company incorporated under the laws of the province or the former Colonies of British Columbia and Vancouver Island. (Section 2)."

Your Lordships observe this legislation was directed specifically against these companies not incorporated under the law of a province.

"Every such extra-provincial company having gain for its object must be licensed or registered under the law of the province, and no agent is to carry on its business within the province until this has been done (section 139). Such license or registration enables it to sue and to hold land in the province (section 141). An extra-provincial company, if duly incorporated by the laws of, among other authorities, the Dominion, and if duly authorized by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the Provincial Legislature extends, may obtain from the registrar a license to carry on business within the province on complying with the provisions of the Act and paying the proper fees (section 152). If such a company carries on business without a license, it is liable to penalties (section 167), and the agents who act for it are similarly made liable, and the company cannot sue in the Courts of the province in respect of contracts made within the province (section 163). The registrar

may refuse a license when the name of the company is identical with or resembling that by which a company, society, or firm in existence is carrying on business, or has been incorporated, licensed, or registered, or when the registrar is of opinion that the name is calculated to deceive, or disapproves of it for any other reason (section 18).

"The charter of the appellant company was granted under the seal of the Secretary of State of the Dominion in 1907. It purported, as already stated, to confer power to carry on throughout the Dominion of Canada and elsewhere the business of a dealer in agricultural implements and cognate business, and to acquire real and personal property. It is not in dispute that it was an extra-provincial company having gain for its object. The chief place of business was to be Winnipeg. The registrar refused, as has been mentioned, to grant a license under the provincial Act to the appellant company. The power of the registrar is not challenged, if the sections of the provincial statute under which he proceeded were validly enacted.

"What their Lordships have to decide is whether it was competent to the province to legislate so as to interfere with the carrying on of the business in the province of a Dominion company under the circumstances stated."

Your Lordships have observed that in the Statute of the Legislature of British Columbia there was a recognition of extra-provincial companies if duly incorporated by the laws of, amongst other authorities, the Dominion, so that they recognized, in that Statute which came in question here, the right of the Dominion to incorporate. Then:

"The distribution of powers under the British North America Act, the interpretation of which is raised by this appeal"—

THE LORD CHANCELLOR: The company that was incorporated outside the province had to obtain a license inside the province. That was the whole question.

VISCOUNT HALDANE: That applied only to extra-provincial companies.

THE LORD CHANCELLOR: Yes.

SIR ROBERT FINLAY: And no question was raised, nor in face of the terms of the British Columbia Statute could any question well have been raised as regards the point whether the company to carry on a business of agricultural implement makers throughout the Dominion generally—whether that incorporation was valid. No such question was raised, and in face of the provincial statute it would have been difficult to raise it.

VISCOUNT HALDANE: With more than provincial objects.

SIR ROBERT FINLAY: The point was never contested in the Courts below. I have here the record on the appeal to this Board and there is no point in the case on appeal raising any question as to the validity of the incorporation of the Dominion company.

LORD PARKER: Are you going to attack that power of the Dominion company?

SIR ROBERT FINLAY: I do not think that it is necessary for my argument that I should, certainly not in the present case; some questions may arise about it afterwards. I think there might have been doubt, but it is not the least necessary for my present argument to say anything about it.

THE LORD CHANCELLOR: The whole point is on page 340, is not it? "If this be so, then the power of legislating with reference to the incorporation of companies with other than provincial objects must belong exclusively to the Dominion Parliament"—

LORD PARKER: I thought that was the point of the decision.

VISCOUNT HALDANE: That was so, and the reason was that the whole matter was outside section 92.

SIR ROBERT FINLAY: Yes, my Lord. I was going to read the whole of this, I will pass on if your Lordships desire, but I think there is a good deal at pages 337-8-9. I will go on if your Lordships would prefer it.

THE LORD CHANCELLOR: I did not want you to alter your course; if there are points in this judgment which you think are in your favour we certainly ought to have our attention called to them.

SIR ROBERT FINLAY: The passage that I desire particularly to refer to is at page 340:

"Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons*, on head 2 of section 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade."

VISCOUNT HALDANE: There is a passage at page 338 which ought to be borne in mind to this extent—you need not read the whole, but it is pointed out that there may very well be disjunctions and overlappings of the literal terms employed—you have to construe, and you cannot read "civil rights" literally as meaning all "civil rights."

SIR ROBERT FINLAY: That is at the bottom of page 338 and then it runs over to page 339. Perhaps I had better read the passage at the bottom of page 339 before I get to page 340 which directly concerns me.

"Turning to the appeal before them, the first observation which their Lordships desire to make is that the power of the Provincial Legislature to make laws in relation to matters coming within the class of subjects forming No. 11 of section 92, the incorporation of companies with provincial objects, cannot extend to a company such as the appellant company, the objects of which are not provincial. Nor is this defect of power aided by the power given by No. 13, property and civil rights. Unless these two heads are read disjunctively the limitation in No. 11 would be nugatory. The expression 'civil rights in the province' is a very wide one, extending, if interpreted literally, to much of the field of the other heads of section 92, and also to much of the field of section 91. But the expression cannot be so interpreted, and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words. If this be so, then the power of legislating with reference to the incorporation of companies with other than provincial objects must belong exclusively to the Dominion Parliament, for the matter is one 'not coming within the classes of subjects' 'assigned exclusively to the legislatures of the provinces,' within the meaning of the initial words of section 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression 'the peace, order and good government of Canada.'

"Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* on head 2 of section 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head must, like the expression, 'property and civil rights in the province,' in section 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. Their Lordships are therefore of opinion that the Parliament of Canada had power to enact the sections relied on in this case in the Dominion Companies Act, and the Interpretation Act. They do not desire to be understood as suggesting that because the status of a Dominion company enables it to trade in a province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the Provincial Legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the province if civil rights were to be read as an expression of unlimited scope. But, as has already been pointed out, the expression must be construed consistently with various powers conferred by sections 91 and 92, which restrict its literal scope. It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation. This conclusion appears to

their Lordships to be in full harmony with what was laid down by the Board in *Citizens Insurance Co.* v. *Parsons*, *Colonial Building and Investment Association* v. *Attorney-General for Quebec*, and *Bank of Toronto* v. *Lambe*.

"It follows from these premises that those provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company to obtain a provincial license of the kind about which the controversy has arisen, or to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes. The question is not one of enactment of laws affecting the general public in the province and relating to civil rights, or taxation, or the administration of justice. It is in reality whether the province can interfere with the status and corporate capacity of a Dominion company in so far as that status and capacity carry with it powers conferred by the Parliament of Canada to carry on business in every part of the Dominion."

LORD PARKER: Will you pause there for a minute. Does not that mean this, that a Provincial Act imposing a license on Canadian companies generally—I mean Canadian extra-provincial companies, is not a regulation of "civil rights" within the "property and civil rights" sub-section.

SIR ROBERT FINLAY: I do not quite take that view of it. What I submit was decided was this, that the Dominion having incorporated a company with power to carry on business throughout all the provinces of the Dominion it is not competent to any province to say: Before you carry on business in our province you must get a license from us.

THE LORD CHANCELLOR: Why?

SIR ROBERT FINLAY: For this reason, that they are not imposing a necessity for a license which is imposed upon all companies; it is legislation directed against Dominion companies, against foreign companies.

THE LORD CHANCELLOR: That is to say where you attempt under a "civil rights" section to put limitations on the rights of a particular trade which is not a trade entirely within the province, it is not within that section at all, but outside.

VISCOUNT HALDANE: I think that is really it.

SIR ROBERT FINLAY: No, my Lord.

LORD PARKER: It is in your favour in a way, because, to put the same argument under the "trade and commerce" section, a Dominion Act regulating the trade and commerce of any particular trade will not do.

SIR ROBERT FINLAY: It will not do.

LORD PARKER: It is really the same argument as to another part of the section.

SIR ROBERT FINLAY: Yes. It was held it was invalid because the legislation is directed against these companies as Dominion companies; it is not imposing a necessity for a license on all companies carrying on business in the province. That is I think the *ratio decidendi* of this case.

VISCOUNT HALDANE: The regulation was confined to Dominion companies. It was said, once you get it that these are the objects of Dominion companies the Dominion has an interest in the trading of these companies and may regulate their trading.

SIR ROBERT FINLAY: Yes, my Lord, and to that extent I claim the decision in John Deere Plow Company Limited, as a decision in my favour, because your Lordship unreservedly accepts what was said in Parsons' case as to the effect of section 91 (2), and what was said in that case is entirely inconsistent with the argument which has been submitted.

VISCOUNT HALDANE: I go as far as this, that I do not think the John Deere Plow case is at all decisive against you.

SIR ROBERT FINLAY: No, my Lord, it is in my favour; if what was said in Parsons' case about section 91 (2) is right my friends are wrong.

VISCOUNT HALDANE: That if you once get insurance as a subject within the competence of the Dominion because of its great importance sub-head 2 may come in.

SIR ROBERT FINLAY: Only to this extent; the Dominion Government may incorporate companies, and with regard to them, it cannot be interfered with by a province.

VISCOUNT HALDANE: I will not say only to that extent. It may be to that extent, but you must not take it that John Deere Plow Company Limited decides that it is only to that extent. That case is an authority for nothing further than what is said in it.

SIR ROBERT FINLAY: No, my Lord, the reasons given show that it is confined to this case; it is said as the Dominion Government lawfully incorporated this Company, it is impossible for a province to restrict its liberty by imposing on it a necessity for licenses which it does not impose on all other companies. That is legislation directed against a particular class of companies lawfully incorporated by the Dominion. Now if the view taken in Parsons' case as to section 91 (?) is right there is an end of my friend's case on this point, and I claim the judgment in the John Deere Plow case as adopting what was said in Parsons' case and as an authority in my favour.

LORD PARKER: I should be inclined to admit that what you say is right, that it would be an authority in your favour, but only so far surely as section 4 applies to companies incorporated for provincial purposes only, and persons carrying on business in one province only.

SIR ROBERT FINLAY: No, my Lord.

LORD PARKER: It is against you in respect of companies incorporated for non-provincial purposes by the Dominion of Canada—they can be regulated by the Canadian Government?

SIR ROBERT FINLAY: That is what I read from the decision in the John Deere Plow Case, but as regards the provincial companies carrying on business only within the province which created them they are excepted from the application of the Act of 1910, which is now in question.

LORD PARKER: They are. They are left out. If you except all those the only other possible companies are foreign companies and Dominion companies.

VISCOUNT HALDANE: And in the trading of these may not the Dominion be interested?

LORD PARKER: The provinces have no power over them—

SIR ROBERT FINLAY: There is another and a very large class, provincial companies incorporated by a province, but which do not confine their operations solely to the province in which they are incorporated.

THE LORD CHANCELLOR: We have to consider that?

SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: As to provincial companies they cannot pass Statutes regulating their "civil rights" outside the province?

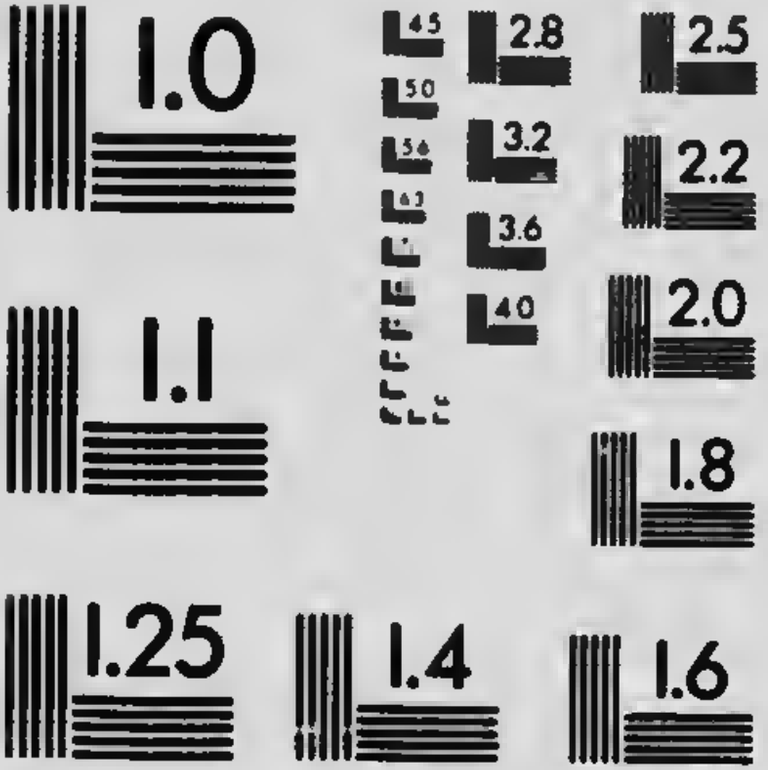
SIR ROBERT FINLAY: No, and neither in this case nor in the later cases where the point comes directly into question, do I mean to contend that a provincial company can as a matter of right carry on its business anywhere except in the province where it was incorporated. It is a matter of comity just as much as the right of an English company to carry on business in France, or the right of an English company to carry on business in Canada, or the right of a Canadian company to carry on business in the United States and so on. It is a matter of comity, but what I shall certainly very strongly contend for is this, that these companies incorporated by the provinces have capacity to carry on business in other provinces, but it is a capacity that they can exercise only by the comity of these other provinces. Just as in this country we recognize foreign corporations—we do not prevent them carrying on business here—we allow them to sue here. By the comity of nations they are recognized just as individuals might be recognized. No corporation from another country has a right to carry on business here; we grant it as a matter of comity leaving out—

VISCOUNT HALDANE: Our recognition is rather more; it is the local law, but it is comity just as it is comity that we allow Frenchmen to come here.

SIR ROBERT FINLAY: Yes, my Lord. My contention and the point is extremely important with reference to what Lord Parker said is as soon as you get a provincial company incorporated, say in Ontario, and which carries on

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

business in Ontario and also beyond the limits of Ontario, say in New York or another province—

LORD PARKER: You are trenching now on the second or third case.

SIR ROBERT FINLAY: I am a little.

LORD PARKER: I suppose an English lawyer would say that *prima facie* no company had any authority to do anything outside the scope of its objects. The scope of its objects can only be objects which are entirely local.

SIR ROBERT FINLAY: I submit not, my Lord.

LORD PARKER: That is anticipating your argument.

SIR ROBERT FINLAY: That is anticipating. Perhaps I had better not go further into it now. My submission would be while they can carry on business as of right, only in the State of incorporation, they have capacity to carry on business elsewhere, although they can only do that by the leave of the other province or the other country. That is my submission, and your Lordships will observe what extensive effect the Act has, because as soon as a provincial company carries on business, say over the border in the United States or in another province, or in England, it would forfeit the exemption from this Act which is contained in that third section, I think it is, sub-section 3, because that exemption is confined to companies which carry on business only in the province of incorporation, and you have the interference not only with individuals, but with companies which otherwise might lawfully carry on their business without the necessity of a license and without being subject to Dominion regulations.

My Lords, my friends referred to the case of the *Grand Trunk Railway of Canada* v. *The Canadian Attorney-General* in the Appeal Cases for 1907, at page 65. That was the case in which Lord Dunedin gave judgment. I submit that as soon as that case is looked into it appears that it really has no application to the present for this reason. The question there was whether a law of the Dominion Parliament contracting out from liability to pay damages for personal injury to their servants was *intra vires* of the Dominion Parliament. The railway which was a Dominion railway, a through railway, ran through the State. The question that was raised was whether this law was not dealing with "civil rights," and the ground and the only ground on which your Lordships decided that it was valid was that the jurisdiction conferred on the Dominion Parliament with regard to the railways was exclusive. The citation of a short passage on pages 67 and 68 will show that:—

> "It is not disputed that, in the partition of duties effected by the British North America Act, 1867, between the Provincial and the Dominion Legislatures, the making of laws for through railways is entrusted to the Dominion.
>
> "The point, therefore, comes to be within a very narrow compass. The respondent maintains, and the Supreme Court has upheld his contention, that this is truly railway legislation. The appellants maintain that, under the guise of railway legislation, it is truly legislation as to civil rights, and, as such, under section 92, sub-section 13, of the British North America Act, appropriate to the province.
>
> "The construction of the provisions of the British North America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894, viz., *Attorney-General of Ontario* v. *Attorney-General of Canada*"—

VISCOUNT HALDANE: He might have mentioned *Hodge* v. *The Queen*, where Lord Watson stated the same doctrine.

SIR ROBERT FINLAY: Yes, my Lord.

> "and *Tenant* v. *Union Bank of Canada* seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

VISCOUNT HALDANE: That is the doctrine of the "occupied field."

SIR ROBERT FINLAY: Yes, my Lord.

> "Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation.

"It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature—which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees. But this is inevitable, and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam*, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers.

"In the factum of the appellants it is (*inter alia*) set forth that the law in question might 'prove very injurious to the proper maintenance and operation of the railway.'"

and so on. "This argument is really conclusive against the appellants." Lord Dunedin was there dealing with a matter which by virtue of head 10 of section 92, and the express terms of section 91 was exclusively within the province of the Dominion.

Now, my Lords, I have so far said nothing or very little in my argument about Lord Watson's judgment in the 1896 case, and I had really intended to leave that out, but now that I know that I misunderstood the extent of my friend's admission yesterday I think I must refer to that decision for the purpose of showing what the rights are if it be put on the ground of "peace, order and good government."

THE LORD CHANCELLOR: If you put it another way—that you have to find under section 92 whether this subject-matter has been specifically assigned to the Provincial Legislature and prove that it is not; if it is not it must come in under one or other of the heads of section 91.

VISCOUNT HALDANE: Or it may come in under the general words only.

SIR ROBERT FINLAY: Yes, my Lord, if it comes in under the head of "property and civil rights," of course—

THE LORD CHANCELLOR: If it comes in under the head of "property and civil rights," then it can only be left in the Dominion by virtue of it being under one of the enumerated heads.

LORD PARKER: Can it be accurately described as an Act to regulate "property and civil rights in the province"? If it can it is clear that it is within section 92, and the Canadian Parliament has no jurisdiction unless it is under "trade and commerce." If, on the other hand, it cannot be so properly described, it is not a purely local matter, and therefore, falls within the general powers at any rate of the Dominion, even if the "trade and commerce", section does not apply.

THE LORD CHANCELLOR: You need not specify, because the object is to provide that there shall be full power between Dominion and provinces of legislation on all matters.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Therefore if you find it is not in section 92 it must be in section 91?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: That is the whole question?

SIR ROBERT FINLAY: That is the whole question.

Now, my Lords, with reference to what was said yesterday I have just been handed a note of what Mr. Upjohn said, and I should like to read just one sentence as justifying the misunderstanding, it is this—

VISCOUNT HALDANE: I do not care in the least what Mr. Upjohn said; we have to interpret the Act.

SIR ROBERT FINLAY: I quite agree, and I am not going to limit the argument, but I should like to read this.

THE LORD CHANCELLOR: There is some reason for yourself and myself being misled?

SIR ROBERT FINLAY: Mr. Upjohn says this: "Having conferred"—that is with Mr. Newcombe—"My Lords, I have conferred with the Attorney-General and he rather accepts my view that, as far as the appellants are concerned they will rest it on the 'regulation of trade and commerce.'"

VISCOUNT HALDANE: Yes. It is very ambiguous.

LORD SUMNER: My impression is the same as the Lord Chancellor's.

LORD PARKER: I think possibly one or other of their Lordships was more or less at cross purposes. I understand Mr. Upjohn was arguing that there were certain questions which were not within the matters enumerated in section 91, which might be within the power of the Dominion, and to which considerations similar to those contained in the exception at the end of the clause after the specified objects applied.

VISCOUNT HALDANE: Yes, and which were within section 92.

LORD PARKER: And which were within section 92.

VISCOUNT HALDANE: That is the whole point—they were within section 92, on the hypothesis; and Mr. Upjohn contended, and I think Mr. Newcombe at one time, that even if you did not come within any of the enumerations of section 91, if you came under the general words by reason of the magnitude of the subject you could override things in section 92. That is what I understood Mr. Upjohn to be giving up.

SIR ROBERT FINLAY: Yes.

VISCOUNT HALDANE: And Mr. Newcombe, too. MR. NEWCOMBE: Yes. If I contended that I agreed with Mr. Upjohn to give it up. I did not think that I put it exactly that way. I rather intended to put it the other way about, that if they were not within section 91, I mean to say founding the argument upon the Prohibition case, that things which originally, or in some aspects might be in section 92 would get out of section 92 by reason of the common interest, then although not governed by any enumeration of section 91 they could be regulated by the Dominion.

VISCOUNT HALDANE: That was your original argument? MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: You said you did not press that, but you did not say you could not legislate merely by reason of the words "peace, order and good government." MR. NEWCOMBE: No. my Lord.

SIR ROBERT FINLAY: I shall act on what my friend Mr. Newcombe tells me. What Mr. Upjohn said was that they were going to rest on "trade and commerce." I am not going to attempt to confine my friends by reason of what Mr. Upjohn said. MR. NEWCOMBE: Mr. Upjohn was representing the same side—

THE LORD CHANCELLOR: I do not think it matters in the least what was said, if it is not in section 92, it must be somewhere in section 91. It is not necessary to say where it is in section 91, if it is not in section 92. That is what happened in *The Queen* v. *Russell*.

VISCOUNT HALDANE: And in the John Deere Plow case.

LORD PARKER: I am not sure that it is not necessary. It would not be necessary except that the section appears to extend beyond companies to persons, and on that ground it may be necessary to determine if we answer the whole of that question. whether it is the trade and commerce clause which applies, or under the general power irrespective of the specific objects.

THE LORD CHANCELLOR: Yes.

SIR ROBERT FINLAY: Now, before I pass to the other head, which is, I concede, still open to my friend, I want to say a few words on the question whether insurance could be considered within the meaning of these words "regulation of trade and commerce." Now in the first place I desire to say this: the question is not merely the meaning of the word "trade"; the question is the meaning of the words "regulation of trade and commerce," and, of course, the word "trade" has different meanings. In old English and at the present day in Scotland "trade" is used as denoting a man's occupation—a man in Scotland will say "I am a joiner to trade;" it is used simply as denoting the occupation. That is used in rather old English. I think it is not commonly used in England in that sense, it is used in England in the sense as defined in the dictionaries; the exchange of

articles of commerce, exchanging commodities one for the other, trade and commerce, and the question here is: What the "regulation of trade and commerce" means. Now, my Lords, I put it to your Lordships that such cases as *Bristow* v. *Towers*, which my friend referred to, have really nothing to do with the subject. That was a case in 6 Term Reports, where it was decided that an insurance by a British subject of the goods belonging to an alien enemy was illegal. The prohibition of intercourse with alien enemies is not confined to trade.

THE LORD CHANCELLOR: I do not see how that can help.

SIR ROBERT FINLAY: I will not say another word about that case.

THE LORD CHANCELLOR: This must be said, although I agree the prohibition is not confined to trade, yet that case appears to have been decided on the footing that it was a trading.

SIR ROBERT FINLAY: There is no judgment given at the end.

THE LORD CHANCELLOR: No, but that seems to have been the basis.

SIR ROBERT FINLAY: And helping the enemy to insure the enemy's goods—there could not be a more direct way of helping the enemy. That case I submit is absolutely no authority that insurance is a branch of trade. Then reference was made to the bankruptcy laws. With regard to that the case stands exactly as Lord Sumner pointed out, and it is summarized in one sentence in Robson's Law of Bankruptcy. I am reading from the seventh edition.

THE LORD CHANCELLOR: Is not the real thing that "insurance" may be a "trade" within the meaning of the word in certain connections. The whole question is whether it has that meaning in this connection.

SIR ROBERT FINLAY: Yes—does the regulation of the business of insurance fall under the head of "regulation of trade and commerce"?

THE LORD CHANCELLOR: Yes, that is the question.

SIR ROBERT FINLAY: That is the whole of the question.

LORD PARKER: Within the meaning of this Act?

SIR ROBERT FINLAY: Within the meaning of this Act. Let me just dismiss the subject of bankruptcy by reading one sentence at page 124 of the seventh edition of Robson on Bankruptcy. "Traders. There are several occupations the persons following which are classed as "traders" by the bankruptcy laws, although they would not *prima facie* be regarded as such, and the number has been added to from time to time." They are deemed to be traders for the purposes of the bankruptcy laws, but the fact that persons were treated as traders, while that was necessary, for the purposes of bankruptcy, does not throw any doubt—

THE LORD CHANCELLOR: For instance there are stockbrokers.

SIR ROBERT FINLAY: That is to say they are to be deemed for the purpose of the Act as traders.

THE LORD CHANCELLOR: Among others I see stockbrokers.

SIR ROBERT FINLAY: And people carrying on insurance business.

THE LORD CHANCELLOR: People carrying on the business of a scrivener.

SIR ROBERT FINLAY: Yes, a long enumeration.

THE LORD CHANCELLOR: You can make a trade into anything by the definition of a Statute.

SIR ROBERT FINLAY: You enact that he is to be deemed to be "a trader." Now if insurance is said to be a trade by reason of its being carried on for profit, that in no way applies to what is a very large class of insurance companies in Canada, the mutual insurance companies; they do not carry on business for profit. The question has arisen here with regard to income tax.

THE LORD CHANCELLOR: That is such a difficult task. Take a general co-operative society—I do not speak of big trading companies in London—could you say it did not "trade" merely because the arrangement was that it should not trade for profit?

SIR ROBERT FINLAY: They are not trading for profit.

THE LORD CHANCELLOR: But they are "trading."

SIR ROBERT FINLAY: In one sense they are. My friend did rely upon profit as one object. I only point out it is eliminated in the case of the mutual insurance companies. I remember it was put in a case of *The New York Life Insurance Company* v. *Styles* (14 Appeal Cases), in which Lord Bramwell sat in the House of Lords, where the question was whether they had income assessable to

income tax. Supposing ten men agree to make a journey together and they have a common purse into which each puts £10 and at the end of the journey there is £10 over, would anybody say they had made profit by that journey? Lord Bramwell elaborated that illustration a little.

LORD SUMNER: Might I put this to you, supposing you were endeavouring to confer upon, say, a commission some regulative powers: "The commission shall have power to regulate accountants, and the commission shall have power to regulate architects, and the commission shall have power to regulate bakers," and so on all through the alphabet. If you did not want to do it by enumeration but wanted to do it by headings, where would you put the insurance company—what heading would you give it? I can understand you saying "this commission shall regulate the proceedings of all professions. The commission shall regulatt the proceedings of manufacturers. This commission shall regulate the proceedings of trade and commerce." What general term would you use.

SIR ROBERT FINLAY: I should say it is a business—insurance is a business.

LORD SUMNER: It certainly is a business, no doubt about that, but then you see I suppose an architect is in business.

THE LORD CHANCELLOR: It is very little more than saying that it is an occupation when it is a "business."

SIR ROBERT FINLAY: An architect's calling would be spoken of as a profession I suppose.

THE LORD CHANCELLOR: A stockbroker is in business.

SIR ROBERT FINLAY: I should not have thought you would speak of a stockbroker as being in trade; he is engaged in what may be a money-making business, but he is not a trader in the ordinary sense of the word.

LORD PARKER: It surely depends on the connection in which the word is; if you say to a man "what is your trade" he may say "I am a gardener"—you would get various answers.

SIR ROBERT FINLAY: In the ordinary use of the English language in the present day one would not speak of the "trade" of a gardener, he never would say "I am a gardener by trade."

VISCOUNT HALDANE: "I am a gardener to trade."

SIR ROBERT FINLAY: "I am a gardener to trade."

LORD SUMNER: The "tradesmen" in the building trade are the joiners and the plumbers.

SIR ROBERT FINLAY: Because "trade" in old English and Scottish in the present day is used as I have said. It is not confined to business in exchanging goods, which is the correct meaning of the word as now used in England.

There is one observation I want to make before referring to American cases on this point, and before passing to the other and more general aspect of the case. It is this: As your Lordships said the question is the meaning of these words in this Act "regulation of trade and commerce." They do not say "regulation of trades;" my friends want to read it as if they had said that. It is "regulation of trade and commerce."

That I submit to your Lordships clearly shows that it was not the regulation of particular trades that was contemplated; it was the making of general regulations in the nature of trade regulations such as are referred to in the judgment in Parsons' case. My friends always argue that "regulation of trade and commerce" could be read as if it were "regulations of trades and of commerce." It is nothing of the kind. "Regulation of trade and commerce" is one thing, and you have to find that it falls within that description.

Now, my Lords, there are two American cases which I wish to refer to.

THE LORD CHANCELLOR: I am afraid it is getting a little too late to embark on a new head.

(Adjourned till Monday next at 10.30).

FOURTH DAY.

SIR ROBERT FINLAY: My Lords, I had been calling your attention to the question of what sense should be attributed to the words "the regulation of

trade and commerce," and I was, when your Lordships adjourned, dealing with the particular question whether insurance should be considered a trade. Now, with regard to that, my Lords, I desire to recall to your Lordships' attention one passage in the judgment in Parsons' case in 7 Appeal Cases. This passage is at pages 111 and 112:—

> "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"—by later Acts they were deemed to be trades, and now, of course, the scope of bankruptcy has been extended—"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."

Now, my Lords, I call attention to that passage because your Lordships will recollect that owing to an inadvertence Lord Watson in the liquor case in 1896 said that insurance had been admitted to be a trade in Parsons' case. So far from that being the fact, the observations in the passage that I have cited all tend the other way, and they conclude by saying that 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 subsequent portion of the judgment I have already dealt with; it deals with the broader question of the meaning of the expression "regulation of trade and commerce."

Now following the same lines, my Lords, I desire to call attention to two cases which were both mentioned by Mr. Justice Idington in his judgment relating to the question of inter-state commerce as between the different States forming the United States of America. These two cases are *The New York Life Insurance Co.* v. *Cravens*, in the 178 United States Reports (7 Davis) 389. The passage I am going to read is at page 401. The other case is *Paul* v. *Virginia*, in 8 Wallace 168. I take the cases in the order in which I have mentioned them. The one that I mentioned first was in 1899. That was a case where a contract for life insurance came into consideration made by a New York insurance company in the State of Missouri, and what they decided was that the contract was subject to the laws of Missouri regulating life insurance policies. The observations to which I am going to call attention are at page 401, and are those summarized in the last paragraph of the headnote at page 389: "The business of insurance is not commerce, and the making of a contract of insurance is a mere incident of commercial intercourse in which there is no difference whatever between insurance against fire, insurance against the perils of the sea, or insurance of life." At page 401, (2)—it is the second point dealt with in the passage of which that page forms part—"Is the Statute an attempted regulation of commerce between the States? In other words, is mutual life insurance commerce between the States?"

VISCOUNT HALDANE: What was the Statute, Federal or State?

SIR ROBERT FINLAY: State, my Lord.

VISCOUNT HALDANE: New York?

SIR ROBERT FINLAY: New York.

VISCOUNT HALDANE: New York could not do that.

SIR ROBERT FINLAY: I beg your Lordship's pardon, it was a Missouri Statute and it provided "that the entire contract contained in the said policy and in this application taken together shall be construed and interpreted as a whole and in

each of its parts and obligations according to the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of the said company in the City of New York."

VISCOUNT HALDANE: Did the Missouri Act prescribe that?

SIR ROBERT FINLAY: I think it did, my Lord.

VISCOUNT HALDANE: It is very curious that it should prescribe that the contract should be ascertained by foreign law. Was it an Act relating entirely to this company?

SIR ROBERT FINLAY: I think it was. That provision was a provision in the policy—not in the Statute.

VISCOUNT HALDANE: The New York policy prescribed that New York law should apply.

SIR ROBERT FINLAY: The policy was made by a New York insurance company in the State of Missouri, and then it contained a provision that it was to be governed by the law of New York, and the Court says at page 401:—

> "That the business of fire insurance is not inter-state commerce as decided in *Paul* v. *Virginia*"—and some other cases—"That the business of marine insurance is not decided in *Hooper* v. *California*, 155 United States 648. In the latter case it is said that the contention that it 'involves an erroneous conception of what constitutes inter-state commerce.' We omit the reasoning by which that is demonstrated, and will only repeat, 'The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the perils of the sea.' And we add, or against the uncertainty of man's mortality."

VISCOUNT HALDANE: Surely that was with reference to a mere definition of "commerce." Must not it have been a definition in the Federal Constitution?

SIR ROBERT FINLAY: In the Constitution.

VISCOUNT HALDANE: That is to say it was not inter-state commerce within the Federal Constitution.

SIR ROBERT FINLAY: Certainly; I do not carry it further than that, but your Lordships will see the precise reasoning by which they arrived at that conclusion.

The other case is the case of *Paul* v. *Virginia*, in 8 Wallace, on page 168. The passage that I am going to read to your Lordships is at page 183; it is in the judgment of the Supreme Court:—

> "There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

VISCOUNT HALDANE: That again refers simply to the definition in the Federal Constitution.

SIR ROBERT FINLAY: Yes, my Lord. Inter-state commerce is mentioned in the Constitution, but there is no definition.

VISCOUNT HALDANE: No.

THE LORD CHANCELLOR: That does not help you greatly, does it, because the contract of purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would certainly be an act of trade?

SIR ROBERT FINLAY: I admit that, but I do call your Lordship's attention to the fact that they say that insurance is not commerce.

THE LORD CHANCELLOR: They do not say it is not trade. Their illustrations are rather against the view, they are suggesting the same thing as the sale of goods.

SIR ROBERT FINLAY: They say it would not be inter-state commerce, but in this case as well as in the other they do deal with the question whether insurance is to be considered as a transaction of commerce, and they say no.

VISCOUNT HALDANE: Because inter-state commerce in the Federal Constitution naturally points to trading in the narrower sense in which all sorts of questions—financial questions—might arise.

SIR ROBERT FINLAY: Yes, my Lord.

Now that brings me to the end of my argument with regard to "regulation of trade and commerce," and I may I think sum up what I have to say by putting this: I am not contending for a restriction of the natural sense of the words "regulation of trade and commerce": I am contending that these words should be read in their appropriate meaning and should not be stretched so as to include matters which in their natural meaning they never would include. It was never intended that the power to regulate particular trades should be conferred by this; it related to such general matters as are described in Parsons' case as following properly within the scope of it and not to the regulation of a particular business like the business of fire insurance.

VISCOUNT HALDANE: This strikes me as in your favour on that point: A little lower down in the section banking is enumerated. There you clearly have the power to regulate banking, but not coming under trade and commerce, but because banking is taken out and treated by itself. You may ask why was not insurance taken out, and it might be answered that there were a number of other things; then you would reply to that that banking is enumerated.

SIR ROBERT FINLAY: I submit no answer has been given to the observation to which your Lordship has called attention. If "the regulation of trade and commerce" had the meaning attributed to it by the Attorney-General, what sense is there in mentioning banking as a separate head? I submit that the observation is really decisive against the meaning now sought to be given to these words.

May I call attention to what was said by Mr. Justice Idington on this subject in the companies case? It is at pages 71 and 72 of the record in the Companies case. No. 7, of 1915.

VISCOUNT HALDANE: Speaking for myself, I think the sooner we get to the other case the better. I do not mean that we can just jump there, but it seems to me the one bears on the other a great deal.

SIR ROBERT FINLAY: They are connected. This passage from the judgment of Mr. Justice Idington in the Companies case at pages 71 and 72 relates directly to the question of the meaning of this description "regulation of trade and commerce." He refers to the terms of section 92 and then he goes on:

> "The last sentence of section 91 and this section 92 make it clear that the enumerated powers in section 91 are paramount, and all else that falls within the scope of the enumerated powers in section 92, must be and remain exclusively within the legislative authority of the Provincial Legislatures. What possible right then can the Dominion Parliament have to interfere by virtue of its residual powers with any enactment duly made by a Provincial Legislature relative to the civil rights or property of anyone, either individual or corporate, seeking entrance therein and contracting there? The right to do so has sometimes been rested upon sub-section 2 of section 91, enabling Parliament to enact relative to the 'Regulation of Trade and Commerce.' That obviously enough relates to what may or may not be done

in connection with, or in relation to, the external trade and commerce of the Dominion as a whole and incidental thereto."

THE LORD CHANCELLOR: Does he mean the trade as between some other country—and nothing else?

SIR ROBERT FINLAY: Yes, my Lord, that is Mr. Justice Idington's view.

THE LORD CHANCELLOR: Is that the view you contend for?

SIR ROBERT FINLAY: In Parsons' case it was put it might comprise also inter-provincial trade, and I think that that is a sound view. I adopt really the definition given in Parsons' case, coupled with the approval of that definition in two subsequent cases before your Lordships.

VISCOUNT HALDANE: The worst of Parsons' case is that in the last sentence of the final consideration of it they take back what they said before.

SIR ROBERT FINLAY: Not on this point; there is nothing in the last sentence which in the slightest degree qualifies what they say, as I submit, on this point, as to the meaning.

VISCOUNT HALDANE: They say regulation of trade in one province.

SIR ROBERT FINLAY: Yes, my Lord, but with regard to the "regulation of trade in one province," it could not be improved by their doing it in eight others as well; that would be regulating a particular trade; it is admitted they could not do it by eight separate Statutes in the eight provinces, and yet they say we can do it if we lump it all into one Statute and say that you shall not do it in any one of the provinces.

VISCOUNT HALDANE: I am not sure that that is the form in which the question arises.

SIR ROBERT FINLAY: That is what the argument resolves itself into when one analyses it. Then Mr. Justice Idington goes on:

> "The adjustment of the tariff, for example, is not otherwise provided for. Legislation within section 132 of the British North America Act to carry out conventions relative to trade with foreign countries forms another subject which in some of the incidental consequences thereof might possibly require legislation to fall within this item and rest therein as well as upon that section. The attempt, so often made, to make this cover mere details of business and the laws relative thereto, was not pressed in argument herein as it was in the Insurance case. When it is attempted to bring within its range some branch or mere detail of business connected with or incident to trade and commerce, one is confronted with the many instances wherein the section specifically provides for separate items equally related to trade and commerce, as, for example, navigation and shipping, currency and coinage, banking, savings banks, weights and measures, bills of exchange and promissory notes, and bankruptcy and insolvency, as well as others which might all be covered by the generic term 'trade and commerce,' as well as these many other things now and again sought to be brought under its wing. Why should these specific assignments of power relative to matters falling within what the term 'trade and commerce' in the widest sense it is capable of, have been made if it ever was intended to cover such as it is now contended it does?"

VISCOUNT HALDANE: The comment on that is that in the case of banking and bills of exchange, and so on, the provinces are precluded from touching even in the smallest degree these subjects within the province. Nobody has yet suggested that insurance cannot be touched within the province so long as it is merely local. Indeed the Act itself excludes this, so that they are not quite on the same footing.

SIR ROBERT FINLAY: I submit to your Lordship that if it was intended to give this power of regulating particular trades by this definition you would not have gone on enumerating the others as you do. I agree the enumeration has the effect of giving the exclusive and over-riding power to the Dominion, but the very same effect is sought to be given by the wide meaning attached to "trade and commerce," because it is said if the Dominion legislates about any trade, that over-rides the legislation of the provinces. I submit that was not intended, and where it was meant to give the Dominion power over any branch

of trade, any part of trade and commerce, it was done in specific terms and in terms which showed that the Dominion legislation over-rode the other.

VISCOUNT HALDANE: This strikes me as being in your favour: Take the sale of goods—the sale of goods is a thing which might quite naturally come within the "regulation of trade," yet nobody says it regulates that, otherwise the Dominion could abolish the old French law of the Quebec Code on the subject.

SIR ROBERT FINLAY: Yes, my Lord, and a very strong argument is to be derived from that section, which provides for assimilating the laws of New Brunswick, Ontario, Nova Scotia, and not Quebec. Even there the provision is made that the Dominion legislation on that subject shall not take effect without the consent of the other legislatures of the province.

VISCOUNT HALDANE: On the other hand is not that said to be so with regard to the whole "civil rights"?

SIR ROBERT FINLAY: Property and civil rights are given to each province.

VISCOUNT HALDANE: Is not that section to which you refer wide enough to cover "civil rights"?

MR. NEWCOMBE: It is so expressed; it is section 94 of the British North America Act: "Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario"—

VISCOUNT HALDANE: It is a power to over-rule a sub-section of section 92.

SIR ROBERT FINLAY: Only with the consent of the local legislature.

VISCOUNT HALDANE: I quite agree, but it is that power.

SIR ROBERT FINLAY: Yes; the fact that it is so limited I submit is decisive to show that without that consent the Dominion Parliament cannot over-ride. "The Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and of the procedure of all or any of the Courts in those three provinces."

VISCOUNT HALDANE: I mean it rather shakes your argument that the section does so much, it really enables a repeal, with the consent of the local legislatures, of a sub-section of section 92.

SIR ROBERT FINLAY: I agree, but the important point is that the consent is required and without that consent it cannot be done. That is the point which I make, and it is sufficient I say to show that the Dominion Parliament has not the power now contended for. "—and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any province unless and until it is adopted and enacted as law by the legislature thereof."

VISCOUNT HALDANE: That could not be done in Quebec.

SIR ROBERT FINLAY: It could not be; it could not be done at all. That was in view of the great difference in the system of law prevailing in that province as compared with the others, but taking those brought within the scope of this I say the fact that the consent of the local legislature was required is decisive to show that the local provisions as to "property and civil rights" could not be altered without the consent. Then Mr. Justice Idington goes on at the top of page 72.

> "To attempt to stretch the power so as to enable Parliament to over-ride the local laws duly enacted relative to property and civil rights or aught else assigned to the exclusive legislative powers of the legislatures is dangerous. Indeed, it seems to me that if such attempts were upheld and followed to their logical consequences they would be destructive of the federal system. Where can one draw the line if not where I have indicated? The vast body of property and civil rights is in a sense almost entirely the offspring of trade and commerce. The family relation, education and municipal institutions are specifically provided for. What then of property and civil rights would remain to the provinces to be dealt with by them if the phrase 'trade and commerce' is to be given the extensive meaning

urged? It is attempted to distinguish what is involved herein as interprovincial trade and commerce, and thus justify interference. Let us in answer thereto consider the situation at Confederation and in connection therewith, section 121 of the Act, which provides as follows: '121. All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces.' And then the purpose of the veto power given by section 90 to the Dominion. There was at Confederation no hindrance by law to anyone going from one province to another. No law but those making tariffs thus swept away, prevented anyone from dwelling where he saw fit, and doing business in one or all of the provinces. And, so far as I can learn, the condition of corporate life and activity was similarly free. When the tariff barriers were thus removed there was no need for any regulation of the so-called interprovincial trade and commerce. And the enactment of section 121 seems to negative the idea of there being implied any power to take any future action in that regard by Parliament or any other authority. All that could ever be done was to preserve this condition of things. Interprovincial trade and commerce was to flow thereafter as freely as if its right to do so had been declared by an organic law. Such seems clearly to have been the conception of the framers of this instrument. Certainly the draftsman of the Act never could have supposed that a province which was only given a power of direct taxation and a subsidy from the Dominion to help cover its expenses of government, could resort to indirect taxation, even though this section never had existed. No one seeks to deny the right of Parliament by virtue of its residual powers to incorporate companies. The conflict, so far as it exists, is between Parliament and the provinces relative to the civil rights of these companies thus created."

May I make one observation in regard to that in support of what was said in the judgment of this Board in Parsons' case and as against one part of what Mr. Justice Idington says here? He quotes the 121st section, which provides:

> "All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces."

That is perfectly true as regards articles of the growth, produce or manufacture of any one of the provinces, but there may be a great deal of inter-provincial trade which does not relate to the articles of the growth, produce or manufacture of the particular province, and I therefore submit that Mr. Justice Idington, although in the main his view is sound, on this point unduly limits the scope of "the regulation of trade and commerce" when he says it would be confined to external trade and commerce and would not have anything left to operate upon as regards inter-provincial trade. That is contrary to what was intimated by this Board in Parsons' case, and I submit what was said by Sir Montague Smith in delivering the judgment in Parsons' case was perfectly right and that there is scope left for the regulation of inter-provincial trade and commerce in spite of that enactment as to the produce of particular provinces going to others. I respectfully submit, with that qualification, the view taken by Mr. Justice Idington of these words is sound. There is on page 113 of Parsons' case (7 Appeal Cases) a short definition; I only read one sentence near the top of page 113: "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"—

THE LORD CHANCELLOR: We have had that read, Sir Robert; I think it is present to our minds.

SIR ROBERT FINLAY: I am obliged to your Lordships. Then that is approved by this Board in the *Toronto Bank* v. *Lambe* in the judgment of Lord Hobhouse (12 Appeal Cases, 585-586). I have no doubt that is sufficiently in your Lordships' minds to make it unnecessary for me to refer to it.

THE LORD CHANCELLOR: I think we are reasonably familiar with the authorities to which our attention has been called.

SIR ROBERT FINLAY: I did read that, my Lord.

THE LORD CHANCELLOR: Yes, I remember that.

SIR ROBERT FINLAY: At pages 585-6 he agreed with that and then finally in the John Deere Plow case Lord Haldane in delivering the judgment of the Board said at page 340 or 341 that the Board agreed with what had been said in Parsons' case on this subject.

Now, my Lords, that I submit forms a body of authority which ought to decide this point. But further than that, my Lords, I put it to your Lordships that the decision in the reference at the end of 1885 with regard to the McCarthy Act could not have been arrived at if "the regulation of trade and commerce" had the meaning that they seek to assign to it here. The Board reported that regulation of the liquor trade by the Dominion Parliament was *ultra vires* in all the provinces, and I submit to your Lordships that a conclusion in favour of the argument for the Dominion now cannot be arrived at without setting on one side and overruling the decision arrived at in 1886. We have not got the reasons given, but the decision speaks for itself and no amount of argument can show that the decision in that case could have been justified if regulation of trade and commerce" meant what my friends now say.

LORD PARKER: Have you considered whether the McCarthy case is consistent with the earlier decision in *Russell* v. *The Queen*?

SIR ROBERT FINLAY: I say that it was right. *Russell* v. *The Queen* is to be taken as being law, but it was justified, my Lord; the distinction drawn, as pointed out by Sir Montague Smith in the course of the argument, is between prohibition and regulation.

LORD PARKER: I understand that. I do not understand why, if regulation infringes the provincial powers, prohibition should not. It seems to me it would be *a fortiori*.

SIR ROBERT FINLAY: The justification—whether it is sufficient I am not going into.

THE LORD CHANCELLOR: It is a difference.

SIR ROBERT FINLAY: It is a difference, and it is a difference which was acted upon by this Board and in 1886 in making the report on the McCarthy case they must have proceeded upon that difference, otherwise they would have overruled the Russell case.

THE LORD CHANCELLOR: So that if you pull your bands of "regulation" tight enough until you strangle the industry, that is within the powers of the Dominion Parliament.

SIR ROBERT FINLAY: If it got so tight it would cease to be "regulation."

THE LORD CHANCELLOR: It would become prohibition and then within the protection of *Russell* v. *The Queen*.

SIR ROBERT FINLAY: If you get that you have got what according to the Russell case was within the competence.

THE LORD CHANCELLOR: That is what I say.

VISCOUNT HALDANE: I am not quite sure, because in 1901 in the Manitoba case Lord Macnaghten took what was virtually a prohibition case and said it was within the powers of the province because of its local character. He went a tremendous distance to take away all the reasons assigned in Russell's case and transferring them into reasons for giving the provinces jurisdiction.

SIR ROBERT FINLAY: Yes, my Lord; I submit the decision in Russell's case is one that stands by itself—it is to be regarded as authoritative, but no argument can be deduced from it.

VISCOUNT HALDANE: I argued the Manitoba case and I remember our surprise that we got so easily over the Russell case, but the ground on which Lord Macnaghten proceeded was I think obviously this, that the Russell case turned not on "regulation of trade and commerce," but merely this, that the particular Statute in the Russell case was not within provincial powers. Whether he was himself of that opinion is another thing; he said: It has been so decided and in Manitoba we have a Statute confined entirely to Manitoba. That was another matter. He would not say it was "civil rights," because that would have brought him up against the Russell case.

SIR ROBERT FINLAY: I submit what was said by Lord Macnaghten in that case is rather in harmony with the whole tendency of Lord Watson's remarks

with regard to *Russell* v. *The Queen*, that *Russell* v. *The Queen* must be treated with respect, and all the more so because it is not quite easy to see the reason for it.

VISCOUNT HALDANE: *Russell* v. *The Queen* is an island that stands out in the middle of a vast ocean.

THE LORD CHANCELLOR: Sir Robert says it is a derelict vessel which hinders the commerce and trade of the province, and ought to be sunk.

SIR ROBERT FINLAY: Well, ought to be dynamited—I am not concerned with it; all I say is it is perfectly impossible for my friends after all that has taken place and the report of this Board in the McCarthy case to rely on *Russell* v. *The Queen* as any authority whatever for this attempted legislation.

Then in conclusion on this head I have only to say I do not seek to narrow the sense of the words to avoid inconveniences, but I protest against unduly extending the natural meaning of the words. The words are "regulation of trade and commerce," which imports regulation in the general and excludes the idea of regulating particular trades. That is my argument and I leave it there.

Now, my Lords, owing to my friend setting right my misconception of what he meant when Mr. Upjohn limited the scope of his argument, I must say some words with regard to the other head of "the peace, order and good government" on which my friend seeks to fall back.

VISCOUNT HALDANE: Now let us see what there is between you upon that. Mr. Newcombe argued that legislation on subjects which fell outside the provisions of section 92 was within the jurisdiction and the exclusive jurisdiction of the Parliament of Canada by virtue of the words "peace, order and good government," the residual words of non-Federal Constitution really—the words which make it not Federal, which reserve the jurisdiction of the Dominion Parliament. You would not contest that?

SIR ROBERT FINLAY: No, I accept that.

VISCOUNT HALDANE: Supposing something comes within the section, although there might otherwise be jurisdiction on the part of the Dominion so to legislate and it had occupied the field, you would not deny that the effect of your argument is that section 92 enables the province to overrule it.

SIR ROBERT FINLAY: No, my Lord.

VISCOUNT HALDANE: What is there between you?

SIR ROBERT FINLAY: It is another form of the argument; from the growth of the industry or business they say it is so important that it is a matter of Dominion concern.

THE LORD CHANCELLOR: I do not know that I am doing justice to the argument, but I apprehend it to be this, if you find a subject that is not within section 92, but is outside section 92 altogether, then it must be within section 91.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Therefore you have to see whether this is outside or inside section 92, and I understand the argument to be that it is outside for this reason, that the only head under which it can be brought under section 92 is head 13, and that is strictly limited to "civil rights" within the province; that is to say, rights which are defined and limited by the provincial boundary and that this Statute is not that.

LORD PARKER: Or a matter of local concern.

THE LORD CHANCELLOR: Yes, merely local.

SIR ROBERT FINLAY: Taking head 13, "Property and civil rights," that is property and civil rights within the province.

LORD PARKER: There is another point there which strikes me and that is this, that if you are right—I am impressed with your argument as to the impossibility of extending the words "regulation of trade and commerce"—every argument which you use in that connection is equally applicable to the impossibility of extending the terms "property and civil rights" within the province.

SIR ROBERT FINLAY: It is.

LORD PARKER: If that is the case, the only sub-section it could fall within, if it is to be looked upon from the point of view of the province, would be the last sub-section about purely local matters. Then the question arises, is this a purely local matter? If not, it is within the power of the Dominion? I can understand you can say with regard to a person who enters into an annuity

business within the province entirely, that is a purely local matter; but that is a different matter and does not deal with the section in question.

SIR ROBERT FINLAY: I desire to say it is a matter that affects "civil rights" within the province; the right to regulate insurance, it was decided in Parsons' case, rested with the legislature—

LORD PARKER: I agree, but if you view the words, legislation with regard to property and civil rights in the province, in the same way that you ask us to view "regulation of trade and commerce," this cannot be called an Act of regulation of civil rights within the province any more than an Act for trade and commerce within the province.

SIR ROBERT FINLAY: The scope of the two regulations is very different. The regulation of trade and commerce I say by force of the very terms imports that there is such general "regulation" as the Board in several cases has said it imports, and not the regulation of particular trades.

VISCOUNT HALDANE: Suppose for the sake of argument only we were to come to the conclusion that you were right on the company appeal and the provincial companies having been provincially incorporated so as to get a complete status were able to trade outside, might not it be a matter of Dominion interest to regulate the trading by companies who could effect insurances outside the provinces?

SIR ROBERT FINLAY: I submit not, for this reason, that it is only by the permission of any other province that a company in the case your Lordship supposes could carry on business in that other province, and that province might impose what conditions it pleased.

LORD PARKER: That is true, but you have to consider this also: Supposing the incorporation of a provincial company, an insurance company we will take for example, does not authorise that company to enter into contracts of insurance outside the particular province—if they go into another province they may be allowed to do it by some such notion as inter-provincial comity, but it does not prevent their act being *ultra vires* within the province, and anybody could stop it.

SIR ROBERT FINLAY: I shall give my reasons in the next case for my submission.

LORD PARKER: Perhaps it only shows that the two cases are so mixed up together that we ought to hear the arguments in both before deciding.

SIR ROBERT FINLAY: Your Lordships propose to do that?

THE LORD CHANCELLOR: Yes.

VISCOUNT HALDANE: I feel very strongly the necessity of keeping my mind free from any conclusion in this case until I see the bearing of the next case upon it, and I am anxious to get, as soon as we have done with the argument in this case, to the argument in the other case.

SIR ROBERT FINLAY: I hope very shortly to conclude my argument; I have very nearly done on this head.

THE LORD CHANCELLOR: Is not another way of putting the case which you have to meet this: Has not the Dominion Parliament recognized and protected all the rights which the provinces possess under section 92 by the provisions of section 3 of their Act? I am excluding for the moment the question of "person." Dealing with regard to companies is not that the real question?

SIR ROBERT FINLAY: I submit that they have not.

THE LORD CHANCELLOR: No, I know that is your submission, but is not that the question, the way in which the matter is put against you, that the provisions of section 3 of the Statute of 1910 have given full effect to all the provincial rights which are conferred by section 92 in relation to this particular subject? That is the point you have to meet.

SIR ROBERT FINLAY: I submit my friends cannot possibly make that out, for this reason. That only reserves the rights of companies formed in a province while carrying on business solely within the province of incorporation. It does not touch the question of the right of individuals.

THE LORD CHANCELLOR: I asked you for the moment to deal with that separately. Dealing with the company alone, does not that protect with regard to a company all the civil rights conferred by section 92?

SIR ROBERT FINLAY: I submit it does not.

THE LORD CHANCELLOR: That is the real thing you have to meet.

SIR ROBERT FINLAY: In the next case I shall have to submit to your Lordships that while a company incorporated by a province can as of right only carry on its business within that province, yet if other provinces permit it to carry on its business there it may do it. May I take the illustration of the Dominion Government? They incorporate a bank; that bank they incorporate for Dominion purposes, but that bank may establish a branch in England if the law of England allows it to do it. If the same rule were applied a Dominion bank could not have a branch in England or in France. I am not going to develop that at length, because it would lead me into the other case.

THE LORD CHANCELLOR: It does not to my mind quite meet their point; it may be met by another argument, no doubt. Their point is that both head 13 and head 16 of section 92 have a strictly limited application, and that directly you get legislation that deals with something that is not in its nature confined to a provincial boundary, that is a matter for the Dominion and not a matter for the province. That is the argument.

SIR ROBERT FINLAY: That is the argument, but I submit it proceeds on unduly narrowing the scope of the enactment in head 13 of section 92, which gives "property and civil rights" to the Provincial Parliament.

VISCOUNT HALDANE: You would admit that another province can limit the right of the first province's company to trade in that other province: you say whatever right that other province has, it is not the Dominion that has the right?

SIR ROBERT FINLAY: I do; the Province has the right because it is only by the permission of the Provincial Government that this company from another province may come there, just as in the case of a foreign country. There is a very good illustration in the case of a Dominion bank, but that Dominion bank has no right to come to England or France; it is permitted to come there because once incorporated, although for the purposes of the Dominion, it has a status as a corporation which by international comity is recognized, just as we for a very long time have recognized the right of a foreign corporation to come here and to enter into contracts here and to sue here. I submit just as a Dominion bank may have a branch by the comity of France or of Great Britain in Europe, so may a company incorporated by Ontario have a branch in Manitoba and carry on business there if they choose to allow it; but it is always subject to the permission of the State.

LORD PARKER: Is there any local restriction on a company incorporated by the Dominion?

SIR ROBERT FINLAY: It must be for the peace, order and good government.

LORD PARKER: Everything they do must be that.

SIR ROBERT FINLAY: Within the Dominion—

LORD PARKER: Here you have an express restriction in the one case and no express restriction in the other.

SIR ROBERT FINLAY: I will not indicate the point. I submit provincial objects means objects other than those which are assigned for incorporation to the Dominion in section 91—legislative restrictions—

LORD PARKER: If you do that you get into a circular mode of construction.

SIR ROBERT FINLAY: No, I submit it is straight on.

LORD PARKER: Nothing is in section 91 which is in section 92, and you are to construe section 92 by the express powers of section 91.

SIR ROBERT FINLAY: "Provincial objects" means that all are provincial which are not given to the Dominion, and with regard to the incorporation of companies you have certain things given to the Dominion.

LORD PARKER: Do you mean not given expressly to the Dominion?

SIR ROBERT FINLAY: No given expressly to the Dominion.

LORD PARKER: That is very wide, because it would prevent the Dominion having any powers under the general words.

SIR ROBERT FINLAY: I agree, but for my argument in this case it is not at all necessary. I do put it in answer to what the Lord Chancellor said, that there is a very serious interference with the authority of the province as regards

"civil rights" in the provision that every company, I am confining myself for the moment to companies, I will come to persons presently, must, to carry on business there, have a license from the Dominion, which license, by the terms of the Act involves obedience to every regulation of the many regulations contained in the Act as to the conduct of the insurance business. The only exception is in the case of companies which are provincial and are carrying on business there. Take a British company coming there. It is a matter of "civil rights" in the province what that British company may do; yet the Dominion purports to say that no company shall carry on business there except on the terms of conforming to every regulation contained in this Act.

In addition to that there is this: This deals with the rights of individuals as well as companies, and I submit on that point no answer is possible on this head because no license is to be granted to individual underwriters; I will not refer again to the very odd exception of associations after the model of Lloyds, but individuals are to be excluded altogether. Is it possible to say that that is not an interference with "civil rights"?

LORD PARKER: I think there is a good deal to be said from that point of view, because if you take a provincial Act which says: Every person within this province possessing certain qualifications shall be at liberty to enter into annuity contracts in such manner as they think fit—if you have that there would be a direct conflict.

SIR ROBERT FINLAY: Yes, and at present every individual has, subject to any enactments of his local legislature, power to enter into such contracts. This comes in and says, no, you shall not. I submit it is an absolutely clear infringement of "civil rights."

Then my friend from time to time—I do not know whether he is going to return to the suggestion—put it forward as if it were the importance of insurance business that is emphasized very much. In the judgment of the Chief Justice there are a number of statistics given. Is the interpretation of the Canadian Constitution to vary with the estimate which each Judge forms of the importance of the business as to whether it has got so big that it must be considered as of Canadian interest? What an extraordinary Constitution. The Court would have to hear evidence, if it proceeded regularly, as to the extent and importance of the business. In these cases so far it has proceeded without any evidence at all upon the statistics such as are referred to by the Chief Justice. I am not going to say anything disrespectful of statistics, but I think I may say this, that there is nothing more easily misunderstood than statistics, and if they are used for the purpose of establishing a conclusion of fact they require the most careful checking. I protest against the idea that the interpretation of a Constitution can depend upon the magnitude of the business that is done. That is emphasized very much by the fact that special provision is made in one class of cases and one class of cases only for the Parliament of Canada declaring a thing to be of national importance. That is in the 10th head of section 92. Your Lordship recollects that section 91 gives the Dominion exclusive jurisdiction with regard to any matters excepted in the provisions of section 92. Then in the 10th head, which relates to works within the province, an exception is made for through lines of railways, steamships, and so on, and further for any works within a province which the Parliament of Canada declares to be of general Canadian importance. I say that in order to base any argument on the extensive nature of the business my friends would need first to find a provision in the Constitution similar to that with regard to these works. It is made only with regard to these works, and the fact that it is confined to the case of works, I submit, excludes the idea that the Parliament of Canada can assume jurisdiction in respect of the alleged importance to the Dominion as a whole of the industry. An industry in one particular province may become of great importance to the whole of Canada; one province may have something like the monopoly of the supply of articles by having got the support of the others in manufacture or by its natural riches in material. It may be said it is extremely important to the whole of Canada to regulate the terms on which they are to dispose of their products and to regulate the industry itself. There is no such power there; you need to find it in the

constitution. They have carefully abstained from giving it, except in the one case provided for in (c) of head 10 of section 92.

Then I desire on this head to invite your Lordships' careful attention to what was said by Lord Watson—I am not going to read it—it runs over a great many pages and I think to some extent at all events it has been read to your Lordships, in 1896 Appeal Cases. The passages which I mean are to be found running over from page 359 to page 363. Take as typical one sentence near the bottom of page 360:

> "But to those matters which are not specified among the enumerated subjects of legislation, the exception from section 92, which is enacted by the concluding words of section 91, has no application"—that is to say it applies only to the enumerated subjects—"and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to Provincial Legislatures by section 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92."

VISCOUNT HALDANE: I drew attention before to the word "and."

SIR ROBERT FINLAY: Yes, my Lord, and my friend's whole argument consists in rather not laying due emphasis upon the word, and he seems to take for granted that if it is of Canadian importance they may then trench upon section 92.

VISCOUNT HALDANE: They do not trench then if it is so great that it is outside section 92?

SIR ROBERT FINLAY: Yes

LORD PARKER: I do not see quite why, if you do not trench upon section 92 it is necessary to have a matter of importance at all—why introduce in that case the reference to the importance of the subject? It is not within the power.

SIR ROBERT FINLAY: This is a residual power; you could deal with anything not enumerated which may turn out to be of importance to the Dominion—

VISCOUNT HALDANE: *Russell* v. *The Queen* has already decided that there is a subject so large that it is outside section 92—it may be that Lord Watson was thinking of that.

SIR ROBERT FINLAY: It is intended to provide for any other case—

LORD PARKER: I should prefer to construe the words "of Canadian importance" as contra-distinguished from being local.

SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: If you do not do that you get into the necessity of considering the growth so as to become of Canadian importance; it is simply construction, is it local or not local.

VISCOUNT HALDANE: It is that increase of quantity sometimes decreases quality.

SIR ROBERT FINLAY: It is the case of liquor, and that is a very exceptional one.

THE LORD CHANCELLOR: We have had that read, and in that case you are faced with the difficulty about the growth of the particular industry. That very case says a matter may become of such dimensions that it does become a matter of Dominion interest.

SIR ROBERT FINLAY: Lord Watson is there speaking of growing out of head 16.

THE LORD CHANCELLOR: Yes; whether it is necessary for this case or not is another matter, but all I mean is it was the answer to your suggestion that the Courts could not possibly consider in each particular case the importance of the subject-matter with which they were dealing and receive evidence as to its extent and listen to statistics.

SIR ROBERT FINLAY: I submit it would be very dangerous indeed. That was a mere suggestion; there is no illustration to be given, and I submit it would be extremely dangerous; the construction of the Constitution cannot vary according to that.

LORD PARKER: I was trying to help you by suggesting that those words would give a perfectly possible construction of the Act if confined to a distinction between what is local and provincial and a distinction of what is so large in area that it is not local and provincial.

SIR ROBERT FINLAY: May I suggest where that lands one? Suppose that in every one of the eight provinces in Canada you have an industry; in each province it is within the jurisdiction of the local legislature. In a sense it concerns the whole of Canada, because you have it in every one of the provinces which form the Dominion.

LORD PARKER: I quite follow that part of the argument, but in the present case the position may be this—we shall hear, no doubt, about it in the other case—that a provincial company has no power to do anything or to make valid what is said to be a matter which is local. If they go outside they may be recognized by other provinces because of some rule of inter-provincial comity, on the other hand what they do outside their own area is probably *ultra vires*—or that may be argued. On the other hand it is said that this enables the company to do what will be *ultra vires* if they obtain licenses from the Dominion Government.

SIR ROBERT FINLAY: Yes, that is the line which the Act takes, but I submit to your Lordships that it is impossible to justify what is done by this 1910 Act by reference—

LORD PARKER: I understand. No provincial Government according to one construction of section 92 could give them powers to carry on their business outside the local area?

SIR ROBERT FINLAY: My friends will seek to argue that in the next case.

LORD PARKER: Supposing that is the case; it is within the power of the Dominion Government to say if any company incorporated in the provinces wants to do it, it may do so, without it being *ultra vires*?

SIR ROBERT FINLAY: Then the question will arise whether the Dominion has any business to do that; that is for the province to which the company incorporated in another province comes. It is for the province there to deal with that.

LORD PARKER: Does the province regulate the rights of aliens?

SIR ROBERT FINLAY: Not of aliens.

LORD PARKER: Then they could not regulate the rights of companies and interfere with the question of inter-provincial comity.

SIR ROBERT FINLAY: It may lay down any conditions it pleases as to the right of a company which, being incorporated by another province, can carry on business in a second province only by the permission of that province; it may impose any conditions it likes.

LORD PARKER: Quebec could not say, things done in this province by an Ontario company shall be *intra vires*.

SIR ROBERT FINLAY: I agree in the abstract proposition, of course, but Quebec could grant the right of being a corporation in Quebec if it pleased.

LORD PARKER: Possibly it might do that, but it could not enlarge the powers?

SIR ROBERT FINLAY: I agree, not the original company, but it could grant the right of having all the privileges of a corporation in Quebec.

Then that, my Lords, is my argument. I submit that my friends entirely fail in their attempt to fall back upon the residual power in section 91, and that "regulation of trade and commerce" cannot possibly have the meaning which they attribute to it. MR. GEOFFRION: My Lords, I fully appreciate that from the long time that has been occupied, your Lordships are in a hurry to hear the Companies case.

THE LORD CHANCELLOR: Please do not think that we are in any hurry to get to that case. MR. GEOFFRION: I submit there is a very great distinction between the two cases, and they must be argued separately, so I ask permission to say a few words. I suggest the distinction is the distinction between the incorporating power and the legislating power. The British North America Act makes a distinction between the incorporating of companies to do certain business, and

the legislating on the business. In the next case your Lordships will have to consider the question of the power to incorporate the companies; it may be, if your Lordships take one view because the incorporation is Federal, nevertheless the business is to be done provincially, and there is the case where a federal company had to submit to provincial laws of Mortmain. In the next case your Lordships will have to decide about the incorporating of companies. In this case you have nothing to do with that. I submit now we are considering legislating on the subject-matter of insurance. As regards provincially incorporated companies, the question whether this Act goes too far respecting them and them alone or not, depends whether they have the right to go beyond the provincial territory or whether they are limited. It is obvious that if your Lordships should say in connection with the companies case that a provincial company cannot go out of the province even by comity, then the provisions in the Insurance Act as to provincial companies are sufficient for them; while if you came to the other conclusion and held that a provincial company can by comity go out of the province—by the permission of the other province—the Insurance Act would be restricting the powers of the provincial companies. Except as regards that, the question whether the Act interferes with provincial companies or gives them full liberty—except on that solitary question the answers to the questions in the Companies case, I submit, will not have any bearing on the answers to be given in this case.

Now, my Lords, I should like to give a brief outline of the main argument which I intend to address to your Lordships on the question of the conflict between "trade and commerce" and "property and civil rights." As your Lordships undoubtedly know now, and as no doubt you knew before, the fight between the Dominion and the provinces on "trade and commerce" as against "property and civil rights" is far from being a new one—I have counted 10 cases in which it has been involved. With reference to the John Deere Plow case, there it was not "property and civil rights" that was in conflict. I will try to show that under the existing jurisprudence of the Privy Council the words "regulation of trade and commerce" have been given a meaning, whether their broad meaning, their natural meaning, or a restricted meaning or an obscure meaning I do not care, but a meaning which does not seriously trench upon "property and civil rights." It has been considered by this Board over and over again that the proper rule to apply in a conflict between "property and civil rights" and "trade and commerce" was to make "trade and commerce" yield to "property and civil rights." I will take up later the answer to the difficulty whether this is "property and civil rights" in the province. I should logically perhaps have taken it first, but I will take it afterwards. Assuming for the purpose of this argument that this Insurance Act would be a law respecting "property and civil rights in the province," therefore which each province could have passed for its own area—indeed, taking it that it is a conflict between "trade and commerce" and "property and civil rights," I submit the jurisprudence is that "trade and commerce" must yield to "property and civil rights." It is true that possibly it gives rise to difficulties as to the defining of "trade and commerce," but your Lordships will see from the cases that we have been referring to and which I will refer to, that your Lordships have never been stopped by that difficulty. Having to choose between curtailing "property and civil rights"—

LORD PARKER: The Act says if there is any conflict between "trade and commerce" and "property and civil rights" trade and commerce is to prevail? It comes back to construction. MR. GEOFFRION: There are two ways of putting it. Perhaps the more accurate way would be to say the meaning of one must be given so as not to trench on the other.

VISCOUNT HALDANE: A pure question of construction. MR. GEOFFRION: But the effect of both ways of expressing it comes to the same—whether you say one must yield to the other or one must be construed to give full scope to the other is immaterial. The last way is no doubt the better way; "trade and commerce" has always been construed so as not to seriously curtail "property and civil rights."

LORD PARKER: So as not to bring about any such conflict. MR. GEOFFRION: Any conflict. There is a distinction I want to show; this being the jurisprudence—

based directly on the fact that "property and civil rights" was really the keystone of Confederation, and was put there at that time on account of the peculiar position of the province of Quebec, and the rights granted by the Quebec Act and by treaty in respect of "property and civil rights"—I take the argument used by Sir Montague Smith for the purpose of defining "property and civil rights," and making it prevail to avoid curtailment by "trade and commerce"—in Parsons' case—the argument that Quebec had a guarantee of its civil rights. This was a fulfilment of the Treaty of Paris when Canada was ceded. The provisions as to "property and civil rights" in section 92, and the provisions in section 94 were made in furtherance, and as a result of the arrangement whereby Quebec had its French law guaranteed, and was entering Confederation on the condition that it should keep control of both. For this reason the words have been construed in a peculiar way.

The next point I want to put before your Lordships is that the term "property and civil rights" is curtailed in its most vital parts, as stated briefly by Mr. Justice Idington in the passage read by Sir Robert Finlay, if "trade and commerce" is given the broad construction put upon it by my learned friend.

I would like to dwell a little more on the necessity of your Lordships considering the whole Act in order to determine the validity of this clause 4. It may be unfortunate, but we did not draft the question; it is not our fault; we opposed this reference and came to the Privy Council to prevent it, but the license is not a substantive part of the law; it is only a means of enforcing the Statute and seeing that the underwriters will comply with the law. The effective part of the law is that which imposes the conditions on which the license will be granted and renewed. Your Lordships could not say under no circumstances could the Dominion enact a license. We are willing to concede that the Dominion could enact a license as a means of raising revenue, so that your Lordships cannot say that under no conditions can a license be enacted, and, if your Lordships are not prepared to say that a license cannot be enacted under any conditions whatever, then the question is: What is the sort of license that can be enacted by the Dominion Parliament; in other words, what is a condition that can be imposed by the Dominion Parliament as to the conditions of the granting of the license. If that is the case it becomes essential to know what is the general character of the Act which can be summed up very briefly. The larger number of the sections provide means to secure that the underwriters will pay their claims. That is what I might call the insolvency group of sections. They provide means to secure that underwriters will fulfil their contracts whatever may be the provisions of those contracts. The second group, which is rather an important group, goes much farther and deals with the contract itself. Those sections provide what contract may be made and what contract may not be made, and what will be the effects of the contract. My Lords, by this Act they purport to do two things. They provide what are the contracts which the underwriters may make, that the undertakings under those contracts shall be fulfilled, and they purport to provide that, to a certain extent, the freedom of contracting shall be limited. Those provisions effectively limit the freedom of contracting both ways. If the underwriters cannot enter into such contracts, inversely the other parties cannot get those contracts. That is dealt with in section 139 which is couched in words permissive to the man asking for insurance. The effect of it is this: Parliament, by saying that no underwriter can enter into contracts unless they are of a certain description, were curtailing the liberty of both parties, and when they permitted certain contracts to be made they only permitted the person who sought assurance to make them. The Act purported to curtail what contracts can be made as regards both the insured and the underwriter. The condition is there no license if that is not complied with, and there is a penalty if a contract is made without a license. If that is the case, let us see what becomes of property and civil rights. I submit that the result is this, that property and civil rights cease to be in the exclusive jurisdiction of the province, and become in the concurrent jurisdictions of the Dominion and the province, which means the subordinate jurisdiction of the province goes where there are concurrent jurisdictions and there is a conflict; the Federal jurisdiction always prevails. So that, if I am right in my suggestion, that holding this section good, involves the

holding of the conditions of the license to be good, then I can show to your Lordships in a few words, that this amounts to authorizing the Dominion to legislate as to any contract as fully as it likes, provided that the contract is a trading contract, and that, therefore, the whole field of trading contracts is cut out of property and civil rights and ceases to be in the exclusive jurisdiction of the province and becomes in the concurrent jurisdiction of both, the jurisdiction of the province being subordinate. I submit that is an effect which cannot be contemplated, and it is this very argument which led the Board in the previous cases, the Montreal case, the Parsons' case and the McCarthy Act case, to give to the words "regulation of trade and commerce," a different meaning in order to avoid this very effect, an effect which particularly had to be avoided considering the nature of the assignment of property and civil rights in the British North America Act and the reason why it was put in the exclusive jurisdiction of the province. If the argument on the other side is right, I say that the whole subject of trading contracts goes. Take, in the first place, insurance. The provincial companies are accepted if they confine their operations to the provinces. This was given to the provinces under this section, but what is to prevent the Dominion Parliament from repealing it? If my learned friends are right, if the regulation of trade and commerce goes as far as they say it does, it does not depend upon the power of incorporating, it does not depend upon the area, they can regulate the particular trade throughout the province, and I fail to see what logical reason can be suggested why they could not repeal that exception as regards provincial companies simply by saying: We are not regulating companies; we are dealing with trade and commerce and we repealed that exception because we are dealing with insurance business; as we can deal with an individual or a foreign company that is operating in one province, so we will deal with provincial incorporated companies. I submit, in the second place, they have, to a certain extent, not only taken care of the solvency of the underwriter, of his ability to perform his obligations, but they have also taken care of the contract he shall make. They have said: You must put the following clause in your contracts, and you must not put the other clause in your contracts; your fire policies must not be for a period of more than three years. They can go on indefinitely. They can put more restrictions on the liberty of contracting and they can take hold of the whole subject of that particular contract. They include the mutuals as well, so that, therefore, they can include the non-traders in the ordinary sense of the word as well as the traders, because the insurance would be a *quasi* contract of trade, and, finally, what they can do with the insurance contracts they can do with contracts for the sale of goods and they can go on. I submit this is getting in the thin end of the wedge, and if your Lordships give a decision this way, the inevitable inference will have to be followed whereby out of property and civil rights, which is of such exceptional importance in the British North America Act, you are carving the whole field of trading contracts, and they cease to be in the exclusive jurisdiction of the province but are in the concurrent jurisdiction of the province and the Dominion, and when the jurisdictions are concurrent the provincial legislation is subordinate to that of the Dominion. I submit that this intention was not contemplated.

Now, my Lords, as to the cases, I do not wish to take your Lordships again through them, but I would ask your Lordships to read them, and not only the extracts from them. Many parts have been read, but some parts have not been read, for example, there is a long decision as to the meaning of property and civil rights in the Parsons case, which I would ask your Lordships to read. because there you will see, not so elaborately as I have stated it, but, to a certain extent, the argument I have been making is indicated.

VISCOUNT HALDANE: I think I may say I have read the whole of the judgment in Parsons' case at least six times in the course of this argument. MR. GEOFFRION: What I want to say particularly about it, in the first place, is this. The reason why "property and civil rights" is to be given so broad a meaning is pointed out in Parsons' case as being the peculiar conditions at the time of Confederation. It happens to-day that all provinces want property and civil rights, but at the time of confederation Quebec wanted it particularly and wanted it exclusively, and property and civil rights was considered in Parsons' case, and

it was undoubtedly intended at the time of the confederation as including trading as well as other contracts. I would like to say this also about Parsons case. Sir Montague Smith uses two arguments as to the meaning of the words "regulation of trade and commerce," as to the strength of which some doubts have been expressed by the members of this Board. One, for example, is the correspondence to the Act of Union between England and Scotland. It may possibly be that that argument may appear more or less conclusive to your Lordships, but that is not the only point. It shows what Sir Montague Smith meant when he pointed out that there was an undertaking in the Act of Union that the same laws as to regulation of trade would apply to the whole of the united countries, and that nevertheless special laws had been passed with regard to separate powers regulating special trades. Whether or not that argument is good or bad in the opinion of your Lordships, it shows what he meant. It shows that what he meant to convey was that regulation of a special trade was not within the meaning of "regulation of trade and commerce" in the Act of Union. In giving that example he means that that was not the meaning of "regulation of trade and commerce" in the British North America Act. The same remark applies to the example which he gives of the assignment of banking and bills of exchange, interest and bankruptcy to the Dominion under the British North America Act, notwithstanding the assignment to the Dominion of the regulation of trade and commerce. As indicating that the regulation is not of the character for which my friend is contending, I submit that is conclusive, but, even if it is not, it would show what was his intention, what his *obiter dicta* suggested, and that has been approved, and it was again approved in the John Deere Plow case, and it seems to me that in the John Deere Plow case the intention was, not only to approve the actual decision in Parsons' case, because the decision in Parsons' case is in a very narrow compass, but it was dealing with the statement of Sir Montague Smith, so that it becomes very important to know what he intended to say, and I suggest that those two arguments, even if they did not appear to your Lordships to be conclusive, are, nevertheless, a clear indication of what Sir Montague Smith meant, and that he meant to give as his opinion that the words "regulation of trade and commerce" had not the broad meaning contended for here. Might I also point this out. The Act cannot be federal and provincial on the same subject according to whether it is applicable to the whole Dominion or the provinces. You might as well say there is no exclusive jurisdiction in the province because the province can never make an Act beyond its limits, and the Dominion always can make an Act for the whole Dominion. Now what is meant by the words "in the province" which qualify the words "property and civil rights," and all other assignments of power to the province? I will just answer one of Lord Parker's last observations: What is meant by the words "in the province" which qualifies "property and civil rights" and limits every power given to the provinces? Simply that each province is to legislate for the province, but it does not mean that the Dominion can also legislate provided they legislate for more than one province as regards property and civil rights, and in view of the reasons which led them to make it exclusively provincial and particularly in view of section 94, which provides for the uniformity of civil laws. The intention surely was not to attach to the words "in the province" such a meaning as would enable the Dominion to make the very same law providing it was made for more than that province. If I am right in that it follows that this Act is necessarily property and civil rights. This Act as passed is not property and civil rights in the province, but a similar Act passed for the province by each Provincial Legislature for each province would be property and civil rights in the province, because, after all, it simply takes care of the ability, by a certain class, of the contracting parties to fulfil their obligations, and it takes care of the sort of contract that people will be allowed to make, so that it is clearly property and civil rights. The only question is whether it is property and civil rights in the province. A similar Act passed by the province for the province would be property and civil rights in the province, and I submit there would be no question about the validity of that Act. That is all we have to show in order to establish that unless it is expressly enumerated in section 91, it is exclusively provincial, and the Dominion cannot take from the province every

one of its powers and exercise them concurrently by simply making the Act applicable to the whole Dominion. That is not the intention of the Statute. My point is that a similar Act passed by each province, or any province, would be an Act as to property and civil rights in the province, and that is enough to make the Act bad as a Federal Act unless my friend can bring it into some of the enumerated matters in section 91. Therefore, we are limited to the question of trade and commerce unless some importance is attached to the number of millions involved in the business. As to that I wish to point out that the insurance business of the United States is much greater, and that they have, moreover, the greater complication of 48 States. There is no national disaster impending in the United States on account of the insurance business being left to each State. The very same law is State law there. To say that insurance must be entirely central, seems to me to go in the teeth of the most conclusive fact on the question. Some people may prefer the Federal system or the central system, and those who prefer the central system will probably say it is of national importance that insurance should be dealt with by the Federal Parliament; others might say otherwise. I submit that the position of the other side, in view of what happens in the United States is indefensible. I submit that property and civil rights are not to be considered provincial only in so far as the amounts involved are not great and only in so far as the intercourse between the various provinces is not considerable. With regard to Parsons' case, I submit that the decision itself, apart from the *obiter dicta*, is a decision in our favour, for this reason, that when the province can pass a law for the province, the Dominion cannot pass a different Act for the whole Dominion unless it is also mentioned in section 91. Further there is the *obiter dicta* as to the meaning of "regulation of trade and commerce," and as to that there is no doubt as to the meaning and intention of Sir Montague Smith.

My Lords, I have very little to say about Lambe's case. The decision in that case is not material to this I submit, but there is the dictum whereby the remarks about trade and commerce in the Parsons' case were approved. I cannot again think that the approval of the remarks of Sir Montague Smith about trade and commerce were intended to apply only to the few words at the end, which he states as being the ground of the decision. I submit that there is more than that and that the intention was to approve the general idea about trade and commerce having to be considered so as not to seriously curtail the broad definition of "property and civil rights," which had been stated before in the judgment.

My Lords, the Hodge case I will not say anything about. It is purely and simply useful if I am right in my proposition that an Act which the province can pass for the province cannot be passed by the Dominion in the very same terms because it was a provincial Act and the statement about the meaning of the words "trade and commerce" is very brief.

Then, my Lords, we come to the McCarthy Act case. I would like to say a few words about that case. That Statute was a Statute which regulated trade as much as any Statute, more than this Statute, and, in some senses, the claim to provincial jurisdiction was greater than here because there were not only financial interests there. The liquor trade is regulated for other than financial reasons, whilst the regulation of the insurance business is exclusively determined by financial considerations. There is nothing but finance, I submit, involved in this insurance, so that if there was a difference, the case for the provincial power is stronger in this Act than the other Act. The preamble of the McCarthy Act states expressly that it is to regulate trade and commerce, and the whole scheme of the Act shows that it is controlling the number of licenses to be allowed, what proportion of the electors in the district must approve before it is introduced, how the premises shall be kept, what shall be the character of the dealer in the liquor, and so on. It is pure and simple regulation of trade which is likely to cause disaster if unrestricted in the interests of order. The argument was mainly based on the regulation of trade and commerce. The argument was that if the Act could be passed by the province then it could not be passed by the Federal Parliament. On the other side the Russell case was relied upon by Sir Farrer Herschell and the argument was based upon trade and commerce. At page 165 in reply Sir Farrer Herschell puts

his case exactly on the Insurance Act in force at that time. He quotes the qualified statement about the Insurance Act contained in Parsons' case, where Sir Montague Smith assumed the Insurance Act to be good as law respecting federal companies. Sir Farrer Herschell treats that as an approval or an implied approval of the Insurance Act then in force and goes on to demonstrate carefully the absolute analogy between that Insurance Act and the Act he was defending; nevertheless the Board declared the Act unconstitutional. The question whether the Act was to be enforced or repealed depended upon the report of the Board, and the Board reported against the Act and it was abandoned. The Board had to hold that it was not regulation of trade and commerce, otherwise the Act would have been good.

VISCOUNT HALDANE: I have noticed the passage you refer to in Sir Farrer Herschell's reply. I think what really influenced the Board was their previous decision in the Hodge case. MR. GEOFFRION: Then the Parson's case becomes authority for me if the Hodge case was authority for the Board in the McCarthy Act case, because the distinction is the same. The only words that could render the actual decision in the Parsons' case inapplicable were those saying that the law regulating the contract of insurance was applicable to all underwriters within the province. If the Hodge case, which was a case with regard to the Liquor License Act for the province, was considered conclusive enough to lead to the decision in the McCarthy Act case ruling the Act applicable to the whole Dominion, your Lordships have the justification for my argument that if the Act is passed by the province for the province it must be bad if passed by the Dominion. Might suggest that the Insurance Act under consideration in Parsons' case was radically different from this. All that Sir Montague Smith said in the Parsons' case was that he assumed the Act to be good. The mere statement by Sir Montague Smith that he was assuming for the purpose of the argument that the Act was good would not be a ground for holding that the Act was good. It was limited to companies. In the first place, it amounted to this, that the regulation was as respects federal and foreign companies. The only question was the control over foreign companies. We do not dispute for a minute the right of the Federal Government to control the federal companies. The provincial companies are left out in terms much broader than they are left out in this Act. They were left out in terms as companies under provincial jurisdiction or words to that effect. I will give your Lordships the exact passage. It is the Act of 1877. "This Act shall not apply to any company within the exclusive legislative control of any one of the provinces of Canada, unless such company so desires," and so on. That is section 28 of the Act of 1877. The same Act, section 2, says: "It shall not be lawful for any insurance company to issue any such policy." Then the Act did not contain a provision regulating the contract. It was exclusively solvency guarantee legislation, if I may say so, except possibly one section, which imposed upon the companies the obligation to submit to the jurisdiction of each province. What has been suggested in the argument, that the theory of the occupied field would have something to do with the McCarthy decision is not justified, I respectfully submit, because the theory of the occupied field has laid down in the cases simply that there are certain matters which, from one point of view, may be provincial being enumerated in section 92 and from other points of view, federal being enumerated in section 91. In those cases so long as the provincial legislation does not conflict with the federal legislation it is good, but the moment it conflicts with the federal legislation, it is the provincial legislation that falls, so that the theory of the occupied field has never been suggested to validate a federal law because the field was unoccupied by the province.

LORD PARKER: The question always in the end is what is the Dominion aspect and what is the provincial aspect? The province has legislated, it being legitimate that it should do so, and the Dominion afterwards comes in and under one of the enumerated matters swallows up the other and then the province is displaced. MR. GEOFFRION: What I suggest is that it has never been suggested that the fact that a field was unoccupied by the province would validate a federal law.

LORD PARKER: If it is not within some head of section 92 or some head of 91, the law, of course, cannot be valid. The thing must fall under both sections in order for that doctrine to prevail. MR. GEOFFRION: And the federal law prevails if there is a conflict.

LORD PARKER: The federal aspect is the Dominion aspect. MR. GEOFFRION: But there has been no case where the Federal Parliament had the power to pass a Statute which, until the province legislated, was good and would become bad when they did. There is no possibility of escaping in that position from the conclusion that they decided that the particular Act was not the regulation of trade and commerce within the meaning of the British North America Act, and whether they decided it as a necessary inference from the decision in *Hodge* v. *The Queen*, or independently of that the decision stands anyway, and I respectfully submit that it was the necessary corollary of *Hodge* v. *The Queen*, and that makes our position only the stronger on that question.

Then, my Lords, there is the Montreal Street Railway case. That is the case where quite recently this very line of argument was used and used successfully in favour of the province, namely, that trade and commerce had not to be given a meaning that would justify that tremendous inroad into property and civil rights considering the peculiar nature of its assignment to the province. It was a conflict between railway legislation. The Dominion had a clause in its Railway Act that through traffic on a federal railway and on a provincial railway would be a case of the provincial railway being subject to federal control, and there my friend was trying to support it on the ground of national importance. He argued the national importance of it being under single control. He also tried to support it on trade and commerce, saying that the carriage of goods was trade and commerce. In that case the Board quoted the very words which Lord Parker quoted from the 1896 case last week, where it is stated that if the power to legislate in matters assigned to the province was left in the Federal Parliament because they were of national importance there would be scarcely a field of provincial legislation that would be untouched. I will give your Lordships the passage in this decision. It is in 1912 Appeal cases at pages 343 and 344. Lord Atkinson begins by a summary of the decision in 1896 liquor case.

THE LORD CHANCELLOR: I do not think there is anything new in that. He summarizes the old authorities. MR. GEOFFRION: I think there is something important about trade and commerce. It is Mr. Cameron's book, at page 795. Lord Atkinson said:

> "That to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by section 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation."

This was to dispose of the argument based on that, and, I take it, as a confirmation of the decision in Parsons' case and of the decision in *Hodge* v. *The Queen* and in the McCarthy Act case, that trade and commerce must not be construed so as to justify such an inroad as is attempted to be made now in the provincial powers, and your Lordships will see that that inroad could be made if this Act is declared good, an inroad that would be much greater than the inroads would have been in those cases. It may be it is advisable that insurance should be controlled by the Federal Parliament, but that is a matter of altering the constitution. Here there is an assertion of power to regulate these contracts and there is no reason why that power should be extended to other contracts.

With regard to the John Deere Plow case I think that also confirms that view

THE LORD CHANCELLOR: What was said in that case was simply: It is a matter which is not within section 92, being, therefore, a federal matter and the federal powers to regulate trade and commerce applied to what was a federal sub-

ject. MR. GEOFFRION: Yes; what the province had attempted to do was to do more than to regulate the company; they wanted to exclude it. The company had been incorporated under a given name, and British Columbia did not like that name, because it appeared there was another company with a similar name. British Columbia was refusing a company incorporated by the Dominion under a given name permission to trade under that name; it had to change its name. That was an interference with the right of a company to trade under a given name. In that case what I want to point out is at page 340. Viscount Haldane begins by pointing out that the civil rights in the province must be given a restricted meaning; it must be restricted by the express assignments, by what has been carved out of it. Then your Lordship points out that incorporation of companies is expressly trade and commerce, so that although incorporation of companies in a sense is property and civil rights, nevertheless it is not for the purpose of this Act. It is carved out of property and civil rights. It is not suggested that trade and commerce is to be carved out of property and civil rights. After proceeding in that way your Lordship says: "Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Company* v. *Parsons*, on head 2 of section 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head must, like the expression 'property and civil rights in the province' in section 92, receive a limited interpretation." The suggestion made by your Lordship seems to be that while property and civil rights is limited by a certain clear exception from it, such as banking, bills of exchange, interest, bankruptcy it is not restricted by "regulation of trade and commerce." On the contrary, it is regulation of trade and commerce that must be restricted so as not to interfere with property and civil rights. I will not repeat the argument as to whether this is a trade in fact, but I would like to say a word about the attempt to take the mutuals. I submit that the mutuals under no conceivable aspect can be considered as trade, and they represent an enormous business; there is no profit on it. Whether you could say that a co-operative store trades because it sells goods which it buys, may be a question, but it would not be accurately speaking anyway, because the essential of trade is that it be carried on for a profit and the mutuals cannot, under any aspect, as I submit, be considered as trading companies. We have again the unincorporated mutual system of insurance which comes under section 139. Your Lordships know of the reciprocal system of insurance where wholesale merchants generally insure themselves individually mutually through an agent without any incorporation whatever. This is a very large business which now has to be carried out by having an agent living out of Canada to get round this Act. That is not trading; that is non-commercial. But in this Act all the insurance is taken as if it were commercial. It has been suggested that in answer to that argument we might bring ourselves under the enumeration of banking, bills of exchange, bankrupty and all those subjects. As to these matters full legislative power is granted, whereas as to the trade and commerce generally only the regulative power. I submit that if the word "regulate" is to be given a meaning sufficient to justify this Act, there is not here any difference between the power to legislate on a subject and the power to regulate it, except the power to prohibit. Presumably if the reasoning in the 1896 decision is correct, the word "legislate" would not include anything other than the word "regulate" under the right to prohibit, and it cannot be suggested that the intention of Parliament in giving banking unreservedly was merely to give the right to prohibit, so that it seems to me the grant of legislative authority for banking and bills of exchange is incompatible with any theory that the grant of a power to regulate trade and commerce including what is claimed now includes the regulating of contracts in particular businesses.

As to the scope of the Act I want to draw your Lordships' attention to this also. The Act applies to individuals. As to that we say it is open to criticism. It applies also to unincorporated underwriters apart from individuals. As to individuals it is prohibitive, but as regards unincorporated underwriters the Act is not prohibitive. It applies to them and it applies to provincial extra-Canadian, including British, other colonies, foreign companies and federal companies. We do not deny the power to regulate the functions of the federal companies. The

Federal Parliament can legislate respecting federal companies as it likes, even if the legislative subject belongs to the province, as long as they do not come in conflict with the civil law of the particular province.

THE LORD CHANCELLOR: What do you mean by that? MR. GEOFFRION: What I mean is this. The Dominion Parliament can put all the restrictions it likes on the powers of its creature under the incorporating power. It can grant all the powers it likes to its creature and impose all the conditions it likes on its doing business as long as it does not come in conflict with the law of insurance of each province if the insurance is provincial. For example, supposing the Dominion incorporates an insurance company with power to do business throughout the Dominion, it can undoubtedly say: You shall not make contracts unless you agree to take a license yourself to be used in every town where you issue a policy and you must take a license so as to validate your policy. There is nothing against provincial law there, but the Dominion could not grant to the company the right to go above the local law.

VISCOUNT HALDANE: Do you mean anything more than to reaffirm what was decided in the John Deere Plow case, that a Dominion company, that is to say, a company operating throughout Canada, cannot escape from the general legislation of the province? MR. GEOFFRION: That is what I mean. Insurance is left as a provincial subject. The general legislation as to insurance would have to be provincial, but the Dominion could legislate with regard to its own creature so long as it did not conflict with the various local powers.

VISCOUNT HALDANE: If the Dominion says: You can carry on business in all the provinces, the Provincial Legislature cannot take away that power. MR. GEOFFRION: No, my Lord, but it can make it submit to its own insurance law as other insurers.

VISCOUNT HALDANE: You would have to take what the Statute was. MR. GEOFFRION: Yes, as regards Dominion companies we do not deny the right of the Dominion to control as it likes its own creature. As to individuals and associations we claim that the jurisdiction does not exist and the last class I have to deal with is the extra-Canadian companies, British companies, companies in other colonies and so forth. As to the British companies and the companies of other colonies there seems to be no difference in reasoning. The same reasoning applies to individuals. They are not under Dominion control. Trading in a province is a matter of property and civil rights in the province, and, if it is not a matter of regulation of trade and commerce, then that is exclusively provincial. The foreign companies would be the only companies as to which it might be possible to suggest that the alien law applied. I submit this is not a case respecting aliens. Foreign companies are not treated in this way because they are foreign. The same provisions apply to British companies. The companies of other colonies and the foreign companies are, in fact, substantially the same as the Canadian companies, and that is sufficient. This is not a law against foreign companies because they are foreign; it is a law because they are insurance companies, and, therefore, it is not alien legislation, but even if it was, I should like to quote to your Lordships the decision of this Board in the Cunningham case which has not yet been read. It is reported in 1903 Appeal Cases at page 151. The Lord Chancellor in giving judgment at page 156 says:

> "Could it be suggested that the province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of section 91, sub-section 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality."

So that I submit, even if this Statute as regards the foreign companies could be supported as an alien law it would not be good under the Cunningham case. As to whether it is good under the criminal law clause I submit that the best answer to that is that a licensing law cannot be criminal. An absolutely prohibitive law may sometimes be considered as criminal law but when Parliament simply says permission must be obtained, certain conditions must be fulfilled in order that the dealer in the business shall not be insolvent and shall not make contracts too hard upon the general public, and he is only to take a license and make the contracts, it seems to me that the penalty, if he fails to take his license, is not a criminal matter. A criminal act is an Act which prohibits something because it is against public order and not a license which permits something providing some preliminary formalities are fulfilled. The mere attaching of a penalty as such does not make a Statute criminal law; otherwise sub-section 15 of section 92 of the British North America Act which provides "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" would be unexplainable in view of the assignments of criminal law to the Dominion. I respectfully submit that the words "property and civil rights in the province" do not mean that the Dominion could pass the same law if they passed it for more than one province, that each province has the exclusive control of property and civil rights within its limits, for the whole subject of property and civil rights is provincial and the Dominion is composed of all the provinces. On the other hand, this law in substance deals with and imposes restrictions on the capacity to contract and takes care of the form and substance of the contract as well as the fulfilment by the parties of their obligations under it, and, therefore, it is a law respecting civil rights, and it is only if it is a law respecting trade and commerce that the federal jurisdiction comes in. I submit for the reasons given before your Lordships that this must be considered so as not to result in such a terrible encroachment upon the power to legislate with regard to property and civil rights. Any other conclusion would mean that the trading contracts would all become subjects of Dominion jurisdiction.

THE LORD CHANCELLOR: I think Sir Robert Finlay was prepared to admit that under the provisions with regard to the regulation of trade and commerce it would be competent to the Dominion Parliament, if they thought fit, to provide that nobody should trade unless they had a license. We must not consider for the moment the reason of the legislation, but they did in fact desire that. They would have power to regulate, not a particular trade, but trade and commerce and to provide that nobody should carry on trade without taking out a license.

MR. GEOFFRION: For taxation, yes. For taxation purposes the Dominion can levy a tax by license.

THE LORD CHANCELLOR: We will not for the moment consider it as taxation by license.

SIR ROBERT FINLAY: I think I said that there might be more to be said for a contention of that kind.

THE LORD CHANCELLOR: What do you say to that? Do you make the admission or not? Could the Dominion Parliament provide that nobody should carry on trade without a license?

SIR ROBERT FINLAY: I find it difficult to answer it in that way.

THE LORD CHANCELLOR: It could regulate trade in the abstract, could it not?

SIR ROBERT FINLAY: Would your Lordships allow me to say a word about that? I should say this: That such a regulation would be certainly a subject of civil rights within the province because it would apply to every province and it would require every citizen of every province to get a license before he could carry on trade.

THE LORD CHANCELLOR: That must be true of every regulation which you make with regard to trade and commerce, even if you make it in the abstract.

SIR ROBERT FINLAY: That must be my answer.

THE LORD CHANCELLOR: It must be equally true of any other regulation that is a regulation of trade and commerce. To regulate trade and commerce you must interfere with the civil rights of people in the province. What I am putting

to you, Mr. Geoffrion, is this, assuming that that was right, what would there be then to prevent the imposition of different conditions for different trades? MR. GEOFFRION: Then the law would be a special law regulating different trades.

THE LORD CHANCELLOR: Not necessarily. MR. GEOFFRION: Your Lordships may find a difficulty in finding what is meant by trade and commerce if it is not given the proper meaning, but that has not prevented the Board before saying: We had better leave the meaning of "trade and commerce" in slight obscurity than make it practically destroy property and civil rights. Your Lordships are undoubtedly facing that alternative and it is the alternative that has always been faced by this Board before, and that is why they have said: We do not attempt to define what are property and civil rights; we say this is not. I ask your Lordships to say this is property and civil rights. Where there is a choice of two evils you must choose that which is the lesser evil. The decision of the Board has been that the lesser evil of the two is leaving trade and commerce obscure rather than curtailing the property and civil rights. MR. NEWCOMBE: If your Lordships please. I fully agree with an observation which fell from one of your Lordships that it would not do to deny a power to the provinces on the ground that they were not fit to exercise it. That is obvious. Neither I suppose would it do to deny power to the Dominion to regulate that which is given to the Dominion to regulate. If the Act be a regulating Act, as I submit it plainly is, the only question can be whether the subject matter is for Dominion regulation. The subject matter is insurance. The business of insurance is trade and commerce or incidental to or an activity or operation of trade. If so the power lies with the Dominion, and the Court I submit will not review the exercise of the power, whether the regulation be wise regulation or not.

THE LORD CHANCELLOR: In that view how do you explain the McCarthy Act. MR. NEWCOMBE: I am coming to that in a moment. That is the first difficulty which I am going to grapple with. First of all I would like to refer your Lordships to a passage in a case which has not been mentioned. It is an observation of Lord Watson in the case of the *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, reported in 1892 Appeal Cases, at page 441. His Lordship is referring to the British North America Act and says: "The object of the Act was neither to weld the provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces." Matters incidental to or connected with trade and commerce the Dominion may regulate certainly if they be of common interest, but it is said if I apprehend rightly the arguments of my learned friends, not as to a single trade, and it is said that the decision of this Board in the case of the Liquor License Act, 1883, which is chapter 30 of the Statutes of 1883, upon the reference which was made pursuant to that Statute is conclusive that under trade and commerce the Parliament may not regulate a single trade, I have not had an advantage which my learned friends have had of reading the notes of the argument in that case, because the pamphlet has not been available to me.

VISCOUNT HALDANE: The McCarthy case. MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: It was published in the 5th volume of Cartwright. It is in Cartwright's cases in the 5th volume, at any rate it is so in my copy. It is bound up with three or four others. MR. NEWCOMBE: In the ordinary published edition I do not think it appears. I have tried frequently to get the report. I have seen it, but I have not had an opportunity of possessing one.

VISCOUNT HALDANE: The whole argument is put in. MR. NEWCOMBE: I have seen it, but they are very difficult to get.

THE LORD CHANCELLOR: Apart from the arguments there remains the Statute. MR. NEWCOMBE: I want to refer to the Statute. The only evidence of the decision is I think in the Queen's order of the 12th December, 1885, and

this is the report to Her Majesty: "Their Lordships report as their opinion in reply to the two questions which have been referred to them by your Majesty that the Liquor License Act, 1883, and the Act of 1884, amending the same are not within the legislative authority of the Parliament of Canada. The provisions relating to adulteration if separated in their operation from the rest of the Acts would be within the authority of the Parliament, but as in their Lordships opinion they cannot be so separated, their Lordships are not prepared to report to your Majesty that any part of these Acts is within such authority"; but the grounds of the decision are not reported. When that case was argued before this Board *Russell* v. *The Queen* had been decided, and *Hodge* v. *The Queen* had been decided. Sir Farrer Herschell relied upon *Russell* v. *The Queen* and Sir Horace Davey relied upon *Hodge* v. *The Queen*, and the question was whether the Act was competent to the Dominion within the principle of the former decision, or incompetent to the Dominion as a matter of private and local regulation within the principle of the Hodge case. *Russell* v. *The Queen* as interpreted and expounded by the Prohibition case of 1896, has perhaps been sufficiently discussed, but less has been said about the Hodge case, and before I refer, as I shall endeavour to do very b fly, to the provisions of the Liquor License Act of 1886, with a view to showing the character of the Act, I should like to read a passage from the case of *Hodge* v. *The Queen*.

VISCOUNT HALDANE: *Hodge* v. *The Queen* is the key to the decision in the McCarthy case. MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: You will find in Lord Fitzgerald's judgment at page 131 of the report a passage which explains what he means. *Hodge* v. *The Queen* has been approved several times. MR. NEWCOMBE: Yes, my Lord, it does not stand in the position of being subject to the imputations which have been made against *Russell* v. *The Queen*. *Russell* v. *The Queen* created a difficulty. *Russell* v. *The Queen* is somewhat like a fixture in a game of chess. If you fasten one of the men down it alters the whole game, so it is when you come to consider decisions in regard to the liquor traffic. They are all influenced more or less by the fact that there is *Russell* v. *The Queen*, which decides a principle, if I may venture to say so, not in conformity with other cases, and it has affected the whole of the decisions.

LORD PARKER OF WADDINGTON: It rather appears to me that *Russell* v. *The Queen* has not affected the decisions, but it has affected the reasons for the decisions. MR. NEWCOMBE: That is a better way of stating it, my Lord.

LORD PARKER OF WADDINGTON: One looks at the statements of the reasons for the decisions with some hesitation, because one does not know on what they are moulded. MR. NEWCOMBE: That is the difficulty.

VISCOUNT HALDANE: It is very difficult to reconcile *Hodge* v. *The Queen*. There is a regulation there which enabled the province to make a regulation of a local nature which cut down the whole sale of liquor in the province. Yet it was said because that was merely local it was *ultra vires* of the Dominion. MR. NEWCOMBE: The decisions are difficult to reconcile. Sir Barnes Peacock delivering judgment in the Hodge case, 9 App. Cas., at pages 130 and 131, said: "Their Lordships proceed now to consider the subject-matter and legislative character of sections 4 and 5 of 'the Liquor License Act of 1877, chapter 181, Revised Statutes of Ontario.' That Act is confined in its operation to municipalities in the province of Ontario, and is entirely local in its character and operation. It authorizes the appointment of License Commissioners to act in each municipality, and empowers them to pass, under the name of resolutions, what we know as by-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 exempt 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 institution 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, etc., 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." I am going to show your Lordships that the Liquor License Act of 1883 is an Act intended to have the same effect in each of the provinces as the Liquor License Act of Ontario, which was upheld in the Hodge case, had in the province of Ontario. "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 the British North America Statute, 1867." Head 8 is: 'Municipal institution in the provinces.' Head 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. Head 16 is: 'Generally, all matters of a merely local or private nature in 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." Then at page 133 his Lordship said: "Many other objections were raised on the part of the appellant as to the mode in which the License Commissioners exercised the authority conferred on them, some of which do not appear to have been raised in the Court below, and others were disposed of in the course of the argument, their Lordships being clearly of opinion that the resolutions were merely in the nature of municipal or police regulations in relation to licensed houses, and interfering with liberty of action to the extent only that was necessary to prevent disorder and the abuses of liquor licenses." I think Lord Watson explained in the Prohibition case that the Board held in *Hodge* v. *The Queen* that these regulations were authorized by section 92, article 9.

VISCOUNT HALDANE: It was Lord Fitzgerald who delivered judgment. "Sir Barnes Peacock" in the report is a mistake. MR. NEWCOMBE: Having shown the principle of the decision in the Hodge case I wish to refer to the Liquor License Act of 1883, as showing what sort of Act the Board had under consideration. In the first place there is a recital which says: "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." Having regard to the true complexion and meaning of this Act I submit, and I shall endeavour to show your Lordships, that it would have been more appropriately introduced by the addition of a few words to this recital so as to make it read somewhat in this way: "Whereas it is desirable to regulate the traffic in the sale of intoxicating liquors privately and locally in respect of each province or as a matter of private and local interest in the provinces." The 4th section of the Act provides: "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"; so that the country is to be divided into comparatively small districts for the purpose of this proposal or project or regulation. Then section 5 provides that "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 province 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; in the province of Quebec, the Judge of the Judicial district

a Judge of Sessions of the Peace, the Prothonotary or a Registrar of the county or registration division, as the Governor-in-Council may appoint; in the province of British Columbia, such one of the Judges as the Governor-in-Council may appoint; (b) The second commissioner shall be the warden of the county or mayor of the city, 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 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: (2) In the counties of Chicoutimi and Saguenay, Gaspe and Bonaventure, in the province of Quebec, the Governor-in-Council may appoint two commissioners, who, with the warden, shall form the Board; and in any unorganized district, the Governor-in-Council may appoint three commissioners." Then by section 7: "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: (1) hotel licenses; (2) saloon licenses; (3) shop licenses; (4) vessel licenses; (5) wholesale licenses."

THE LORD CHANCELLOR: It is provided that there shall be licenses granted to saloons, hotels, shops and wholesalers dealing with liquor, and that part from those licenses people shall not sell. MR. NEWCOMBE: Yes, sale was prohibited except with a license.

VISCOUNT HALDANE: And there was to be a local veto. MR. NEWCOMBE: Yes, my Lord, there was to be a local veto, and there was to be a commissioner appointed to consider in each locality how many licenses should be issued there, and they might have two in one locality and six in the next, depending upon the discretion of the commissioners. The object was not to prohibit the trade, but to provide the conditions upon which the trade was to be carried on locally.

VISCOUNT HALDANE: Or was not to be carried on at all. MR. NEWCOMBE: Not to be carried on at all it is true, but really no one anticipated that the trade was not to be carried on.

THE LORD CHANCELLOR: Was not the intention that there should be uniformity between the provinces? MR. NEWCOMBE: As a matter of fact it was providing under what terms and conditions this county and that county, this city and the other city, was to indulge its propensity for drink. That was the thing that the Dominion was regulating and providing for, and they did it in the way of saying there shall be no liquor sold without a license, and licenses shall be issued for small localities; there shall be a Board to consider how many in each locality, and in those localities hotels, for instance, shall be of a certain character; they shall have a separate entrance to the Bar and an opportunity for people to look through the window to see who is taking drink inside, and that sort of thing. It is purely local. Your Lordships have to consider the whole Act and the purpose of it. Then it is mixed up with another thing. I am not going to refer to many sections. This has been pressed against me in the argument.

VISCOUNT HALDANE: Is it necessary to go into the details of that. Ontario purported to pass a regulation Act, that is to say, a licensing Act, and the Dominion were trying it too. Mr. McCarthy followed up the victory in the Russell case by introducing a licensing Act. There was one in Ontario, and there was another in the Dominion, Mr. McCarthy's Act, and they came up for discussion about the same time, and having given their decision in the Hodge case the Board did not give any reasons in the other case. MR. NEWCOMBE: The Dominion did not think they had the right to enact it; it was a tentative sort of thing; it was simply a lawyer's project, if I might say so, an attempt to see how far in view of the Russell case the Court would go in upholding Dominion legislation to take local control of the whole liquor trade. I think no one was

better pleased than the Dominion when it was found that it was an *ultra vires* measure.

(Adjourned for a short time.)

THE LORD CHANCELLOR: Has any arrangement been made among yourselves as to the way in which the subsequent cases are going to be dealt with. Fortunately everyone is here and I have no doubt that all the arguments which have taken place in the first case have been heard by everyone who represents the different provinces. I want to know how it is going to be done.

SIR ROBERT FINLAY: The next case is the Bonanza case and your Lordship said you would take that before the other.

THE LORD CHANCELLOR: Yes.

SIR ROBERT FINLAY: In that case I appear with Mr. Nesbitt for the petitioners, who represent the provinces, and what we propose to do, subject to your Lordship's sanction, is that I should open that case in its general aspect as bearing on the powers, that then my friend Mr. Hellmuth, who appears for the company which is directly interested in that case, should deal with such points as would supplement what I said on the general point and deal with some points specially affecting the company, but not in the same general interest. Then I should ask your Lordship to hear Mr. Nesbitt, who is with me, for the provinces, when my friend Mr. Hellmuth is finished.

THE LORD CHANCELLOR: I notice that the questions which are asked in the general case cover the greater part of the ground that is traversed by the Bonanza case and the present case.

SIR ROBERT FINLAY: I think a good deal of the Companies case, the general case will be covered by the Bonanza case; in fact the judgments in the Companies case are referred to in the judgments in the Bonanza case.

THE LORD CHANCELLOR: They are very closely allied.

SIR ROBERT FINLAY: Very closely.

THE LORD CHANCELLOR: So far as they are not the same they appear to wander far into the region of the abstract.

VISCOUNT HALDANE: In the John Deere Plow case we had these judgments before us, and I think we shall all have read them through again. It will not be necessary for counsel to read them through to us; they can comment on any points that arise in the judgment, but we shall have read these judgments.

SIR ROBERT FINLAY: In the Companies case.

VISCOUNT HALDANE: In the Companies case in the questions there are some to which the observations we made in the John Deere Plow case apply; you must not expect us to answer the whole of what is, I think, irreverently termed the longer catechism in Mr. Justice Idington's judgment. It may be if those questions are borne in mind in the opening of the Bonanza case, substantially the two cases can be dealt with together.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: I see Mr. Nesbitt seems to assent. MR. WALLACE NESBITT: I think so, my Lord.

VISCOUNT HALDANE: We are very familiar with the points in this case. MR. NEWCOMBE: Yes, my Lord, but I shall have to reply to a few points which have been raised.

My Lords, the next observation is that these local districts into which the Dominion was divided for the purposes of exercising licensing jurisdiction in the case of the Act of 1883 are all provincial districts, they do not overlap; provincially, therefore, they are all local districts, every district is local within a province and does not extend into any two provinces. Now will your Lordships let me refer to sub-section 2 of section 7 to show the local character of the Act, and how it is supplementary, as it were, or in aid of the power of local legislation given by section 92: "But hotel, saloon and shop licenses and such other of the licenses by this Act authorized 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 ninth enumerated class of subjects in section ninety-two 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." The license was to be issued by the Dominion, the license fee provided by the province and raised by the Dominion, as I shall show by a later section for the benefit of the province. Then by section 9 the Board is to hold a meeting: "(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, ale-houses, beer-houses," and so on, for limiting the number, and for declaring the number of saloon licenses that may be issued in any one year, and so on. By section 13 an application for a license must be certified by one-third of the electors in the polling division in which the premises are situate; that is as to the fitness of the person in the estimation of the local inhabitants to have such a license. Section 14 provides that "Such certificates shall be in the form in the second schedule hereto, or to the like effect, in respect of the fitness of the applicant to have such license, and the premises in which it is proposed to carry on the business, and the desirability, on the ground of public convenience, of having a license granted therefor,"—public convenience in the locality. Section 17: "It shall be the right and privilege of any ten or more electors of the said polling sub-division, and in unorganized 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" among other things, "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." Section 40 provides: "Upon the obtaining by the applicant or the certificate authorizing the issuing of a license, the Chief Inspector shall, on the demand of the applicant so authorized, 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 is, to the provincial or municipal authorities under the provisions of that clause which authorises the issue of licenses in order to the raising of local revenue. Section 42 provides for the number of licenses in cities, towns and villages, according to the population, with a special provision for Niagara Falls: "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." Section 56 provides that the license fund after payment of expenses is to be paid over to the municipality: "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." And this is to be paid over to the municipality by the provisions of section 56. Then section 146, which is the only other section to which I refer, provides: "Until the first day of May, in the year one thousand eight hundred and eighty-four, all the laws of the 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,"—re-enacting by Dominion authority the local provisions. The whole scheme and purpose of the Act is, therefore, to restrain and regulate locally, largely in the discretion of different local boards, and the Act in my submission was condemned, as relating to private and local matters, not of common or Dominion interest or importance, or as relating to the strictly private and local aspect of the trade. It was in all constitutional respects I submit like the Hodge case, and to the Hodge case we go for the observation so often quoted that a matter which in one aspect and for one purpose may fall within section 92, in another aspect and for another purpose may fall within section 91. This legislation is referable, therefore, to private and local matters rather than to the regulations of trade and commerce of general Dominion interest.

It had to do with the local and private aspect of the trade and was involved also, as I have shown, with local powers of taxation, a matter of local and not national concern. Now there is Lord Watson's observation in answer to a question in the Prohibition case, which illustrates the sort of case which this was. That case was, like this, a case of a reference of questions by the Governor-General for the determination of the Court, and one question was: "Has a Provincial Legislature jurisdiction to prohibit the manufacture of such liquors within the province?" This was Lord Watson's answer: "In the absence of conflicting legislation by the Parliament of Canada, their Lordships are of opinion that the Provincial Legislatures would have jurisdiction to that effect if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province." In the absence of Dominion legislation to the contrary, the province could do that, and its power of prohibition extended only in so far as the manufacture was carried on in such a way as to be merely a private and local matter in the province. That was not "trade and commerce," that local and private aspect of the manufacture of liquors was not "trade and commerce," and they could prohibit that as it is said in the absence of Dominion legislation to the contrary, but the broad question of prohibiting the manufacture of liquor, the prohibition in its broad or national aspect, is certainly by the necessary implication of this answer left to the Dominion. And upon what does it rest? Upon nothing, I submit, except the "regulation of trade and commerce." Just so, in my submission, in connection with the Liquor License Act of 1883. That was legislation which regulated in the local aspect. The province of Ontario could pass the Act in the Hodge case. Equally it could have passed this Act in the McCarthy case, limiting its operation to the territory of the province, because dealing with the trade and the regulation of the trade in its private and local aspect; but in the national aspect, the broad general aspect of the case, the regulative power would necessarily lie with the Dominion. Nothing to the contrary is in any sense determined by the Report of your Lordships' Board in the 1883 case. Lord Watson's dictum in the Prohibition case with regard to the magnitude of the subject has been read several times, and it still stands, and perhaps in connection with my argument I may repeat it: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the Provincial Legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada." That observation stands and must necessarily be effective, and it is I submit to be read in connection with dicta in Parsons' case, and other cases suggesting limitation of the power to regulate trade and commerce to trade in matters of inter-provincial concern. My learned friends emphasized inter-provincial trade. Those were not the words in Parsons' case. I do not know that there is very much difference. It strikes me there may be a difference. It was suggested by Sir Montague Smith that the Dominion might regulate trade in matters of inter-provincial concern, general regulation of trade affecting the whole Dominion, and as I have said at the opening, Lord Watson uses the words "matters of common interest."

Now, my Lords, I can remember when there was serious debate as to whether any petty regulation of trade was competent to the provinces, a question of early closing of shops in a village municipality, and matters of that sort. It was suggested that these could not be provided for locally, because they were "regulation of trade and commerce," and, therefore, for the Dominion, but it was found out, when the Courts came to consider, that they were private and local matters or "property and civil rights" in the province; they were local, having a local and not a national or Dominion interest, not a matter of common interest or inter-provincial concern. It was suggested also in Parsons' case that the words would include political arrangements with regard to trade requiring the sanction of Parliament, but I humbly submit that nothing can rest upon that when you consider

the other provisions of the Statute. Section 132 of the British North America Act provides: "The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries." Section 121 provides: "All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces," and, therefore, no restriction could be put upon that. Then by the enumerations of section 91 we have, given to the Dominion, the raising of money by any mode or system of taxation, which includes the power exercised by the Dominion with respect to customs and inland revenue, and we have the general subject of navigation and shipping. Therefore in so far as political arrangements with regard to trade requiring the sanction of Parliament are concerned, I submit that those are amply provided for under the provisions which I have referred to, and you cannot find any place for political sanctions of such arrangements under "the regulation of trade and commerce."

Your Lordship mentioned the matter of the gold supply. Now perhaps a concrete example of that sort of case is better, and that is the case of the grain trade; I mentioned it in my opening. When the provinces came into the Union there were the four old provinces: Ontario, Quebec, Nova Scotia and New Brunswick. Those were wooded provinces; the agriculture of the country was in the hands of small farmers; there was no great grain producing; the country did not produce its wheat except in neighbourhoods, and the grain trade in so far as it existed was a local matter, a matter of exchange, a matter of the grist-mill, not a matter of export, not a matter of inter-provincial trade or concern. Then came the surrender of the vast western territory by the Hudson Bay Company, the establishment of the province of Manitoba, and we had the Manitoba Grain Act. Later on as the country developed and the grain trade became enormous the new provinces were added, and the whole subject of the grain trade, as to combinations, elevator owners, grain dealers, commission merchants, elevation and transport, all that, regulated finally in 1912, in its inter-provincial aspect, as a matter of immense magnitude, the conditions which existed at the Union having changed altogether. It would have been impossible perhaps to have sustained an Act to regulate the grain trade at the Union because it might have had no application, except local; such an Act as the Act of 1912, would at that time have had no place, but it is a concrete example of regulation of a trade for the benefit of the whole community at the instance and at the request of the localities; there have been numerous petitions and requests to the Dominion for legislation with regard to this trade, and the Dominion alone has from the necessities of the case the power effectively to regulate this vast trade in the national interest.

SIR ROBERT FINLAY: A good deal of that Act might come under section 95, which expressly gives power to Parliament to pass laws with regard to agriculture in any of the provinces or all. MR. NEWCOMBE: It is not with regard to agriculture, it is with regard to the transport and disposition of grain; it has nothing to do with the raising or the production of it.

VISCOUNT HALDANE: Where are the Acts to be found? MR. NEWCOMBE: Chapter 27 of 1912; and formerly the Manitoba Grain Act.

VISCOUNT HALDANE: That is not Dominion, it is? MR. NEWCOMBE: Yes; it was called the Manitoba Grain Act, but it related to grain between the lakes and the mountains. It will be found in the Inspection and Sale Act in the second volume of the Revised Statutes of Canada; the Manitoba Grain Act was consolidated into the Inspection and Sale Act.

VISCOUNT HALDANE: Is that the Act of 1912? MR. NEWCOMBE: No, that is not consolidated; that is the new Act. There has been no revision since then. It repeals the Manitoba Grain Act. Then my learned friend Sir Robert says that my argument goes to the desirability of amending the British North America Act. This implies, as I think is true and must be admitted, that a province could not enact the Insurance Act; but if not, surely, my Lords, the Dominion can. In each of the following cases it has been said that that which is committed to the Dominion under section 91 is nothing less than what is excluded from provincial authority under section 92: *Valin* v. *Langlois*, 5 Appeal Cases, 119;

Bank of Toronto v. *Lambe*, 12 Appeal Cases, 587; *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, 1892 Appeal Cases, 441; *Brophy* v. *Attorney-General for Manitoba*, 1895 Appeal Cases, 202; *Union Colliery* v. *Bryden*, 1899 Appeal Cases, 585.

THE LORD CHANCELLOR: I think that proposition has the additional advantage of not being disputed by your opponents. MR. NEWCOMBE: I understood it must be disputed when it is said that it is necessary to amend the British North America Act to give effect to this Statute.

SIR ROBERT FINLAY: To enable the Dominion to deal with it; I did not say whether the provinces could deal with it. MR. NEWCOMBE: The provinces cannot give effect to this. Then it is said the Act relates to matters in Parsons' case held competent to Ontario, and that the regulations of the Act clearly trench on property and civil rights to an extent denied by Parsons' case. Parsons' case did nothing more with regard to trade and commerce than to say that the construction of "the regulation of trade and commerce" must be limited, because if it received its broadest construction it would be too broad. The decision was that it did not extend to prevent the right of a province from prescribing the terms of an insurance policy for a single province, and when Lord Watson came to consider what was said in Parsons' case, in the Prohibition case in 1896, he introduced another term which I submit is very significant—he says: "It becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886 as being an Act for the 'regulation of trade and commerce' within the meaning of No. 2 of section 91. If it were so, the Parliament of Canada would, under the exception from section 92 which has already been noticed, be at liberty to exercise its legislative authority, although in so doing it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of section 91"—that is regulation of trade and commerce—"were discussed by this Board at some length in *Citizens' Insurance Co.* v. *Parsons*, where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade." The question of the effect of Dominion legislation was not present in Parsons' case; and as Lord Watson shows, even as to the regulation of the form of contracts in a single province, the pronouncement in that case only went to the extent that in the absence of Dominion legislation regulating the trade, that was competent to the province.

Then, my Lords, as emphasizing that the Dominion may within its enumerated powers affect property and civil rights, would your Lordships refer. I will not delay your Lordships to read the passage, to *Tennant* v. *Union Bank of Canada*, which is reported in 1894 Appeal Cases at page 31. In that case the Dominion was exercising a power with regard to banking in dealing with warehouse receipts and transfers, and it was held that that legislation, which necessarily affected "property and civil rights in the province" was nevertheless competent to the Dominion as a general measure of banking.

LORD PARKER: That was an enumerated object. MR. NEWCOMBE: That was an enumerated object.

Now my learned friend refers to sections 84 and 95 of the Dominion Act as affecting life insurance contracts. These two sections, which do require that the contract shall or shall not contain certain provisions, occur in Part II. of the Act, which is by section 85 limited in its application to life insurance.

THE LORD CHANCELLOR: This case you refer to contains a passage which is strongly against your argument at page 46. The Board of the Privy Council was composed of the Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Morris, Lord Shand, and Sir Richard Couch. This is what is said: "An Act relating to bankruptcy, passed by the Parliament of Canada, was objected to as being *ultra vires*, in so far as it interfered with property and civil rights in the province; but, inasmuch as 'bankruptcy and insolvency' form one of the classes of matters enumerated in section 91, their Lordships upheld the validity of the Statute." See the strength of that. Bankruptcy must obviously be one of the most immediate circumstances affecting the regulation of trade

and commerce, but it was not upheld on that ground at all. MR. NEWCOMBE: Because bankruptcy and insolvency is an enumerated subject in section 91.

THE LORD CHANCELLOR: But see what is said, it "was objected to as being *ultra vires* in so far as it interfered with property and civil rights in the province." Why was it upheld? Not on any general ground, but on the ground that bankruptcy and insolvency were expressly reserved to the Dominion. MR. NEWCOMBE: Yes. That is the case of *Cushing* v. *Dupuy*.

THE LORD CHANCELLOR: It depends upon its being an enumerated matter, and the particular enumerated matter was not the regulation of trade and commerce. MR. NEWCOMBE: No, because they had a finer enumeration than that—"bankruptcy and insolvency."

THE LORD CHANCELLOR: It is impossible, it seems to me to say that that case can help you much. MR. NEWCOMBE. I only cited it for this and I think it is an authority for this, that it clearly shows where you have an enumerated matter and you legislate under that, "property and civil rights" must give way.

THE LORD CHANCELLOR: Your opponents never questioned that; they said you are not legislating under enumerated objects: They did not say if you were you could not interfere with civil rights. They could not help themselves. MR. NEWCOMBE: I understood the argument that in one way or another we could not interfere with property and civil rights in the province.

THE LORD CHANCELLOR: The position is quite plain; you can interfere with civil rights within the province if you can come within one of the enumerated heads. If you cannot come within one of the enumerated heads you cannot interfere with civil rights in the province—that is their contention.

VISCOUNT HALDANE: I am not sure that that is quite an accurate way of putting it. If you do not come within section 92 the Dominion has paramount authority, just as because you do not come within section 92 you do not interfere, you may incidentally interfere with some aspect, but if you are not within section 92—

THE LORD CHANCELLOR: That is the point, the wider and more accurate way to state it. They never have contended that if you are within one of the enumerated objects you may not interfere with civil rights. MR. NEWCOMBE: Then I need not say any more on that subject, if they are within one of the enumerated subjects of section 91 it is clear that the Dominion legislation must prevail, no matter how much it conflicts with property and civil rights or private and local matters.

Then, my Lords, my learned friend says the Dominion cannot regulate a baker's trade; perhaps not; that is not here. It will be time enough to consider that when it arises under the special circumstances of the case. The Dominion is certainly very careful and very anxious to avoid any undue interference with local legislative subjects; nevertheless there are general powers committed to it, and it has responsibility and duty to exercise for the common good, when a case of the kind arises, as I submit has here arisen in the case of insurance most conspicuously, even if incidentally the legislation may effect "property or civil rights" in the provinces.

Now with regard to the case of the Montreal Street Railway in 1912 Appeal Cases, 334, to which my learned friend refers, that was a question in which it was propounded here on behalf of the Dominion company and supported by the Dominion that the Parliament had authority to regulate through traffic as between the Dominion company and the local company. There were two companies, both in their character local: it happened that one of them was a company declared for the general advantage of Canada; two local street railways in the City of Montreal, one of them within exclusive Dominion, and the other within exclusive provincial, jurisdiction. There was a question of exchange of fares and traffic, and the Board of Railway Commissioners had made an Order under the Dominion Railway Act for the regulation of that traffic. Now the principle of that decision in so far as any general principle can be extracted from it, I submit, is this, that although in the absence of any enumeration of railways in section 91, the railway traffic might be regulated under the general authority to regulate trade and commerce, still inasmuch as railways were specially provided for, therefore the exercise of legislative jurisdiction with regard to railways by the

Dominion must be attributed to railways other than local, or railways declared for the general advantage of Canada, which are placed under the exclusive power of Parliament, and not to the heading of trade and commerce. Then it was said that railway legislation is an exceptional case because there is a special provision under section 92 for the declaring of local railways to be for the general advantage of Canada, thereby taking the subject altogether out of local jurisdiction; but if the decision be right, it is a decision which can have no application to any case except railways or local works; there is no provision for declaring a company, or a subject, to be for the general advantage of Canada and thereby taking it out of local jurisdiction. There is no attempt to take over or deprive the province of a subject of legislation here; the question is, to which legislature has been committed the power to pass this regulating Act? Lord Selborne's judgment in the case of the *Attorney-General of Ontario* v. *Mercer*, 8 Appeal Cases, 776, applies where he says that the extent of the provincial power of legislation over property and civil rights in the province cannot be ascertained without at the same time ascertaining the power and rights of the Dominion under sections 91 and 102—section 102 relating to lands, because that case had to do with lands.

When my learned friend reads definitions of "trade" as including merely exchange of commodities, or barter, that cannot be the meaning in which the word is used in section 91, because as I have shown, section 121 provides comprehensively for that.

Then my learned friend cited the John Deere Plow case. What I want to submit with regard to that is this: In the case of John Deere Plow there was a Dominion company incorporated, and it was submitted here that when the Dominion incorporated that company it did so under the power to regulate trade and commerce, that the incorporation of companies by the Dominion for purposes not confined to those particularly specified in the enumerations of section 91, other than trade and commerce, was in execution of the power to regulate trade and commerce. Your Lordships did not pronounce upon that. As I understand the judgment, that question is still open, but it was not denied, and it was affirmed there, I suppose in accordance with previous decisions, that the Dominion alone could incorporate a company which was to trade throughout the Dominion. Then the question was as to what was the character of local legislation which prescribed that a company the objects of which extended to the whole of Canada could not trade or exercise its franchise within a province without a license. The province of British Columbia had imposed that requirement as against foreign companies, including Dominion companies, and the principle of the decision is, as I submit very humbly, that that sort of legislation was incompetent to the province because it was regulation of trade and commerce. Now it was incompetent to the province therefore, because it was "regulation of trade and commerce," to say that a Dominion company shall not trade in British Columbia without a license. I submit it follows that it is equally "regulation of trade and commerce" to provide that a British company shall not trade in British Columbia without a license, that a colonial company shall not trade in British Columbia without a license, and that a foreign company shall not trade there without a license. That is "regulation of trade and commerce" within the authority of the John Deere Plow case. If that be so, that case is a precise authority to uphold my contention in this case (except in so far as it affects persons in the provinces). It is established I say that a province could not pass this sort of Act affecting Canadian corporate companies because it would be "trade and commerce." Is it any less "trade and commerce" with regard to any sort of foreign company?

Now, my Lords, nobody has told us yet what kind of an Act regulating trade and commerce the Dominion could pass if it could not pass this Act. A great many things have been excluded. My learned friends have told us what we cannot do, but I should like to know what in the world the use of that enumeration is, to what purpose it is to be applied in the general public interest, if we cannot regulate a trade or a business of this sort when the regulation of it transcends provincial authority, when it becomes necessary in the national interest to regulate.

Reference was made to this passage in the Prohibition case: "If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the Provincial Legislatures." "Substantially of local or private interest." That is the subject-matter of that observation, my Lords, and that does not describe the Insurance Act.

I have a note here as to these deposits: The British and foreign companies "are required, however, to deposit further amounts from time to time as their liabilities in Canada exceed the amount of the initial deposit. The requirements for these companies is that their deposit shall always be at least equal to their total liabilities in Canada. Under these provisions the British and foreign fire insurance companies licensed under the Act have deposited amounts varying from 50,000 dollars to 1,000,000 dollars, and life insurance companies have deposited amounts varying from 50,000 dollars to 20,000,000 dollars." Those are the British and foreign companies. Those are the deposits that are now lying at Ottawa for the benefit of all the policy holders throughout Canada. Can it be said that those deposits are put up there for matters of merely local or private interest?

Then, my Lords, as to "persons." Is it a matter of inter-provincial concern to require that the business of insurance shall only be done by licensed companies? Nobody objects or has objected to the Insurance Act, as a just measure of legislation necessary for public security. The only objection seems to be that it involves a principle which will be fatal to "property and civil rights in the province," or "private" and "local" matters in other cases. The Dominion has no disposition to interfere with these local powers, but it has a responsibility to perform in excess of local powers. I refer to the case of *Royal Bank of Canada* v. *The King*, in 1913 Appeal Cases, page 283, as showing the local limitation of provincial powers. I will not read the whole of the headnote, but the conclusion of it. It was held there that "bondholders having subscribed their money for a purpose which had failed were entitled to recover their money from the bank at its head office in Montreal, that this was a civil right existing and enforceable outside the province, and that the province could not validly legislate in derogation of that right."

Of course, I need not remind your Lordships that the Act has stood for 50 years without any objection on the part of the provinces, and that the question arises only by reason of a local decision in Montreal.

The United States cases to which my learned friend refers, I submit do not apply. Their Constitution is different, and the words are different. Article 1 of section 8 of the Constitution of 1787 reads: "The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Moreover the decisions are in my favour, because they say, although the insurance trade is not commerce, it is an incident of commerce.

As I understand the Constitution of the United States it is merely a grant of powers of legislation of different states, which are in themselves sovereign, and nothing goes with the grant except what is necessarily included in it, therefore what is strictly commerce goes; what is incidental to commerce does not go. In the case of the British North America Act it is precisely the other way about, and the powers which the Dominion has under section 91 may be exercised both as to that which is essentially within the definition and that which is ancilliary or incidental to it. In the latter case the Dominion has an overriding power, but the provinces so long as the field is free have the right to legislate if their legislation relate to the subjects under section 91. But whatever be the effect of the United States decisions this country was the leading commercial country of the world before the first colony was planted in America, and I do not suppose that your Lordships will look to the authority of the Supreme Court of the United States to ascertain what commerce is.

The Act deals with Dominion companies, foreign companies, British companies, colonial companies and persons. It must be good as to Dominion companies, and I submit it must be good as to the other companies as determining the terms and conditions upon which they can be permitted to exercise their trade. It excludes a person as a legitimate project of regulation, because the trade of the person is not merely local, but a matter of inter-provincial concern. If, however, this part of the Act be *ultra vires* as affecting civil rights or private local it is separable. The Dominion desires to protect the public if possible, and the provinces, no matter how well disposed they may be cannot do it; it is impracticable. They could not legislate in the terms of this Act, nor cover the cases which it is necessary to cover; the intention is that these deposits shall be put up, and these regulations made, for the benefit of all the people in the country in common stock, and we ask for a definition of the power. I submit that this Statute is referable to trade and commerce, or to the general power of the Dominion, because it is not local. I repeat also what I said at the opening, my learned friend has not suggested an answer, how can the provinces require a license for regulative purposes? They are given the authority to license for the purpose of taxation. It is admitted that this is not a taxing Act; it is a regulative Act. Under what clause of section 92, I ask, have the provinces the power to require a license for the purpose of regulation? It is said that some of these clauses with regard to contracts, and some other sections of the Act are *ultra vires*. If so the question is not here. I maintain that they are *intra vires*, but the question is not involved in the submission. It is section 4 that is referred. In Willis Faber & Co.'s case, the prosecution out of which this reference resulted, supposing the magistrate had found that section 4 was *intra vires*, could they have escaped conviction by showing that section 95 was *ultra vires*? Those questions do not arise, and they will be better determined when they arise in a specific case.

Therefore I submit that this question should be answered affirmatively to the Dominion.

The Manitoba Grain Act to which I promised to refer your Lordships is chapter 83 of the Revised Statutes, 1906.

THE LORD CHANCELLOR: Is that the same Statute as the Inspection and Sale Act. MR. NEWCOMBE: No, the Inspection and Sale Act is chapter 65 of the Revised Statutes of 1906. The Manitoba Grain Act is a separate Act, chapter 83.

THE LORD CHANCELLOR: The Manitoba Grain Act is 1906, chapter 83. MR. NEWCOMBE: Yes.

THE LORD CHANCELLOR: The Inspection and Sale Act is what? MR. NEWCOMBE: Chapter 85 of the Revised Statutes of 1906. The Adulteration Act is chapter 133 of the Revised Statutes, 1906, I should have mentioned that in the report of the McCarthy case, they excepted the Adulteration sections, chapter 133 is the general Act of the Dominion regarding adulteration.

THE LORD CHANCELLOR: It was decided that the McCarthy Act was bad, except so far as it dealt with adulteration. MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: The other Act was No. 27 of 1912. MR. NEWCOMBE: Yes.

SIR ROBERT FINLAY: My friend has cited two new cases. I shall not take half a minute with regard to each.

THE LORD CHANCELLOR: Will not they arise in the next case?

SIR ROBERT FINLAY: I do not think they will. The first was the case of the *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*.

THE LORD CHANCELLOR: That is nothing to do with it. I think in that case they were dealing entirely with a specific regulation.

SIR ROBERT FINLAY: The question was whether it was a Crown debt where the Government of the province had a claim against a bank in liquidation; whether it was still a Crown debt although it was a province of the Dominion. The observation they made about common interests in Dominion matters had nothing to do with the case.

The other case was *Tennant* v. *The Union Bank of Canada*. That was a very simple case. It was as to the power to legislate with regard to banking, and what they said was that a warehouse receipt when it was taken by a bank in

the course of business had an effect different from that which by the mercantile law of the province it would otherwise have.

THE LORD CHANCELLOR: Is it possible to open this and the next case together or not? There seem to be so many questions in the Companies' case which are equally covered by this.

SIR ROBERT FINLAY: The first two questions are. There are some other questions. I think not very much of the case will be left.

THE LORD CHANCELLOR: You appear in both cases for the intervenants?

SIR ROBERT FINLAY: Yes, my Lord. I will take them both together if your Lordships prefer it.

THE LORD CHANCELLOR: It seems to me it is hardly worth while having two discussions on one whole thing.

VISCOUNT HALDANE: The Bonanza case is a concrete case, and one can therefore see how far it is right to go into the theory.

SIR ROBERT FINLAY: I will take whatever course your Lordships think most convenient. I will state first the facts of the Bonanza case, the issues there raised, and then I will deal with that.

THE LORD CHANCELLOR: If you do that you will probably occupy the rest of to-day, and then by to-morrow you will be better able to form an opinion as to whether it will be convenient to present them both together. You must know better than it is possible for the Board to know whether it is convenient.

SIR ROBERT FINLAY: I will take that course unless on reflection any difficulty should arise.

My Lords, the Bonanza case is a case of a company incorporated in Ontario by letters patent which your Lordships will find at page 30 of the record. This is not the case of a reference at all; this is a case in which there was a Petition of Right presented by the company, and the objection being taken that the company had no capacity to enter into transactions with regard to mining in the State of Yukon, the claim in the Petition of Right arose.

LORD PARKER OF WADDINGTON: The point was the capacity of the petitioners to present a Petition of Right.

SIR ROBERT FINLAY: To carry on the business in respect of which the transactions occurred which form the basis of the Petition of Right. I may say that the case gave rise to some difference of opinion in the Supreme Court. It came first before Mr. Justice Cassels in the Exchequer Court held in Ottawa. Yukon is a territory, as your Lordships are aware. It has a legislative council now, but it is not in the same position as a province which has entered the Confederation.

VISCOUNT HALDANE: It was formerly the North-West Territory before it was organized.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: Was it a district?

SIR ROBERT FINLAY: A territory, the Yukon Territory, administered by the Dominion. MR. HELLMUTH: The North-West Territory Act was passed subsequently to the Yukon District, and subsequently an enactment was passed by the Dominion giving to the Lieutenant-Governor of the Yukon and the Council there the same powers practically as each province had under the British North America Act.

VISCOUNT HALDANE: Is there any North-West Territory left now, or is it all absorbed? MR. NEWCOMBE: There is a considerable North-West Territory still.

VISCOUNT HALDANE: Alberta and Saskatchewar were organized out of it? MR. HELLMUTH: Yes; Saskatchewan and Alberta all came out of the North-West Territory, but there are still considerable portions in that North-West part of Canada that is territory and not province.

VISCOUNT HALDANE: I suppose some of the Hudson Bay land. MR. HELLMUTH: Yes, my Lord.

THE LORD CHANCELLOR: You appear for the interveners?

SIR ROBERT FINLAY: Yes, the provinces. All the provinces are interested in the case.

THE LORD CHANCELLOR: How does the matter stand?

SIR ROBERT FINLAY: It was a Petition of Right by the appellant. It came before Mr. Justice Cassels sitting in the Exchequer Court of Ottawa. He dismissed the Petition of Right on the ground that the company had no capacity to enter into these business transactions. He dismissed the Petition of Right in view of the fact that Mr. Justice Anglin had expressed a particular view with regard to the capacity of provincial companies to carry on business elsewhere, and he said under those circumstances, although technically the opinions given in reference to that were not binding, he did not think it was respectful to the Judges of the Supreme Court if he disagreed with the opinion of Mr. Justice Anglin. The learned Judges were evenly divided. The point is that taking the view he did of Mr. Justice Anglin's judgment he thought that that turned the scale. They were three and three, and reading Mr. Justice Anglin's judgment, he thought that he must be classed as making four against two. Then the case came before the Supreme Court, and Mr. Justice Anglin takes up this matter, and says he cannot understand how Mr. Justice Cassels could possibly have read his judgment in the sense in which he did.

VISCOUNT HALDANE: I am rather surprised too. I read Mr. Justice Anglin's judgment, and a very able judgment it is.

SIR ROBERT FINLAY: He did not say it, or anything like it. It is a mere interlude in the case, although it was of great importance, because Mr. Justice Cassels would have exercised his own judgment upon it, and he might have decided it in our favour.

THE LORD CHANCELLOR: Did Mr. Justice Anglin's view prevail in the Supreme Court?

SIR ROBERT FINLAY: No, my Lord.

THE LORD CHANCELLOR: The other Judges did not decide that he had said something different from what he said he had said?

SIR ROBERT FINLAY: No, they did not; and when the case came to the Supreme Court, on the one side were two, Mr. Justice Idington and Mr. Justice Anglin; on the other side were three, the Chief Justice, Mr. Justice Davies and Mr. Justice Duff.

THE LORD CHANCELLOR: The Chief Justice simply followed his opinion in the previous case?

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: The appeal was dismissed, and from that appeal you come here?

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: You come here as interveners?

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Has the appellant dropped out?

SIR ROBERT FINLAY: No, my Lord, my friend Mr. Hellmuth appears for him. He has asked me as representing, with my friend Mr. Nesbitt, the interveners, if I would open the general aspects of the case, and then Mr. Hellmuth will follow on some points of the case relating to the general matters to some extent, but also certain matters which particularly affect the appellant. So your Lordships see there is a great difference of opinion, three to two, in the Supreme Court, and I shall have to call your Lordships' attention to a previous judgment of the Supreme Court in the case of *The C. P. R.* v. *The Ottawa Fire Insurance Company*, reported in 39 Supreme Court Reports, at page 405. I was about to state to your Lordships the facts out of which this action arose, and the proceedings as far as material. The letters patent are at page 3.

LORD PARKER OF WADDINGTON: Are those letters patent granted pursuant to an Act of the Provincial Legislature of Ontario?

SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER OF WADDINGTON: It is not the exercise of the power of the Crown outside sections 91 and 92; it is something done in exercise of the power conferred by the legislature?

SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER OF WADDINGTON: This company is in the same position practically as a limited company under Statute?

SIR ROBERT FINLAY: It is analogous.

LORD PARKER OF WADDINGTON: The capacity of the company depends upon its method of incorporation? A company created either by the common law or the Crown is in a different position to a statutory corporation in regard to capacity.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: There is a great difference between the two, as was pointed out by Mr. Justice Blackburn in a famous case.

SIR ROBERT FINLAY: If it is incorporated by a royal charter it has a general power conferred upon it by the Crown. In the case of a company incorporated under the Companies Act you must look to the memorandum of association, the case your Lordship has referred to in the case is the 7th English and Irish Appeals, the well known *ultra vires* case.

VISCOUNT HALDANE: I was referring to what Mr. Justice Blackburn said in the Exchequer Chamber, which was reversed it is true, where he explained the difference between a common law corporation and a statutory corporation.

SIR ROBERT FINLAY: Yes, my Lord. The Act giving power to the Lieutenant-Governor in Council appears at page 6 of the appendix to the appellant's case. Section 9 is: "The Lieutenant-Governor in Council may, by letters patent, grant a charter to any number of persons, not less than five, who petition therefor, creating and constituting such persons and any others who have become subscribers to the memorandum of agreement, a body corporate and politic for any of the purposes or objects to which the legislative authority of the legislature of Ontario extends except the construction and working of railways within the province of Ontario, the business of insurance and the business of a loan corporation within the meaning of The Loan Corporations Act." Then at page 30 of the record are the letters patent granted under the power thereby conferred upon the Lieutenant-Governor in Council.

"Whereas the Ontario Companies' Act provides that with the exceptions therein mentioned, the Lieutenant-Governor of our province of Ontario in council may by letters patent under the Great Seal, create and constitute bodies corporate and politic for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends.

"And whereas by their petition in that behalf the persons therein mentioned have prayed for a charter constituting them a body corporate and politic for the due carrying out of the undertaking hereinafter set forth.

"And whereas it has been made to appear to the satisfaction of our Lieutenant-Governor in Council that the said persons have complied with the conditions precedent to the grant of the desired charter, and that the said undertaking is within the scope of the said Act.

"Now, therefore, know ye th.. by and with the advice of the Executive Council of our province of Ontario and under the authority of the hereinbefore in part recited Statute and of any other power or authority whatsoever is in us vested in this behalf.

"We do by these our royal letters patent hereby create and constitute the persons hereinafter named, that is to say, John Payne, accountant; Richard Credicott and William Gilchrist, bookkeepers; Alexander Foster, law student; and Thomas Taylor, law clerk, all of the city of Toronto, in the county of York and province of Ontario, and any others who have become subscribers to the memorandum of agreement of the company and their successors, respectively, a corporation for the purpose and objects following, that is to say:

(a) To carry on either as principal agent, contractor, trustee, or otherwise, and either alone or jointly with others, the business of mining and exploration in all their branches."

THE LORD CHANCELLOR: Without any territorial limits at all?

SIR ROBERT FINLAY: That is so my Lord. Then:

(b) To apply for, purchase, lease, or otherwise acquire patents and patent rights, trade marks, improvements, inventions, and processes and to exercise, develop and grant licenses with respect thereto and for said purposes."

VISCOUNT HALDANE: The question is whether that was the principal object, having no territorial limits.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: The last part, on page 32, is important.

"To do all acts and exercise all powers and carry on all business incidental to the due carrying out of the objects for which the company is incorporated, and necessary to enable the company to profitably carry on all or any of its undertakings."

SIR ROBERT FINLAY: Yes. Then clause 2 on page 31 is:

"To acquire by purchase, lease or otherwise, and upon such terms and conditions as may be agreed upon, real and personal property and estates and interests therein, including mines, mining claims, mining locations, quarries, wells, water powers, lakes, reservoirs, ponds, streams and water courses."

Then, as your Lordship has pointed out, there is the general clause 10 on page 32. Then line 10, page 32: "The corporate name of the company to be Bonanza Creek Gold Mining Company, Limited. The share capital of the company to be one million seven hundred and fifty thousand dollars, divided into three hundred and fifty thousand shares of five dollars each. The head office of the company to be at the said city of Toronto, and the provisional directors of the company to be . ." Then the provisional directors are named. And at line 19, page 32, it goes on: "And we hereby authorize the company to hold its meetings without the province of Ontario." All the rest is purely formal. It was in 1904 that it was incorporated. The company proceeded to acquire assignments of certain leases that had been made by the Crown in Yukon to certain parties, Doyle and others, and Matson and others. The first of these leases in order of date your Lordships will find at page 33. It is a lease from Queen Victoria, represented by the Minister of the Interior of Canada, hereinafter called the Minister, to Doyle and others. It is a lease for a term of 20 years from the date, which was in 1899, of the lands specified, a considerable parcel of land, the boundaries and dimensions of which are given at page 34, beginning at line 9. Then there is a certain yearly rent to be paid, 150 dollars; and the rest of the instrument is not printed at large, not being material. That was the first lease. The next lease is at page 36, No. 8. It is a grant to the same persons of another parcel, adjoining the parcel comprised in the lease at page 33.

VISCOUNT HALDANE: Was this in the same form?

SIR ROBERT FINLAY: I think substantially in the same form.

VISCOUNT HALDANE: It was between the same parties?

SIR ROBERT FINLAY: Yes, the same parties. MR. HELLMUTH: This was for hydraulic mines as distinguished from placer mines. In placer mining the ore is washed by hand. In the hydraulic mines the water is brought hydraulically to the ore.

SIR ROBERT FINLAY: The hydraulic mine is on a larger scale.

VISCOUNT HALDANE: There are two or three other charters.

SIR ROBERT FINLAY: Yes, my Lord. I might with reference to that read the two first recitals at page 33. "Whereas prior to the date of these presents, the lessee made application to the Minister for the exclusive right and privilege of taking and extracting by hydraulic or other mining process, all royal or precious metals or minerals from, in, under or upon that certain tract of land situate and being in the Yukon Territory, in the Dominion of Canada, hereinafter particularly mentioned and described." That was the second lease. The third your Lordships will find at page 41. It is numbered 9. It was granted by Her Majesty, represented by the Minister of the Interior of Canada, to C. A. Maston and others. There are similar recitals to those that I called attention to; and then there is a grant in similar terms of another parcel to Matson. All those three leases were assigned to the Bonanza Company, and your Lordships will find at page 46, in another lease from the Crown of a few claims that had reverted to the Crown, a recital of the vesting of those leases in the Bonanza Company. That is at page 46. The indenture is between His Majesty King Edward VII., represented by the Minister of the Interior of Canada, and the Bonanza Creek Gold Mining Company, Limited. It recites the three indentures to which I have referred, and then goes on at line 26: "And whereas the said hydraulic leases and all the interests therein of the said John Joseph Doyle and others, and the said Charles A. Matson

and others, have become vested in the lessees."—My friend reminds me that perhaps I ought to have read the whole of the passage from line 10, where the name of the company is given. The second party is stated to be "The Bonanza Creek Gold Mining Company, Limited, a body corporate and politic duly incorporated under the laws of the province of Ontario, hereinafter called 'the lessees.'" Then at line 27 is the recital that these leases have vested in the lessees, that is the company.

VISCOUNT HALDANE: What does all this come to, merely that the Crown has demised to an Ontario company these properties in Yukon.

SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: That is the whole of it.

SIR ROBERT FINLAY: That is all. It seems that this lease was a lease of certain claims which had reverted to the Crown, and which the Crown had considered itself bound by.

THE LORD CHANCELLOR: The question is whether the company is entitled to hold under those three documents. MR. NEWCOMBE: No, whether they are entitled to recover damages.

SIR ROBERT FINLAY: I will show your Lordships how the question arose exactly. There had been agreements between the Crown and the company which your Lordships will find at pages 39 and 44. I am not going to stop to read them, but it is necessary just to state what they were to make the case intelligible. They are agreements between Her Majesty, represented by the Minister of the Interior for Canada, and Doyle and his associates. The second agreement was between Her Majesty, represented by the Minister of the Interior of Canada, and Matson and his associates. These were agreements, to put it quite shortly, for the Crown handing over to the persons with whom those agreements were entered into, leases of any claims which have reverted to the Crown. Various claims had been given out by the Crown, and it was considered that if these claims remained outstanding they might very much hamper the hydraulic company in the prosecution of its hydraulic mines, and these agreements were entered into. I think I have said enough to make intelligible the Petition of Right by which the proceedings were commenced. It is at page 4 of the record.

VISCOUNT HALDANE: Those two agreements, I imagine, were scheduled to the agreement you read on page 47.

SIR ROBERT FINLAY: Yes, my Lord. It is not necessary to read very much of this rather lengthy petition. It is at page 4 of the record. The company complained, to put it very compendiously, that the Crown had not carried out the obligations it had entered into with regard to those claims and other matters, the grievances as against the Crown arising out of the breach of contract are stated in the Petition of Right at very considerable length. It is endorsed at the top "Let right be done," and it is signed by Lord Grey. Then there is a claim for damages at the end. Then at page 18 your Lordships will see the answer.

LORD HALDANE: It was a claim by the lessees against the lessor.

SIR ROBERT FINLAY: It is a claim by the assignee.

VISCOUNT HALDANE: Against the lessor.

SIR ROBERT FINLAY: Yes, and is a claim under collateral agreements mainly. MR. HELLMUTH: And also it is an action by the lessor.

THE LORD CHANCELLOR: In derogation of their grant? MR. HELLMUTH: Yes, my Lord.

SIR ROBERT FINLAY: That is so. Then at page 18 is the answer, and the earlier paragraphs of the answer, I think, are alone material for the present purpose. "In answer to the said Petition the said Honourable Allen Bristol Aylesworth saith as follows: (1) The respondent denies that the suppliant has now, or ever has had the power either under letters patent, license, free miner's certificate, or otherwise, to carry on the business of mining in the district of the Yukon, or to acquire any mines, mining claims or mining locations therein, or any estate or interest by way of lease or otherwise in any such mines, mining claims or locations." Then: "(2) Should a free miner's certificate have been issued to the suppliant, the respondent claims that the same is, and always has been, invalid and of no force or effect—that there was no power to issue a free miner's

certificate to the suppliant, a company incorporated under provincial letters patent, and that there was no power vested in the suppliant to accept such a certificate." Then " (3) The respondent denies that the three leases in the 12th, 14th and 15th paragraphs of the petition mentioned or any of them were assigned to the suppliant, or that the suppliant had any power to accept an assignment thereof." That really resolves itself into the matters mentioned in the earlier paragraph.

THE LORD CHANCELLOR: Does that mean that all these leases are good and the property is re-vested in the Crown, or has never left the Crown?

SIR ROBERT FINLAY: That appears to be what the Crown contends for. They say it was entirely *ultra vires* for the Ontario company to prosecute mining operations in Yukon.

VISCOUNT HALDANE: Therefore they never got anything at all.

SIR ROBERT FINLAY: No, my Lord.

THE LORD CHANCELLOR: They were not even there under license; they were trespassers.

VISCOUNT HALDANE: Somebody who claimed their name was a trespasser.

SIR ROBERT FINLAY: Somebody masquerading as the Ontario company was there, and your Lordships will see that an order was made, which is at page 55, for the determination of the question of law, apart from the question of consequences. It is an order of the 5th March, 1914.

VISCOUNT HALDANE: Supposing it was decided that this was *ultra vires*, as to which there is a great conflict of opinion, is there any other question? Have the Bonanza Company any other claim?

SIR ROBERT FINLAY: This goes to the root of it. The order I was about to cite was founded on the view that this was a preliminary question which would cut away their right of suing altogether.

VISCOUNT HALDANE: Supposing we are in favour of the Bonanza Company, is there any other question? MR. HELLMUTH: It would then have to go to trial.

VISCOUNT HALDANE: Do you wish us to decide that, or to send it back?

SIR ROBERT FINLAY: I think it will need to go back. It would involve an impossible investigation of detail. It has not been tried at all.

VISCOUNT HALDANE: Have we anything to decide here except this question? MR. HELLMUTH: There is the question of recognition by the Dominion by their Act.

LORD PARKER OF WADDINGTON: Supposing somebody was to convey land to a foreign corporation, the mere fact that according to the laws of the foreign country the company had no power to acquire it, would not avoid the lease, would it?

SIR ROBERT FINLAY: I submit it would not. MR. NEWCOMBE: There would be the question of title.

VISCOUNT HALDANE: Is that quite the question here? Here you have the Confederation Act saying that the province had no power to confer an entity upon this corporation outside its own limits.

THE LORD CHANCELLOR: Directly it got outside the limits of the province it ceased to be a corporation.

LORD PARKER OF WADDINGTON: There is no authority for that, is there?

SIR ROBERT FINLAY: No. I submit it is wrong altogether.

LORD PARKER OF WADDINGTON: As I understand the Crown to say you have no power to carry on; there is a total failure of consideration. Then they would have to ask for this land back again.

VISCOUNT HALDANE: There is no corporation. Supposing Mr. Newcombe is right, what becomes of these pieces?

SIR ROBERT FINLAY: I submit that this company is in exactly the same position in the province of Yukon as a French company is that comes to this country.

VISCOUNT HALDANE: That is the whole point between you?

SIR ROBERT FINLAY: Yes. As to what the consequences are is another matter.

THE LORD CHANCELLOR: The parallel of the French company is not quite right, is it, because nobody questions the right of the French Government to incor-

porate a company to trade where it likes. The question is whether the Provincial Legislature has power to incorporate a company to carry on business outside its limits.

SIR ROBERT FINLAY: If the Crown here chooses to recognize a French company and to grant it a lease of land—

THE LORD CHANCELLOR: The question is whether it is a company when it has got here.

LORD PARKER OF WADDINGTON: An English company incorporated to carry on business in Birmingham would have power to buy its goods in London. The question is where the business is carried on.

VISCOUNT HALDANE: It is very necessary to distinguish what the two theories are. If it be true that the company does not exist for the purpose of carrying on business outside Birmingham or England, then the French company cannot carry it on.

LORD PARKER OF WADDINGTON: Granted there is a power to incorporate only for a provincial object, it does not follow that you cannot acquire some land outside the province as an incident to the business.

VISCOUNT HALDANE: That is the whole controversy between you on this appeal, and the Supreme Court has decided upon it?

SIR ROBERT FINLAY: Yes, my Lord. I was going to read the terms of the order at page 55.

THE LORD CHANCELLOR: The claim for damages is at least substantial.

SIR ROBERT FINLAY: Yes, my Lord. The order is at page 55. "This Court doth order that the questions of law set up by the respondent in paragraphs one and two of the answer of the respondent to the said Petition of Right and such questions of fact as may be necessary to the determination of the same, be raised, heard and determined upon the said Petition of Right, answer and reply, and upon the said admissions and documents, and that pending the final determination of such questions, all other proceedings herein be stayed." Upon that order the case proceeded, and it was with reference to the questions stated in paragraphs 1 and 2 of the answer at page 18 that the judgments were given. Reference is made in this paragraph to a free miner's certificate and license to carry on business in Yukon. The certificate to carry on business in Yukon your Lordships will find at page 52. It is granted by the Commissioner for Yukon. It is headed "Yukon Territory." "License to the Bonanza Creek Gold Mining Company Limited, authorizing it to do business in the Yukon Territory." Then, near the foot of the page, is the operative paragraph. The Commissioner of the Yukon Territory, "by and with the advice and consent of the council of said Territory, do hereby authorize and license the Bonanza Creek Gold Mining Company, Limited, to use, exercise and enjoy within the Yukon Territory, all such powers, privileges, and rights set out in their memorandum of association as are within the power of the Commissioner of the Yukon Territory in Council to authorize and license, and to carry on within the Yukon Territory all such objects of their incorporation." That was granted under the Yukon Ordinance which your Lordships will find in the joint appendix, page 6. It is the "Consolidated Ordinances, Yukon Territory, 1902, chapter 59. The Foreign Companies Ordinance. Any company, institution or corporation incorporated otherwise than by or under the authority of an Ordinance of the Territory or an Act of the Parliament of Canada desiring to carry on any of its business within the Territory may (through the Territorial Secretary) petition the Commissioner for a license so to do, and the Commissioner may thereupon authorize such company, institution or corporation to use, exercise or enjoy any powers, privileges and rights set forth in the said license." Then there are certain conditions as to the charter, and so on which are imposed on applicants for a license. Then the other document speaks of the free miner's certificate. Your Lordships will find that at pages 49 and 50 of the record. These are records of a free miner's certificate being granted by the Dominion Government.

VISCOUNT HALDANE: Is that under a special Statute?

SIR ROBERT FINLAY: That is under the regulations which are in the joint appendix, at page 11. I will refer your Lordships to the terms of the certificate

first, and then to the regulations at page 49 your Lordships will find a memorandum of the license granted on 24th December, 1904, from Ottawa to the Bonanza Creek Gold Mining Company. The amount paid is 100 dollars. Then just below that, on the same page 49, is one granted on the 26th January, 1906, to the Bonanza Company. The amount paid is 72 dollars. Then on page 50 there is a certificate granted on 26th January, 1906:

> "This is to certify that the Bonanza Creek Gold Mining Co., of Dawson, Yukon Territory, has paid me this day the sum of seventy-two dollars and is entitled to all the rights and privileges of a free miner, under any mining regulations of the Government of Canada, from the 24th day of December, 1905, to the 30th June, 1906.
>
> "This certificate shall also grant to the holder thereof the privilege of fishing and shooting, subject to the provisions of any Act which has been passed, or which may hereafter be passed for the protection of game and fish; also the privilege of cutting timber for actual necessities, for building houses, boats and for general mining operations; such timber, however, to be for the exclusive use of the miner himself, but such permission shall not extend to timber which may have been heretofore or which may hereafter be granted to other persons or corporations."

That was granted under the regulations which your Lordships will find at page 11 of the joint appendix. These are the regulations approved by an Order-in-Council governing placer mining in the Yukon Territory as to the granting of free miner's certificates. "'Free miner' shall mean a male or female over the age of eighteen, but not under that age, or joint stock company, named in, and lawfully possessed of, a valid existing free miner's certificate, and no other." Then it says that "'joint stock company' shall mean any company incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada." A question arose on those words that I just read at line 30, page 11 of the joint appendix. It was contended by my friend Mr. Newcombe that a company incorporated for mining purposes under a Canadian charter meant one incorporated under a Dominion charter. This gives us reasons for thinking that that contention was erroneous, and that a Canadian charter meant any charter granted either by the Dominion or by a province of Canada, as long as it was validly granted.

LORD PARKER OF WADDINGTON: Those Canadian charters there were charters of the Dominion.

SIR ROBERT FINLAY: No, my Lord. My friend Mr. Newcombe contends but Mr. Justice Duff gives amply sufficient reasons for thinking it does not, but it is not confined to that.

THE LORD CHANCELLOR: That is one of the points in controversy between you?

SIR ROBERT FINLAY: Yes.

LORD PARKER OF WADDINGTON: If by the laws of the Territory of Yukon a license may be granted to a foreign corporation by virtue of its being a corporation, then the body to whom the license is given would become a quasi-corporate body in the land where the license was granted?

SIR ROBERT FINLAY: Yes, my Lord.

(Adjourned till to-morrow at 2 o'clock).

FIFTH DAY.

SIR ROBERT FINLAY: May it please your Lordships. I was calling your Lordships' attention when you adjourned yesterday to what had been done in the way of granting licenses and so forth, in Yukon, to this company. As the matter is of some inportance I think I ought to bring clearly before your Lordships how it stands with regard to each one of these Acts. There are three, and I will take them in their order. In the first place there is the grant on the 7th September, 1905, by the Commissioner of a license to carry on business in Yukon. That is at page 52.

VISCOUNT HALDANE: When was the company incorporated?

SIR ROBERT FINLAY: On the 23rd December, 1904.

VISCOUNT HALDANE: The first of the licenses is at what page?

SIR ROBERT FINLAY: The first that I am going to deal with comes in between the other two, which are both free miners' licenses. It is at page 52 of the record. May I call your Lordships' attention, in order to have it before you, to the legislative authority under which it was granted. It is from the Commissioner of the Yukon Territory to the Bonanza Gold Mining Company authorizing it to do business in the Yukon Territory:

"Whereas the Bonanza Creek Gold Mining Company, Limited, has petitioned the Commissioner of the Yukon Territory for a license to carry on its business within the Yukon Territory.

"And whereas the said company has deposited with the Territorial Secretary a certified copy of the memorandum and Articles of association of the said company."

THE LORD CHANCELLOR: Will you pause there for one moment? The company was incorporated, under letters patent?

SIR ROBERT FINLAY: Yes, my Lord. They are at page 30.

THE LORD CHANCELLOR: But is the memorandum of asssociation for the objects stated in the letters patent?

SIR ROBERT FINLAY: There is no separate memorandum. It is a form I have, no doubt.

THE LORD CHANCELLOR: In another case I was told that the company might be incorporated either under letters patent or with a memorandum, and it varied from place to place. The case I am referring to came from British Columbia.

SIR ROBERT FINLAY: The only thing is the letters patent in the present case. It is really a misnomer arising from this being a general form which is used in many cases.

THE LORD CHANCELLOR: They are treated as equivalent terms?

SIR ROBERT FINLAY: Yes, my Lord.

"And whereas the said company has deposited with the Territorial Secretary a certified copy of the memorandum and articles of association of the said company, whereby it appears that the said company is duly incorporated under the laws of the province of Ontario, one of the provinces of the Dominion of Canada, for the purposes and objects therein set out;

"And whereas the company has deposited with the Territorial Secretary a power of attorney empowering Emil Weinheim, of the City of Dawson, Yukon Territory, to accept service of process and to receive all notices and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of said power;

"Now, therefore, be it known, that in pursuance of the Ordinance, being chapter 59 of the Consolidated Ordinances of the Yukon Territory;

"I, William Wallace Burns McInnes, Commissioner of the Yukon Territory, by and with the advice and consent of the council of said Territory, do hereby authorize and license the Bonanza Creek Gold Mining Company, Limited, to use, exercise and enjoy within the Yukon Territory, all such powers, privileges and rights set out in their memorandum of association as are within the power of the Commissioner of the Yukon Territory in Council to authorize and license, and to carry on within the Yukon Territory all such objects of their incorporation."

Your Lordships see that that is the grant by the Commissioner, with the consent of the council of the Territory, a license to the company to exercise within the Yukon Territory all the powers that are set out in the letters patent.

LORD PARKER: All the powers that are set out in the letters patent, and which the Crown in Yukon had power to grant?

SIR ROBERT FINLAY: Yes. The Ordinance under which that was granted is chapter 59 of the Consolidated Ordinances of the Yukon Territory.

LORD HALDANE: These are made under the powers of the British North America Act relating to unorganized territory?

SIR ROBERT FINLAY: Yes, my Lord. Perhaps I had better take the Statute first. It is the Statute of the Dominion Parliament with regard to the Yukon

Territory. Your Lordships will find it at page 1 of the joint appendix, at the bottom of the page. This is really the constitution of the Yukon Territory.

"The Yukon Judicial District, as constituted by the proclamation of the Governor-in-Council bearing date the sixteenth day of August, one thousand eight hundred and ninety-seven, and contained in the schedule to this Act, is hereby constituted and declared to be a separate territory under the name of the Yukon Territory, and the same shal' no longer form part of the North-West Territories.

"The Governor-in-Council may, by instrument under the great seal, appoint for the Yukon Territory a chief executive officer to be styled and known as the Commissioner of the Yukon Territory.

"The Commissioner shall administer the government of the territory under instructions from time to time given him by the Governor-in-Council or the Minister of the Interior.

"5. The Governor-in-Council by warrant under his privy seal may constatute and appoint such and so many persons from time to time not exceeding in the whole six persons, as may be deemed desirable to be a council to aid the Commissioner in the administration of the territory, and such persons so appointed to the council shall, before entering upon the duties of their offices, take and subscribe before the Commissioner such oaths of allegiance and office as the Governor-in-Council may prescribe.

"The Commissioner-in-Council shall have the same powers to make ordinances for the government of the territory as are at the date of this Act possessed by the Lieutenant-Governor of the North-West Territories, acting by and with the advice and consent of the Legislative Assembly thereof to make ordinances for the government of the North-West Territories, except as such powers may be limited by order of the Governor-in-Council.

"A copy of every such ordinance made by the Commissioner-in-Council shall be despatched by mail to the Governor-in-Council within ten days after the passing thereof, and shall be laid before both Houses of Parliament as soon as conveniently may be thereafter, and any such ordinance may be disallowed by the Governor-in-Council at any time within two years after its passage."

I do not think I need read these exceptions. They are not material to the present purposes. Then 9:

"Subject to the provisions of this Act, the laws relating to civil and criminal matters and the ordinances as the same exist in the North-West Territories at the time of the passing of this Act, shall be and remain in force in the said Yukon Territory in so far as the same are applicable thereto until amended or repealed," etc.

I do not think I need read any more of that Act. Your Lordships see the extensive power of legislation there given to the Commissioner-in-Council in Yukon, and the provision that a copy of every ordinance is to be sent to the Governor-in-Council of Canada, and laid before both Houses of Parliament; that is the Canadian Parliament; and every such ordinance may be disallowed within two years. It was under these extensive powers of legislation for the Territory that the ordinance at page 6, which is referred to in the license to which I have been calling attention was passed. It is the Consolidated Ordinances of the Yukon Territory, No. 2. We have not got the whole thing printed. The second clause is the first that occurs here:

"Any company, institution or corporation incorporated otherwise than by or under the authority of an Ordinance of the Territory, or an Act of the Parliament of Canada desiring to carry on any of its business within the Territory may (through the Territorial Secretary) petition the Commissioner for a license so to do and the Commissioner may thereupon authorize such company, institution or corporation to use, exercise or enjoy any powers, privileges and rights set forth in the said license.

Then No. (2):—

"No such license shall be issued until such company, institution or corporation has deposited in the office of the Territorial Secretary a true

copy of the Act, charter or other instrument incorporating the company, institution or corporation verified in the manner which may be satisfactory to the Commissioner, together with a duly executed power of attorney empowering some person therein named and residing in the Territory to act as its attorney and to sue and be sued, plead or be impleaded in any Court and generally on behalf of such company, institution or corporation and within the said Territory to accept service of process and to receive all notices and for the purposes aforesaid to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney; and such company, institution or corporaion may from time to time by a new or other power of attorney executed and deposited as aforesaid appoint another attorney within the Territory for the purposes aforesaid to replace the attorney formerly appointed; and notice of the granting of such license shall be given forthwith by the Territorial Secretary in the official gazette.

"The license or any exemplification thereof under the seal of the Territory shall be sufficient evidence in any proceeding in any Court of the Territory of the due licensing of the company, institution or corporation as aforesaid."

Then there is a provision with regard to companies under head 4.

THE LORD CHANCELLOR: Do I understand that the object of section 2 is this: That the company that is incorporated under an ordinance of the territory would be at liberty without any authority to trade, and similarly a company incorporated by Act of Parliament would be at liberty to trade. The two exceptions are the Yukon company and the Dominion company, and therefore "all other companies" must include such a company as the one we are dealing with?

SIR ROBERT FINLAY: Exactly.

LORD PARKER: It does not say any company having power to carry on business in Ontario; it is any company in the world.

SIR ROBERT FINLAY: In fact the object of this license is to give it power, and on our petition we got that license I submit to your Lordships that if the matter rested on that certificate alone granted by the Government of Yukon under statutory powers in conformity with the constitution of Yukon established by the Dominion Parliament the company was authorized.

THE LORD CHANCELLOR: It is "any company"?

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: Do I understand your argument to be that supposing a company had been incorporated here, and its memorandum of association had strictly limited it to mining in Australia, which would have prevented it, according to our law, from carrying on business anywhere else, it would none the less be "any company," and therefore could have received validly this license, although as between the company and its shareholders the whole transaction would have been *ultra vires*.

SIR ROBERT FINLAY: Any shareholder might have taken steps to restrain them in the case your Lordship puts.

LORD PARKER: It does not alter the powers of the company outside this particular district, but it gives them power within the district?

SIR ROBERT FINLAY: Yes, it is purely local.

VISCOUNT HALDANE: It enables any company or corporation to use, exercise, or enjoy any powers, privileges, or rights expressed in the license, always subject to this: that it is a corporation so existent in law that it can?

SIR ROBERT FINLAY: Yes my Lord; but when the license is once granted I submit it is quite impossible for the Crown who granted the license, and has granted a lease, to then come forward and say that the whole transaction is a nullity.

VISCOUNT HALDANE: How can they be estopped from saying it is non-existent in law?

SIR ROBERT FINLAY: It is existent in law as soon as they get their license.

VISCOUNT HALDANE: No. Supposing the company is incorporated under the English Companies' Act, and there is a clause put in the memorandum: "This company has no power to dig for gold in Yukon," what do you say then?

SIR ROBERT FINLAY: That would merely be a ground for an application by a shareholder to restrain the directors from applying for a license.

VISCOUNT HALDANE: It would be a ground for saying that the company did not exist.

THE LORD CHANCELLOR: It might be a ground why the license should be refused?

SIR ROBERT FINLAY: It might be.

THE LORD CHANCELLOR: As one of the matters for consideration.

VISCOUNT HALDANE: Suppose you granted it what would you be granting it to? A non-existent thing which has no power to take it.

SIR ROBERT FINLAY: I submit that is not the question in Yukon. The question in Yukon is whether the Government of Yukon have not there that which really has been spoken of sometimes as a sort of incorporation of the company for Yukon purposes.

VISCOUNT HALDANE: Supposing an Imperial Statute in express terms had said that this company shall not accept such a license from the Government of Yukon, and such a license if granted will be a nullity?

SIR ROBERT FINLAY: That, of course, would override everything. I should concede that.

VISCOUNT HALDANE: I am not at all sure that that is not what we come back to?

SIR ROBERT FINLAY: Surely not, my Lord?

VISCOUNT HALDANE: I am not putting any theory upon you. I am only dealing with the argument that if it is a pure question of *ultra vires* you are up against this difficulty.

SIR ROBERT FINLAY: My submission is it is not a pure question of *ultra vires*. As regards what the powers of the company were before this license I will deal with that afterwards, and I shall hope to satisfy your Lordships that it was not *ultra vires* of the company, apart from those altogether, but at present I am treating that matter separately.

VISCOUNT HALDANE: I quite appreciate that you only want to get it out of the hypothesis about *ultra vires*. There is great difficulty in saying that a corporation which has no power to accept a license of this kind by the law which governs it . . .

SIR ROBERT FINLAY: In Yukon it has power?

VISCOUNT HALDANE: Has it?

SIR ROBERT FINLAY: Yes, my Lord, because they have said so by their law passed under the authority of the Dominion Act.

VISCOUNT HALDANE: What is it? How does the company come into existence? By the law of the place of its constitution? Yukon cannot repeal that law?

SIR ROBERT FINLAY: It becomes a corporation by virtue of what was granted to it in its place of birth. It becomes a corporation, but having become a corporation if it afterwards gets what is the equivalent of a Statute of Yukon authorizing it to carry on business there I submit to your Lordships that that is for all practical purposes an incorporation in Yukon for the purpose of carrying on business there.

VISCOUNT HALDANE: It may be that the Crown has created a new corporation altogether in Yukon, but it is not within its capacity to accept a license.

SIR ROBERT FINLAY: Something has been created in Yukon. I do not care which way it is put, but the Yukon Legislature has done that which empowered the Commissioner-in-Council to constitute a body competent to carry on business there.

VISCOUNT HALDANE: He does not profess to do it.

SIR ROBERT FINLAY: Not to constitute a new body.

LORD PARKER: You may read this clause 2 as meaning any company that seeks to carry on business, and to do what is contemplated in the section.

SIR ROBERT FINLAY: Yes.

LORD PARKER: If you construe it in that way, then *cadit questio*, because it would not be within the section if it had not the power. On the other hand it may mean, and apparently it does mean, any company whatever, that is to say any

corporation whatever, whether it is foreign or colonial, and whether it has the necessary powers, or not. If that is the case then you have an over-riding Statute applicable to Yukon which gives Yukon the power to recognize the corporation.

SIR ROBERT FINLAY: I submit the second is the meaning, because one reason for that reading is, apart from the wording of the section which I submit bears it out, they were really dealing with the case of companies which had not the power. They must really have been dealing with provincial companies, otherwise there is no point in the exception; and in order to make sure about their being competent to carry on business in Yukon these powers are given to them. Therefore I submit to your Lordships that the Statute must be read in that way; and that altogether apart from the general questions to which I shall come presently as to the power, apart from special legislation of this kind, in Yukon you have a body which by the legislation of Yukon has the capacity to carry on the business, and I submit to your Lordships that it is impossible for the Crown in face of that to show that the lease is a nullity. The Crown has received rent, and if your Lordships would look at paragraph 51, page 16 of the record you will see it says at line 10:

> "Since the inception of the suppliants' enterprise, the applicants and their predecessors in title have expended in actual cash in or about the operation, development and improvement of the territory comprised within their leases a sum exceeding $315,000, in addition to which very large sums have been expended in connection with collateral matters relating to the said enterprise. Owing to the obstruction, delay and loss occasioned to the suppliants and their predecessors in title by the wrongful acts and omissions of the Department of the Interior hereinbefore set forth, the suppliants and their predecessors in title have only been able during the said period to take out of their locations gold to the value of less than $130,000."

I submit that with regard to such an action on the part of the Crown, authorized by competent local legislation after the expenditure of money because of the company possessing this power, it is impossible for the Crown to say:—This is all a nullity, and we treat you as having no lease at all, and we treat you as having no *locus standi* in Court; you are non-existent, and you cannot even appear in Court in order to assert your rights.

LORD PARKER: You cannot say you have no power because it is you who have conferred the power.

SIR ROBERT FINLAY: That is my submission, and when it is looked at with reference to the position of the shareholder, whether in Canada or the United States, who may have put money into this enterprise, the matter becomes very serious, and I do not think that Mr. Justice Idington went a bit too far when he said that the dignity and the honour of the Crown were deeply concerned in these proceedings.

VISCOUNT HALDANE: Mr. Justice Idington was not troubled with the point you are now raising.

SIR ROBERT FINLAY: He was by the other point.

VISCOUNT HALDANE: Your present point is not a difficulty if Mr. Justice Idington and Mr. Justice Anglin are right. SIR ROBERT FINLAY: There is obviously no difficulty about the present point. If I am right on the general point I hardly want this point; and I shall certainly argue, and argue most strenuously, on the general point, which is of far reaching importance; although this point also is of very far reaching importance, because it would apply to other companies also, many of whom are, or may be, in the same position; but if I am right in either of these points, and they are really in the nature of separate points, I am right altogether so far as the Bonanza Company is concerned.

THE LORD CHANCELLOR: This does not arise unless the other has been decided against you? SIR ROBERT FINLAY: The point I am on now is necessary for me.

Then, my Lords, the second act of recognition by the Government is in respect of the certificate of title to free miners' rights. That is at pages 49 and 50 of the record.

THE LORD CHANCELLOR: They are merely giving effect to the license, are they not? SIR ROBERT FINLAY: This is separate, I think. It is a certificate of rights and privileges of a free miner.

THE LORD CHANCELLOR: You could not have got that unless you had got the license, could you? SIR ROBERT FINLAY: I am not sure of that. MR. HELLMUTH: We could have got that from the Dominion.

THE LORD CHANCELLOR: I quite follow. SIR ROBERT FINLAY: Then would your Lordship observe what this is? There are two specimens given at pages 49 and 50. The second, which is dated the 26th January, 1906, is in these terms:

> "This is to certify that the Bonanza Creek Gold Mining Co. of Dawson, Yukon Territory, has paid me this day the sum of seventy-two dollars and is entitled to all the rights and privileges of the free miner, under any mining regulations of the Government of Canada, from the 24th day of December, 1905, to the 30th June, 1906."

Then there are certain incidental matters. This is given by the Minister of the Dominion. Your Lordships will see it is a general certificate of being entitled to the privileges of a free miner. The other was a local license to carry on the business of mining in Yukon.

THE LORD CHANCELLOR: This might not carry you so far. Because it may be you are entitled to the rights and privileges of a free miner so far as the Dominion is concerned, but where and how you can enforce them is another matter. SIR ROBERT FINLAY: Yes, my Lord, but I submit at the same time it goes a long way to show that having that certificate we are entitled to take these leases in Yukon.

VISCOUNT HALDANE: Where is Bonanza Creek? SIR ROBERT FINLAY: In Yukon. If your Lordships will look at page 51 of the record you will see there is an extract from the cash return of Mr. Lithgow, Treasurer and Controller of the Yukon Territory. The receipt is No. 1447, dated 7th September, 1905, from "C. B. Burns, Territorial Secretary, incorporation fees of Bonanza Creek Gold Mine Company Limited, 500 dollars." That is certified as being correct.

LORD PARKER: Then they treat the license, apparently, as an incorporation. SIR ROBERT FINLAY: Yes, my Lord, apparently. That is the date of the license. Your Lordships see that the date on this page 51 is 7th September 1905. The license on page 52 is dated 7th September, 1905, the same date. Now, my Lords, turning to the free miner's certificate granted by the Minister of the Interior for the Dominion, at pages 11 and 13 of the joint appendix, your Lordships will find the regulations under which that free miner's license was granted. These regulations are dated 13th March, 1901. These regulations govern placer mining in the Yukon Territory. They are set out in the Appendix to the Statutes of Canada, and dated 13th March, 1901. At line 25 it says:—"Free miner" shall mean a male or female over the age of eighteen but not under that age, or joint stock company, named in, and lawfully possessed of, a valid existing free miner's certificate, and no other. "'Joint stock company' shall mean any company incorporated for mining purposes under a Canadian Charter or licensed by the Government of Canada."

VISCOUNT HALDANE: What document is this? SIR ROBERT FINLAY: These are regulations approved by the Order-in-Council of the 13th March.

VISCOUNT HALDANE: Who made them? The Dominion Minister? MR. HELLMUTH: The Dominion Government. SIR ROBERT FINLAY: Your Lordships see they are in the Appendix to the Statutes of Canada, 1st Edward VII., page 49:

> "'Joint stock company' shall mean any company incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada."

I submit it is clear, as Mr. Justice Duff points out in his judgment, that "Canadian charter" includes charters granted by the provinces. It is not confined to a Dominion charter.

LORD PARKER: It does not matter to you, does it, because it is not licensed by the Government of Canada. Are not you licensed by the Government of Canada when you get a free miner's certificate?

THE LORD CHANCELLOR: That made you a free miner, did it not? SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Then does it really matter? SIR ROBERT FINLAY: I am not quite sure that the free miner's certificate by itself would be enough for

that purpose, because this is referring to the person who got these certificates. I think that is made plain by the following sentence.

THE LORD CHANCELLOR: Will you tell me what is meant by "licensed by the Government of Canada"? SIR ROBERT FINLAY: If the Government of Canada has granted a license to a company to carry on mining then it would be competent to take a free miner's certificate. I think that is what it means.

THE LORD CHANCELLOR. It looks as if it would not be unless it were so. SIR ROBERT FINLAY: Yes. It says it "shall mean any company incorporated for mining purposes under a Canadian charter, or licensed by the Government of Canada."

THE LORD CHANCELLOR: I do not quite follow that. SIR ROBERT FINLAY: Suppose there is a provincial company that is clearly under a Canadian charter?

THE LORD CHANCELLOR: Let us assume that. Will you give me an instance of a company that is licensed by the Government of Canada. SIR ROBERT FINLAY: Take a British company, or a United States company. They might be licensed by the Dominion of Canada.

LORD PARKER OF WADDINGTON: To do what? SIR ROBERT FINLAY: To carry on the business of miners.

THE LORD CHANCELLOR: How does the Government of Canada license anybody to carry on the business of miners except by granting them the free miner's license? MR. NEWCOMBE: Will your Lordships look at page 1 of the joint appendix? You will see there there is an Act to amend the Companies Act. SIR ROBERT FINLAY: I think that probably answers the question:

> "Any joint stock company or corporation duly incorporated under the laws of the Parliament of the United Kingdom, or under the laws of any foreign country for the purpose of carrying on mining operations may, on receiving a license from the Secretary of State of Canada, carry on mining operations in the Yukon District and North-West Territories, and shall be entitled to the privileges of a free miner, subject to the regulations governing and affecting free miners."

So that I submit that exactly bears out what I suggested in answer to your Lordship's question that it would apply to a British company or a United States company, or any joint stock company incorporated under the laws of the United Kingdom, or under the laws of any foreign country. I am obliged to my friend. That is no doubt the reference in that paragraph at line 30, page 11.

VISCOUNT HALDANE: It must be duly incorporated for the purpose of carrying on a mining business. SIR ROBERT FINLAY: Yes, my Lord, the power would be granted by the license.

LORD PARKER: The license here is quite a different thing from the license which was granted which you read to us just now. SIR ROBERT FINLAY: Yes, it is my Lord.

LORD PARKER: This is a license for the carrying on of a mining business in Canada? SIR ROBERT FINLAY: Yes, My Lord.

LORD PARKER: The other was a license for carrying on a mining business in Yukon? SIR ROBERT FINLAY: Yes, my Lord. As I put it to your Lordships, the license here spoken of from the Government of Canada is preliminary to, or one qualification for getting the free miner's certificate. It is not the free miner's certificate itself, and it may be an indispensable requisite in the case of certain companies for getting the free miner's certificate, but it is not the same thing. Then line 32:

> "Every person over, but not under eighteen years of age, and every joint stock company, shall be entitled to all the rights and privileges of a free miner, under these regulations and under the regulations governing quartz mining, and shall be considered a free miner upon taking out a free miner's certificate. A free miner's certificate issued to a joint stock company shall be issued in its corporate name. A free miner's certificate shall not be transferable."

I do not think there is anything that I need read in the 7th paragraph, unless my friend wants it. Then paragraph 8. MR. NEWCOMBE: The opening lines are important. SIR ROBERT FINLAY: I will read any part of 7. which my friend

considers important. MR. NEWCOMBE: Will you read the first two sentences? SIR ROBERT FINLAY: Certainly. This is paragraph 7, at the bottom of page 11:

> "No person or joint stock company will be recognized as having any right or interest in or to any placer claim, quartz claim, mining lease, bedrock flume grant, or any minerals in any ground comprised therein, or in or to any water right, mining ditch, drain, tunnel, or flume, unless he or it and every person in his or its employment, except house servants, shall have a free miner's certificate unexpired."

That, I suppose, is all my friend wants? MR. NEWCOMBE: Yes. SIR ROBERT FINLAY: Then paragraph 8:

> "Every free miner shall, during the continuance of his certificate, but not longer, have the right to enter, locate, prospect, and mine for gold and other minerals upon any lands in the Yukon Territory, whether vested in the Crown or otherwise."

THE LORD CHANCELLOR: If this license is not determined it has never been revoked. SIR ROBERT FINLAY: That is so, my Lord. MR. HELLMUTH: It was taken out year by year by the appellants here until a free miner's license ceased to be required.

THE LORD CHANCELLOR: So that at the moment it is not required? MR. HELLMUTH: That is so, and that appears in the admissions in the case. SIR ROBERT FINLAY: I am obliged to my friend. What I read related to placer mines. In paragraph 13 your Lordships will find the application of that to hydraulic mines. It is Regulation No. 12. It is headed:

> "The regulations for the disposal of mining locations to be worked by the hydraulic process printed in the appendix to the Statutes of Canada, 62-63 Vic. at page lxiii., follow. The sections specially referred to on the argument are 3, 4 and 14.
>
> "3. To any person who has prior to the date thereof filed an application in the Department of the Interior at Ottawa, or in the office of the Commissioner of the Yukon Territory or in the office of the Gold Commissioner for a mining location in the Yukon Territory not provided for by the mining regulations already in force, the Minister of the Interior may issue a lease subject to the same conditions as to size and otherwise, and conferring the same rights as a lease issued under these regulations for a location acquired at public competition; provided that the Commissioner has reported that it has been proved to his satisfaction that the applicant himself, or a person acting for him, was upon and actually prospected prior to the date hereof the ground included in the location, and provided further that the Gold Commissioner has reported that the ground included in the location is not being worked and is not suitable to be worked under the regulations governing placer mining. But under this section no person shall be given a lease for more than one location.
>
> 4. The unreserved locations not disposed of under the next preceding section shall be offered at public competition, and awarded to the highest bidder after being advertised in such manner and at such times as the Minister of the Interior may direct; and to the person or corporation to whom any such location may be awarded as such competition the Minister of the Interior may, after such person or corporation has obtained a free miner's certificate as provided in the regulations governing placer mining, and filed in the Department of the Interior at Ottawa, within a period to be fixed by the Minister, a Dominion land surveyor's plan of the location issue a lease of the same for a term not exceeding twenty years, such lease to be renewable for a further period of twenty years upon the performance to the satisfaction of the Minister of the Interior of the conditions imposed thereby."

Under that I submit that we are in Yukon entitled to all the privileges of a free miner, and one of those privileges, the most important of them, is that of taking a lease of the ground for mining. Yet in the face of that it is now argued by the Crown that we are incompetent to take that lease. That is the second ground of recognition we rely upon.

LORD PARKER: I suppose the petition of right in this case was filed in the usual way? SIR ROBERT FINLAY: Yes.

LORD PARKER: That I have always understood puts the Crown in the same position as a subject for the purpose of ascertaining their rights? SIR ROBERT FINLAY: Yes, my Lord. Then, my Lords, the third class of recognition is best illustrated by one illustration in a lease of some reverted claim granted by the Crown on the 16th March, 1907, at page 46 of the record. I have called attention to it. In this connection your Lordships will observe the recital. It is made between His Majesty King Edward VII., represented by the Minister of the Interior of Canada, and the Bonanza Creek Gold Mining Company Limited, a body corporate and politic, duly incorporated under the laws of the province of Ontario, hereinafter called the lessees. It recites the indenture of lease, which I mentioned to your Lordships yesterday, to Doyle and his associates, and Matson and his associates, and then it goes on at line 27. Certain claims had reverted; the claims that were outstanding would have been a considerable obstacle in the way of the hydraulic mining; therefore they had an agreement to get them. This was a lease of certain of these reverted claims.

THE LORD CHANCELLOR: As set out in the schedule.

LORD PARKER: I understand the validity of that lease depends on the corporation to whom it is granted having a free miner's license, and their right to a free miner's license depends upon the Statutes and Ordinances to which you have referred us. SIR ROBERT FINLAY: Exactly. Then there is that lease granted to them and they got it having the free miner's certificate. Then there is the fact that from the time, this is in 1907, as I pointed out, when the company became the assignees, rent was regularly paid to the Crown and received by the Crown.

VISCOUNT HALDANE: This notwithstanding that they set out in the title to the document that it is a company incorporated under the laws of the province of Ontario. SIR ROBERT FINLAY: Yes. I submit on all these grounds that the recognition is complete.

THE LORD CHANCELLOR: The recognition is complete? The question is whether they could recognize. SIR ROBERT FINLAY: Yes, my Lord, and that they could recognize I submit to your Lordships for this reason, that the power to grant these certificates, the license to work in Yukon and the free miner's certificate, is not confined to companies having capacity. The license to work in Yukon is granted in respect of companies who otherwise have not power to work in Yukon, and it is intended to confer that power upon them.

VISCOUNT HALDANE: May I tell you the ambiguity that has troubled me throughout this case? Applying Lord Cairns' judgment in *Ashbury Railway Carriage, etc., Company* v. *Riche*, the corporation does not exist for any purpose outside the limits of what is prescribed by the Statute enabling it to exist. If, on the other hand, it be true that a company is fully incorporated for general purposes and that it is not a question of *ultra vires* in that sense at all, but a question of limitation of its powers, you may well be right; but what I am anxious to get at in this case is the meaning of the words "with provincial objects." SIR ROBERT FINLAY: I will come to that directly.

LORD PARKER: That is the broader question. SIR ROBERT FINLAY: That is the broader question. I will not read the authorities on this first part of the case at the present moment. I will defer that till later, but may I say one word? The Crown has the power of incorporation. To take the case that was put by Lord Parker yesterday, suppose a French company comes to England and the Crown makes a grant to that company by charter. Even if it turned out that by the law of France that company had not capacity to take land in England, that grant by the Crown would operate as an incorporation for that purpose in England.

LORD PARKER: I should like to confine that—even if the company had no power to take land at all? I should demur to the point that an English company can be given capacity to hold land in France. The capacity depends on the foreign law. SIR ROBERT FINLAY: Absolutely, my Lord.

VISCOUNT HALDANE: Obviously as far as the municipal law of the foreign country is concerned, you can incorporate a company so far as the English legisla-

ture give it power to hold property in any land. SIR ROBERT FINLAY: A great many companies are formed to hold . . .

VISCOUNT HALDANE: There is all the difference between that and a company deprived by the English legislature or excluded by the English legislature from the power to hold land. SIR ROBERT FINLAY: I recognize that, but the point I am anxious to bring out clearly for your Lordships' consideration is this. In the case of a foreign company with no power to hold lands at all, if the Crown here makes a grant to that company, that would be considered, I submit, as an incorporation for the purpose.

THE LORD CHANCELLOR: May I put to you what is in my mind? I should like to know your view upon it; supposing that the Government in France granted rights in real estate to a company incorporated in England that clearly had no power under this memorandum to hold land in France, and the question of the validity of the grant arose: would not it be decided according to the law of France exclusively? SIR ROBERT FINLAY: I think it would.

THE LORD CHANCELLOR: If by the law of France it made no difference what the memorandum of association was in England, the grant would be good. Therefore in that view the objects of the company become immaterial in determining the validity of the grant. SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: You have to distinguish between power and capacity. Power is very important to be considered, where it is a question of *ultra vires;* but the company's capacity varies from country to country. SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: It depends on the law of each particular country. SIR ROBERT FINLAY: Certainly, my Lord.

LORD PARKER: We may incorporate a company with power to hold land in France, but its capacity to hold land in France is not affected in the least; that depends on the French law.

VISCOUNT HALDANE: On the other hand, we must presume that the French Courts would apply the well-known principles of international law. One is that when you are dealing with a corporation you look at the country to which it owes its existence for the definition of the ambit of its vitality. SIR ROBERT FINLAY: But suppose the French Government, as the French Courts have sometimes done, misunderstood English law and granted it without enquiring?

VISCOUNT HALDANE: I think we should say in the Courts here that they granted nothing. SIR ROBERT FINLAY: Surely not.

THE LORD CHANCELLOR: I am not so sure that the question of misunderstanding the law arises here. I should have thought the Dominion would be supposed to know the provincial law. Knowing the provincial law, they granted to a company that they stated was incorporated in Ontario. SIR ROBERT FINLAY: They did.

LORD PARKER: I rather demur to the distinction between municipal law and international law. There is a whole series of relations of foreigners, aliens, where what we call international law comes into operation. That law is always the municipal law. The only thing which makes it international law is that we in our Courts have laid it down that we will adopt principles which we think may be adopted by other nations, but as a matter of fact, are seldom adopted by them. SIR ROBERT FINLAY: We have a whole series of cases in which it had been assumed over and over again that the law of the domicil as governing succession and so on is international law. Every country except this and the United States treat the law of the nation—and in that connection there is a most interesting point as to renvoi . . .

VISCOUNT HALDANE: That is a very good illustration of the difficulty you get into. Surely, here we are getting ourselves into difficulties through want of definitions: capacity certainly. In an English Court there could be no question. Suppose the French Government purports to grant a lease to a company which is incapable of taking it; in any English Court, the company has not got a lease. SIR ROBERT FINLAY: Looked at merely in its English aspect, that might be so. but what the English Court would have to look at is the company with the power conferred upon it in France.

VISCOUNT HALDANE: I doubt that. SIR ROBERT FINLAY: I submit that a grant by the French Government would have exactly the same effect as a grant here by the Crown to a foreign company would have. If the company had not capacity to take a grant of lands, that would amount to an incorporation for the purpose . . .

VISCOUNT HALDANE: A new incorporation is another thing, but I am by hypothesis asking whether it is the same corporation. SIR ROBERT FINLAY: That raises interesting questions as to identity, and one may refine upon them to any extent; but I submit that whether it be theoretically the same corporation or not, it has the land, and any English Court would recognize that by virtue of what had taken place in France, the company, as dealt with under French law, with the powers conferred upon it by that grant, the powers implied in the grant, had the land effectually.

THE LORD CHANCELLOR: I do not know whether the result of that would be if a shareholder took proceedings in the English Courts to declare that the whole transaction was *ultra vires* and that the company did not hold the land, that the Court would say none the less that they did.

LORD PARKER: You could not take proceedings in the English Court to declare that a French grant of land was ineffectual. It would depend entirely upon the territorial law. You could have it declared that the acquisition of the land by the company was *ultra vires*, and then get consequential relief, but the relief would not enure for the benefit of the grantors in France; the property would be sold for the benefit of the creditors in England. SIR ROBERT FINLAY: A shareholder might do that; or if the company was proposing to ask the French Government for a grant, he might apply to restrain them on the ground that it was *ultra vires* for them or he might apply for relief in the manner Lord Parker has pointed out. I submit to your Lordships anyhow the thing done would be good, and that the power to hold the land in France would be conferred by the very act of the grant from the French Government. Otherwise the consequences would really be most extraordinary. Supposing a company has acquired property, it has acquired a house in a foreign country, and the furniture—

THE LORD CHANCELLOR: The house is the better illustration. SIR ROBERT FINLAY: I was going to take the furniture for the sake of an observation that I was going to make, but it will do just as well with regard to land. Take the house and the furniture and the land; would the result be that, if it was beyond the capacity of the company to acquire property in that foreign country, that the property did not belong to it at all?

LORD PARKER: It is beyond the power, is not it? The capacity is governed by the law of the foreign country. SIR ROBERT FINLAY: You would look at the law of the foreign country. Otherwise, if the proposition I venture to submit is not correct, it would follow that anybody might help himself to the property—I mean to say, if he were charged with stealing the property, he would say, "There is no such company." I submit that it must be so, that if the law of the country recognises the acquisition as good, it supplies any defect, if defect there be, in the powers of the company.

VISCOUNT HALDANE: Not, to my mind, in the same corporation. It must be that the existence of a corporation is determined by the law of the country that creates the corporation? SIR ROBERT FINLAY: For the purpose of this appeal, it would not matter to me whether it is the same or another, I recognise that it is in a sense another corporation because it has acquired new properties from the fact that the Government of the country has by implication conferred upon it the right to hold land there.

VISCOUNT HALDANE: If the other view was right notwithstanding an Act was passed setting out the doctrine of *Ashbury Railway Carriage, etc., Company* v. *Riche*, and saying that an English corporation is not to hold land in France and not to receive any grant, and that any such grant made is to be a nullity, yet the French Government could make a grant, no doubt they would make a grant. they could do anything within their own powers, but not to that English corporation in a way to entitle the English corporation to recognition. SIR ROBERT FINLAY: Suppose this had happened in France, it could not possibly be said,

the French Government would not say and I submit could not say that the grant was a nullity, because it was in excess of the powers of the company and therefore claim to retain what had been paid—refuse to recognise the lease and propose to turn the company out.

LORD PARKER: If the French law gave power to the French Government to confer an additional power on an English company and they did so, they never could say the English company had not that additional power; it would be dead against their own laws. SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: The French Court would say: We have to administer our own laws. No doubt they would administer any law they were commanded to administer, but any French Court following ordinary principles would say the question of capacity is on the face of it a question of the Government of the domicile of the corporation.

LORD PARKER: In the particular case, we have the Statutes which distinctly say the Yukon Government may confer on any foreign company these powers. It may be wrong.

VISCOUNT HALDANE: Whether that means that they are enabled to repeal a provision of the British North America Act is another thing.

THE LORD CHANCELLOR: It is not any foreign company; it is any company except the ones incorporated by the Dominion.

SIR ROBERT FINLAY: By the British Parliament or the Parliament of Canada.

VISCOUNT HALDANE: I doubt whether that is intended to repeal the British North America Act, if there is any question of the repeal of the British North America Act. SIR ROBERT FINLAY: I submit if there were and if I were wrong upon the more general point, it would cure it.

My Lords, without quoting authorities on what I have been arguing up to now, I propose to pass to the more general point as to the scope of the British North America Act. We are dealing with the second question and the more general one, and possibly one a little more important—

THE LORD CHANCELLOR: They are both important. SIR ROBERT FINLAY: The question depends on the construction to be put on the British North America Act, but I submit that it is very material to remember that before the British North America Act the provinces that incorporated had been exercising and had the right to create corporations; although of course each province which afterwards united to form the Dominion could confer the right only to carry on business in that province, yet it could constitute a corporation with capacity to carry on business in any other province or country where the local authorities allowed it to carry on.

VISCOUNT HALDANE: It certainly could do that. SIR ROBERT FINLAY: That was the state of things when the Act was passed.

VISCOUNT HALDANE: You must remember that "province" under the Confederation Act means something very different—there is the province of Canada and the province of New Brunswick and the province of Nova Scotia; then came an Act which gave an entirely new meaning to the word "province." SIR ROBERT FINLAY: And of course one great province was reconstituted. It was found that the elements in Upper and Lower Canada did not work quite well together always, therefore the two provinces were formed.

VISCOUNT HALDANE: The Government of the old province of Canada used sometimes to sit in Upper Canada, and sometimes in Lower Canada, and there were two different sets of laws. SIR ROBERT FINLAY: The second consideration is this, and your Lordships will not I think on a point of this kind altogether ignore the practice that has prevailed ever since the Act passed—it may be all wrong—

VISCOUNT HALDANE: No, we will not, nor will we ignore this, that the powers in section 91 and section 92 are powers which interlace to a very remarkable extent. The legislative powers interlace. Why certain things should be given to the Dominion and others not given, I have never known. I have always put it down to this, and indeed I think I have said so in a judgment, that when they discussed the distribution of powers at Quebec in the autumn of 1864, they

were discussing as a Parliament, an assemblage of statesmen, not as a body of logicians, and they discussed what would be convenient and did not trouble themselves whether the things were quite consistent or overlapped or not, which was left to the Court to determine. You are not to look in the Constitution for a scheme of logic. You may well find some overlapping, and the question is whether you have not some here. SIR ROBERT FINLAY: It was Lord Macaulay, I think, who said discussing the Bill of Rights that those who framed it were not strictly logical; they were quite satisfied if a major premiss carried a certain set of votes, and a minor premiss another set of votes even though the thing did not work out in a perfectly logical fashion. My friends may give details with regard to the amount of capital involved, but the greater part of the business has been done by companies incorporated by the provinces since the British North America Act. The amount of capital involved is such that we had to discuss what the exact meaning of a billion was—whether it was a thousand millions or a million millions: it is an enormous quantity. My friends will give the particulars of the capital involved. The business is carried on by provincial companies which carry on their operations necessarily not only in the province of incorporation but in others as well. The nature of the business is such that they must.

THE LORD CHANCELLOR: That is one view of the matter. It is another view to say that they can incorporate themselves so that they shall expressly carry on the same business in two provinces. SIR ROBERT FINLAY: All I mean is the view now presented on behalf of the Dominion is revolutionary, and I say it destroys the vast fabric which has been built up of companies with an enormous amount of capital.

THE LORD CHANCELLOR: Is the view presented by the Dominion strictly limited to the view that the provincial company can only operate within the provincial area? SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: And whatever it is incorporated for, it cannot do any act outside. For example, if it were a stores like Eaton's stores, could not it buy goods anywhere it pleased and could not it consign goods to anybody it pleased? MR. NEWCOMBE: We say it cannot carry out its main functional powers except within the incorporating province, incidental powers very likely. It is in the same sort of position that a company incorporated by the Parliament here to do business in Wales for instance would be. It must carry on its main business there. Its business must be carried on there. There may be incidental powers which may be exercised outside. Suppose a cigar factory: it may have to come outside to buy its leaf or something of that sort.

THE LORD CHANCELLOR: Everything necessary for the purpose of carrying on the business within the area. SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: That is a wider thing than the view that you thought the Crown took. SIR ROBERT FINLAY: I did not venture to answer for the Crown.

THE LORD CHANCELLOR: That has relaxed the bonds a little, has not it? SIR ROBERT FINLAY: May I make one observation as to the extraordinary difficulty of carrying out the doctrine in practice?

LORD PARKER: Is there any difficulty? Supposing an English company were incorporated for the purpose of carrying on a publishing business in London; nobody would pretend that they could not get paper from Newfoundland if they wanted it, and nobody would contend that they could not send books to America. It is only when they begin something which is not a publishing business or carry it on outside the specified area; they could not remove to New York. SIR ROBERT FINLAY: The difficulty hardly arises with regard to English companies, because I do not think you get English companies incorporated to carry on business only in the country.

THE LORD CHANCELLOR: Plenty of them have definite localities. SIR ROBERT FINLAY: The head office may be at a particular place.

THE LORD CHANCELLOR: There are well known cases where a company has been incorporated to do a certain act, mining for instance in Australia, and they have been stopped from doing it in West Africa. SIR ROBERT FINLAY: What

my friend has been good enough to say in answer to your Lordship's question does not get rid at all of the consideration which I submit should have some weight.

THE LORD CHANCELLOR: It does not enable you to get this license. SIR ROBERT FINLAY: No, but it does not get rid of the consideration that what my friend is arguing for would cut at the root of a vast fabric of companies carrying on business in several provinces. Very often from the nature of the business it is highly convenient that they should do so, and the view that so far has been acted on is this, that the province of Ontario, say, can confer the right only of carrying on business in Ontario. It cannot confer the right of carrying on business anywhere else, but having created the corporation, that corporation as a legal entity, if it is permitted by the government and the legislature of any other province to carry on its business there, may do it.

LORD PARKER: If you construe it in that way, practically the clause would read like this: The body shall have power to carry out a certain business within the province, and also power subject to any objection anybody may raise outside the province to carry on business outside the province. That is, practically the same powers as an English company has under a very wide memorandum. SIR ROBERT FINLAY: It must be so in the nature of things.

LORD PARKER: I can understand that construction. I cannot see how it is in the least consistent with the John Deere Plow case. If that is the meaning of section 92 clearly the Dominion could not have done what they purport to have done under the residual powers of section 91. SIR ROBERT FINLAY: Under the residual powers of section 91 the Dominion has in several cases been held to have the power of creating companies to carry on business in a number of provinces, and usually in all the provinces all over the Dominion.

VISCOUNT HALDANE: The John Deere Plow case was simple enough, because on the face of the letters patent the company was incorporated for the purpose of carrying on business right through the Dominion in all parts. That obviously was not a provincial object. Therefore the John Deere Plow Company had to be incorporated by the Dominion. When you look at section 91 and section 92, it is not a contrast of territory because the territory of the Dominion and the territory of the province are the same; it is a contrast of legislative purposes, and they interlace and are carried on on the same terræ, some by the Dominion, some by the provinces. When I turn to section 92 I see a number of things that in their nature are to be done only in the province. When I get to this particular head that we are dealing with, No. 11, there is not a territorial limitation, but it is the incorporation of companies with provincial objects. That may mean that you cannot incorporate any company that is expressed to have objects outside the province. I mean, for instance, a company to trade as the John Deere Plow Company did, in every province of Canada. It may be that you have to go and ought to go to the Dominion Government there. SIR ROBERT FINLAY: I absolutely agree it could not create a company with the right to trade in any province in Canada; the right would exist only in the province of incorporation.

LORD PARKER: Or with the power. SIR ROBERT FINLAY: I submit it would have the power—the capacity. I am only anxious to keep separate the two ideas, what I meant the right was, that by law it could do it and did not require any further permission.

THE LORD CHANCELLOR: Supposing it were formed in the province of Ontario, and it proceeded to carry on its objects in the province of Manitoba, the province of Manitoba could not authorize it to carry on its business there, could it? It would not have been formed for the purpose of any provincial object. SIR ROBERT FINLAY: The province of Manitoba could.

THE LORD CHANCELLOR: Why It is entitled to incorporate companies with provincial objects, but it would not have incorporated this. SIR ROBERT FINLAY: If the province of Manitoba authorized the company to carry on business in Manitoba, I am speaking of a company which had been formed in Ontario, whether it would be theoretically the same company or not the province of Manitoba would have authorized its carrying on business there.

LORD PARKER: The shareholders in Ontario could bring an action to restrain it carrying on business there because it is *ultra vires*. SIR ROBERT FINLAY: On that construction I suppose they might have restrained the application. I submit on my reading of the Act they could successfully make that application, but when the province of Manitoba has granted the leave, you have a body—whether precisely the same with the original corporation or not—

THE LORD CHANCELLOR: Are any such grants made in fact by a company in one province to trade in another? SIR ROBERT FINLAY: They have never been considered except for the purpose of mining—

LORD PARKER: You get a good instance in the Insurance Act. As I understood the Act it contains provisions that a local provincial insurance company upon obtaining a license from the Dominion Government may carry on business anywhere in the Dominion, is not that so? SIR ROBERT FINLAY: That is so, my Lord.

LORD PARKER: That is exactly the case to which you are referring. Whether the corporations be the same or not is simply a metaphysical question, if you have a body with the powers to do it recreating an existing corporation for purposes within their own province or within the Dominion generally. SIR ROBERT FINLAY: I should like to say a word on that power before I go to sections 91 and 92 more in detail. I am going to submit to your Lordships that the framework of that provision really suggests that that Act of the Dominion Parliament recognized that it was *intra vires* of provincial companies to carry on operations elsewhere, because it is not equivalent to a new enactment; it is really recognizing that these companies had it *intra vires* to take such a license.

VISCOUNT HALDANE: I do not myself see how a Dominion Act could be decisive on that. You are dealing with an Act of the Imperial Parliament here. SIR ROBERT FINLAY: Yes, but surely, my Lord, it must be material to consider what is recognized in the legislation of the Dominion Parliament as being the power of the provincial companies whatever they may contend now?

VISCOUNT HALDANE: I am not sure that we ought to look at in in construing the British North America Act, only within limits. SIR ROBERT FINLAY: I will not carry it very far.

LORD PARKER: I mentioned it as an instance.

THE LORD CHANCELLOR: We are tempted very much to ask all sorts of questions on a point of this kind which is extremely interesting, and, so far as I know, new. I will only ask you one more for the moment, it is this: If you incorporate your company with provincial objects in Ontario, and it is going to obtain licenses to trade in Manitoba, surely there must be included in its powers conferred upon it in Ontario the power of obtaining a license to trade in Manitoba? SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: If that is so how can the power to acquire a license to trade in Manitoba be a provincial object if "provincial object" means the province where the company is incorporated? SIR ROBERT FINLAY: I am going to contest that reading. I have been led into anticipating an argument. That is not what "provincial object" means, and I will go at once to that. I should like to say one word on section 3. The Insurance Act of 1910, which your Lordships have got, which is at page 252 of this volume, has this provision in the third section to which I think my Lord Parker was referring:

> "Any company incorporated by an Act of the legislature of the late province of Canada or by an Act of the legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province, may, by leave of the Governor-in-Council, avail itself of the provisions of this Act on complying with the provisions thereof; and if it so avails itself the provisions of this Act shall thereafter apply to it, and such company shall thereafter have the power of transacting its business of insurance throughout Canada."

VISCOUNT HALDANE: I think that is a very strong illustration of what the Dominion Legislature thought. Whether they had power to pass that is a ques-

tion. MR. NEWCOMBE: That is one of the questions submitted. SIR ROBERT FINLAY: I am anxious not to get into questions outside this case, but this is incidental to the present case.

LORD PARKER: That assumes, does not it, that the company with which they are dealing has no powers outside the territory or province, and confines its operation within the province. They are starting with a company of that sort, and what they say is if that company applies for an Order-in-Council and obtains it they may take advantage of this Act and get a license and carry on business throughout Canada or anywhere in the world in the same way as if they had the powers. That must be the meaning of it. SIR ROBERT FINLAY: I agree.

LORD PARKER: That recreates the corporation with fresh powers. SIR ROBERT FINLAY: Rather than a recreation of the corporation does not it assume that the company has it *intra vires* to accept such a license?

VISCOUNT HALDANE: I think there is something to be said for your view, I rather read it at the first blush as meaning this. Here is a company with a provincial object and we should not allow such a company to carry on the business of insurance through the rest of Canada, although theoretically it might, subject to restriction by its shareholders. If it wishes to, we will give it a license for doing so, recognizing its latent capacity to do so. SIR ROBERT FINLAY: Yes, its capacity. All I am contending for is this, and it is to illustrate that that I referred to it—that the true effect of head 11 of section 92, is that while the province is not allowed to incorporate a company for any Dominion purpose, or a company with the right to carry on business outside the province of incorporation, it can create the legal entity with the right in the province of incorporation and the capacity if it is permitted either by express grant or by non-interference to carry on business in any other province.

VISCOUNT HALDANE: You say there is a contrast here between what has been the language in the other sub-heads of the section where they have said "in the province" or "within the province," and the words "with provincial objects." The objects do not necessarily point to anything territorial. After all the territory is part of the Dominion. Legislative powers for such objects may be provincial, yet the objects of a company which has a capacity outside the territorial limit. SIR ROBERT FINLAY: Yes, my Lord, and if they had meant to say that the business or the main business, to adopt my friend's term, was only to be within the territorial limits of the province they would have said so. They have not said so, they have used language which points to another *ratio decidendi* altogether than the ascertainment of territorial limits, namely what the purposes are.

VISCOUNT HALDANE: The only express power to incorporate companies is this power. SIR ROBERT FINLAY: Except as regards banking. That is in section 91.

VISCOUNT HALDANE: That is specially provided, but apart from that, the power to incorporate companies. SIR ROBERT FINLAY: Now for what purposes may a province incorporate companies? The words of head 11 are "the incorporation of companies with provincial objects." That would exclude the class of objects which are manifestly Dominion objects in their nature. I will take only two, because it is only necessary to illustrate my meaning. Take head 15 of section 91. That is "banking, incorporation of banks, and the issue of paper money." The incorporation of banks is manifestly a Dominion purpose. It is an object which the province could not touch.

VISCOUNT HALDANE: Not territorial. SIR ROBERT FINLAY: It is not territorial at all, and as I submit to your Lordships it never is contemplated on the wording of head 11 that the territorial limitation should be looked at; you look at what the object is. Then take the second head and it is as important in this connection. Head 29 of section 91 is: "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."

That sends one to head 10 of section 92, which gives to the provinces:

"Local works and undertakings other than such as are of the following classes:

"*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."

VISCOUNT HALDANE: There is one question I should like to ask you on what you say there. Is it your view that when a company is incorporated simply for the purpose of mining without saying where or how, that is a provincial object? SIR ROBERT FINLAY: Simply for mining?

VISCOUNT HALDANE: Yes, the purpose of this company is to carry on the business of mining. You say that is a provincial object? SIR ROBERT FINLAY: For this reason, applying the British North America Act to that it has the right to mine only in the province of creation. In any other province it must get the leave to mine, which may be either given expressly as it was in Yukon, or impliedly.

VISCOUNT HALDANE: It has not any right to mine even in its own province unless the law gives it—the legislature could not give it a right to mine, some other legislature might. SIR ROBERT FINLAY: Assuming it to get the land honestly, to mine under, it has by law the right to do it there. It would not have that right in any other province because it would depend entirely on whether the local law allowed companies incorporated in other provinces to come there to work.

VISCOUNT HALDANE: Your case is that mining is a legitimate provincial object. SIR ROBERT FINLAY: A legitimate provincial object.

VISCOUNT HALDANE: It does not mean mining only within the limits of the province? It means the object. SIR ROBERT FINLAY: The object, but the effect is that the company has the right by law provided it can get the land within the province of incorporation—it has the capacity.

LORD PARKER: Do you mean power by "right" there? You are varying between "capacity" and "power.' SIR ROBERT FINLAY: The two phrases I intended to use to denote the two things are "right" and "capacity." I might instead of using "right" use "power," but capacity I mean to denote what is *intra vires*.

VISCOUNT HALDANE: It is capacity to mine anywhere, because mining is a provincial object? SIR ROBERT FINLAY: Because it has been incorporated for a purpose which may be carried out within the province and which it is entitled to carry out by law there. Elsewhere it has the capacity, but not the right, because it must have the leave of the Government of the province.

VISCOUNT HALDANE: In the province every kind of business is carried on with every kind of object. You say this is one of the objects which is a provincial object. SIR ROBERT FINLAY: Any mine in Ontario might be worked, and no one could interfere with it.

VISCOUNT HALDANE: According to you, any mine anywhere so long as authority was given *ab extra*, because it is a company legitimately incorporated to carry on mining which is one of the objects.

THE LORD CHANCELLOR: If the Dominion had given it exactly the same powers would it have made any difference, and if so what? SIR ROBERT FINLAY: Does your Lordship mean by Dominion charter or statute?

THE LORD CHANCELLOR: I meant by a Dominion charter. SIR ROBERT FINLAY: It would have made all the difference in the world.

THE LORD CHANCELLOR: What would have been the result of it? SIR ROBERT FINLAY: Then the Dominion Act would have given it the right to carry on business.

THE LORD CHANCELLOR: Without getting the license? SIR ROBERT FINLAY: Without getting the license.

THE LORD CHANCELLOR: That is the whole question. SIR ROBERT FINLAY: No province could have interfered with the right of a company incorporated by a Dominion Act to mine anywhere.

THE LORD CHANCELLOR: That is your view as to the difference between the two? SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: They could have local laws in the provinces to give power to have local licenses. SIR ROBERT FINLAY: The decision in the John Deere Plow case was this, while they could require the Dominion company to take out a

license, if they require all other companies to take out a similar license they could not impose any restriction on the Dominion company as such.

LORD PARKER: I understand that. SIR ROBERT FINLAY: That was held in the John Deere Plow case.

VISCOUNT HALDANE: That they could not legislate provincially so as to restrict the Dominion company in the exercise of its capacity, but they could *per contra* legislate provincially so as to restrict a Provincial company to any extent they liked? SIR ROBERT FINLAY: And further that the Dominion company was subject to all the general legislation in the province, that is to say if every company working in the province had to take out a license the Dominion Company would have to do the same thing, but the John Deere Plow legislation in the province was aimed at restricting the right which the Dominion Parliament had conferred.

(Adjourned till to-morrow at 10.30.)

SIXTH DAY.

SIR ROBERT FINLAY: I was calling your Lordships' attention to sections 91 and 92 with reference to the meaning of the phrase "the incorporation of companies with provincial objects." I had reminded your Lordships of the provision as to the incorporation of banks which would clearly be taken away from the province, and I have referred to the 10th head of the 92nd section which deals with local works which are put under the province, but makes an exception (*a*) of steamships, railways, and so on, which provide what I may call summarily through communication, (*b*) "Lines of steamships between the province and any British or foreign country;" then (*c*) a head of considerable importance, "Such work 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." Clearly any of these would not be a provincial purpose because they are expressly taken out and given to the Dominion. Now with regard to the purposes for which the province may incorporate companies, I submit to your Lordships that put broadly it is that they may incorporate companies for purposes which are not Dominion purposes, that the use of that phrase with provincial purposes was intended to exclude these Dominion purposes.

VISCOUNT HALDANE: You say it is a negative expression? SIR ROBERT FINLAY: I say it is a negative expression, it is used for convenience, but if really means for other than Dominion purposes. The majority Judges in the Supreme Court have held that there is another limitation which is to be imported by that phrase, with provincial purposes, and it is this, that there is a territorial limitation, that the objects are to be objects that are to be carried out within the province. I submit to your Lordships that that further limitation cannot stand when one looks at the context of the Statute and the reason of the thing. The phrase is "provincial purposes."

THE LORD CHANCELLOR: "Objects." SIR ROBERT FINLAY: Yes, my Lord, the phrase "provincial purposes" occurs in the second head. Here it is "provincial objects," but in the second head you have got "for provincial purposes" with reference to taxation. Now the province has exclusive authority under the second head as to "direct taxation within the province in order to the raising of a revenue for provincial purposes." I suppose it is impossible to read "for provincial purposes" as meaning that the revenue is to be spent exclusively within the province. Every year the provinces spend money in keeping agents, outside the boundaries of the province, outside the boundaries of the Dominion, indeed for the purpose of looking after provincial interests.

VISCOUNT HALDANE: Every citizen of the province is a citizen of Canada, and has to take his part in the common Government, he has to pay taxes and do many things. SIR ROBERT FINLAY: Yes, my Lord, all the agents for the provinces may be maintained and are maintained outside even the limits of the Dominion. In Great Britain, in London, they have, I understand, agents for the provinces to look after provincial interests. At all events they might have. I understand that

there are in fact. There the word for provincial "purposes" closely resembles the phrase "with provincial objects," and inasmuch as it is clearly quite impossible to say that "for provincial purposes" means that the revenue must be all spent within the province, so I submit to your Lordships that the limitation with reference to the territorial limits of the province which the majority of the Supreme Court in this case imported under the 11th head is one that cannot stand.

VISCOUNT HALDANE: You say "purposes" and "objects" are *in pari materia?* SIR ROBERT FINLAY: Yes, my Lord, they are.

VISCOUNT HALDANE: They are something distinct from the legislative territory within which alone the laws and ordinances could be made. SIR ROBERT FINLAY: Yes, my Lord. I suppose it could not be argued that the taxation had all to be spend within the limits of the province under the second head, and I submit that that disposes of the territorial limitation which really forms the basis of the decision of the majority of the Supreme Court.

LORD SUMNER: Is there any territorial element in it at all? SIR ROBERT FINLAY: I submit not, my Lord.

LORD SUMNER: If the company has been incorporated according to laws, unless those laws of the province specifically require it to have an address and office and secretary and so forth in the province, is it at liberty to turn its back on the province and pursue its objects elsewhere? SIR ROBERT FINLAY: Always if it obtains the sanction of the province or country where it desires to carry on.

LORD SUMNER: Of course, if it goes into another jurisdiction it has to obtain permission to be there, but as far as the incorporation in the province is concerned may it cut itself adrift as soon as it has been born, so to speak, and never see its home again? SIR ROBERT FINLAY: I suppose the head office is probably fixed in the province of incorporation as it is I think here.

LORD SUMNER: That I understand you to say would be because there was provincial legislation requiring its incorporated companies to have a head office in the province. There is nothing involved in "provincial objects;" you bring it to the birth, then it may go out into the world and never return? SIR ROBERT FINLAY: It cannot find "a place for the sole of its foot," except with consent—the point I suggest where the limitation should be drawn, that it is only in the province the provincial incorporation can confer a right to carry on business; everywhere else the company although it is a juristic being with right of suit and must be recognized as a person, can exert its activities as a person only by the permission of the local Government.

LORD SUMNER: Then what is the exact area of the power of incorporation left to the Dominion under the residual powers of section 91 if the province can incorporate companies with provincial objects in such senses that the object may be pursued anywhere and the company once incorporated may never see the province any more? SIR ROBERT FINLAY: It is this, and I submit a very important distinction, that the Dominion, it has been held quite recently by this Board, has the right of giving incorporation which carries with it the privilege that no local legislation in any province can interfere with it. The provincial company can enter another province only on sufferance, and if the other province says, we do not choose to recognize you and will not allow you to carry on business here, it must go out. The Dominion company is entitled to carry on business in any province where the Dominion has conferred on it the right to be.

LORD SUMNER: That goes to what they can do, not how it can be incorporated; but if you take section 92 head 11 and write it out at large: "The incorporation of companies with" the object of doing anything that it seems to the provincial authority desirable that it should be allowed to do anywhere, that is a power specifically and exclusively given in that case to the province unless any of the enumerated things in section 91 clash with it. How much is left under the residual power, if anything? SIR ROBERT FINLAY: What is left is the sole power of conferring the right in spite of any local legislation to carry on business in the province.

LORD SUMNER: That is after it is incorporated, but what power of incorporating a company, except banking and that sort of specific thing, is left to the Dominion if everything that comes within that very wide provincial power

is specifically given to the province. SIR ROBERT FINLAY: Afterwards they have to compete, and the Dominion companies have this great advantage that they are in every province as of right, so your Lordships have ruled, whereas a provincial company is of right only in its own home, in the place of its birth; in every other Province it exists on sufferance, just as a Dominion company exists on sufferance in Great Britain or in any foreign country.

LORD SUMNER: I should have thought at present if you read the "provincial objects" to mean that any province can incorporate a company to trade, for instance, in pork anywhere to any extent; and then the Dominion incorporate a company to trade in pork all over the Dominion, the province would be entitled to say that is my power. I have a power to incorporate a company to trade in pork anywhere; therefore you have not. SIR ROBERT FINLAY: Surely there is this very great difference, that the Dominion can confer the right and the province cannot?

LORD SUMNER: It is a very much more useful thing to be incorporated by a power that could give you the right to do something than by a power that could not. SIR ROBERT FINLAY: It may make all the difference. That is the characteristic of the Dominion jurisdiction in this matter as distinguished from the provincial.

VISCOUNT HALDANE: Let us see if we get any nearer to it by looking at "civil rights." The provincial company has only civil rights within the province; any other civil rights it gets *ab extra*. The "civil rights" is not identical with its status as incorporated; its status as incorporated is that of a natural born person in the province; but it has no civil rights outside the province except such as are conferred *ab extra*. A Dominion company has civil rights within the province, that is to say it has civil rights which enable it to overrule the expression "civil rights in the province," as contained in section 92. There is a limitation on that which is pointed out in the John Deere Plow case, you cannot read it unlimitedly. Is not that the marked distinction between the two? The status of the provincial company carries no status outside the province, the status of a Dominion company does.

LORD PARKER: I have taken the trouble to write down what I consider to be the effect of your argument yesterday and this morning. It is this. You say each province has an unlimited right of incorporating companies for purposes which it conceives to be provincial, but so that with regard to conferring civil rights outside the territorial limits of the province every other province is in the position of a foreign country. SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: Then you go on to say the Dominion has this same unlimited right of incorporation but it can confer rights throughout the whole Dominion and in every province. Is not that the effect of it? SIR ROBERT FINLAY: I accept that, my Lord.

THE LORD CHANCELLOR: Is it in accordance with your view that the province of Ontario could incorporate a company to carry on business anywhere excepting in Ontario? SIR ROBERT FINLAY: No, I do not think so.

THE LORD CHANCELLOR: Why not?

LORD PARKER: Then you do not accept my note of the effect of your argument. SIR ROBERT FINLAY: I overlooked that. I had not present to my mind the possibility of some persons coming to the Legislature of Ontario and asking them for an Act to carry on business solely outside of Ontario.

THE LORD CHANCELLOR: Why not, according to your argument? The power to carry on business outside Ontario is, according to your contention, conferred by the Statute.

LORD PARKER: Or may be a provincial object.

THE LORD CHANCELLOR: And may be a provincial object.

VISCOUNT HALDANE: Is that so? SIR ROBERT FINLAY: They can confer that.

VISCOUNT HALDANE: Must not you draw a sharp distinction between the personality which arises from incorporation and the civil rights which are the creatures of legislation? SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: If so a company incorporated in Ontario would have no civil rights outside the province and a company incorporated by a province outside of Ontario would have no civil rights in Ontario except what Ontario chooses to give it.

LORD PARKER: That is exactly the same with regard to an Imperial company. The Imperial Government may incorporate any company it chooses for any purpose it chooses. It will only do so because it considers it to be its interest to do so; there is an Imperial interest served. That company when incorporated has no powers in an outside foreign country such as France except such as may be conferred or given by comity by France itself. SIR ROBERT FINLAY: I agree, my Lord.

LORD PARKER: It seems to me your argument puts every Provincial Legislature on that footing, with this proviso, that the other provinces are to be considered in the same position as a foreign country. That leaves the Dominion to empower for any purposes that it considers for the benefit of the Dominion, with this difference, that it can grant powers throughout all the provinces. SIR ROBERT FINLAY: Yes, my Lord:

LORD PARKER: But I agree with what the Lord Chancellor said, the inevitable result of that is this, that Ontario might incorporate a company for the purpose of catching fish off the coast of Newfoundland and bring it into the Ontario market, or might incorporate a company to carry on a business in England. SIR ROBERT FINLAY: Take that very illustration, my Lord "with provincial objects." Suppose that the province of Ontario desires to promote immigration from Great Britain into the province, can it be said that it would be *ultra vires* for them to incorporate a company which was to carry on in England the promotion of emigration from England to the province of Ontario? I submit that anything more distinctively a provincial object cannot be conceived, and that it follows from the judgments against which I am appealing that such a company could not be incorporated in Ontario. The company to be effective in its work must have its place of operations in England and the company is incorporated for the object of promoting emigration from England to Ontario. It would result inevitably from the judgments that I am appealing against that such a company could not be formed.

LORD PARKER: You see the word "object" is really a little bit ambiguous. You may have a certain object in incorporating a company; that is an entirely different thing from the objects for which the company is incorporated; and as a matter of fact there is this in your favour; that it is not incorporation of companies for provincial objects, but "incorporation of companies with provincial objects." SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: There is that in favour of your argument. SIR ROBERT FINLAY: Yes, my Lord. I therefore respectfully submit to your Lordships that that simple case of the province incorporating a company to carry on business in England for the purpose of promoting in every way emigration from England to Ontario is enough to displace the contention which pervades all the judgments against me, that there is besides the limitation of objects, a territorial limitation that the work is to be done inside the provinces.

VISCOUNT HALDANE: You may create the status of the corporation, but you must not do it if the object is non-provincial. Whether the object is non-provincial or not is a question of fact from the circumstances.

LORD SUMNER: Would you before you pass from that give me an illustration of a non-provincial object? SIR ROBERT FINLAY: Any of the objects in clause 91.

LORD SUMNER: They stand in a different category. Apart from that? SIR ROBERT FINLAY: Well, take the case of a company incorporated solely for the purpose of works in another province. That would be non-provincial, but I submit that the word "provincial" is satisfied as long as the province is included and the company may operate there as of right, while it may exist and be active elsewhere by permission. May I in this connection refer your Lordships to a paragraph in Bar on Private International Law, where the whole subject is dis-

cussed and references given. It is paragraph 104 at page 227 of the Translation of Bar's Private International Law, by Mr. Gillespie of the Scottish Bar.

VISCOUNT HALDANE: Which edition? SIR ROBERT FINLAY: The second edition published in 1892 in Edinburgh.

"There may seem to be more difficulty about the recognition of the legal capacity of juristic persons (foundations and incorporations) that belong to another country, than there is about the recognition of the legal capacity of foreigners. To a superficial observation, the former look like purely artificial creations of the law or of statute. Accordingly, the life of these artificial creations must cease at the point at which the power of the legislator ceases, i.e., at the frontier of his dominions; and the foreign legislator will require to re-animate this artificial creation by some special provisions for his own dominions. This is the opinion which Laurent holds; he is filled with an extreme dislike of religious corporations, and undertakes to show that most other corporations are in the same way mischievous to the public security. The only corporations which he is ready at once to recognise as necessary and beneficial are the state itself, and such corporations as more or less serve objects of state, as provinces and communes. But so soon as civilisation has reached a certain pitch, juristic persons press forward on every side, compelling recognition even without special legislation;"

this is the author speaking in his note. He has hitherto been stating the superficial view which Laurent favoured—

"and to such an extent does the practical necessity for them go, that they are in fact recognised, even where legislation does its best to discourage them. As a consequence, they are further removed in such cases from the operation and oversight of the law than if their existence were legally recognised. It is a necessity of human nature, which will take no denial, to combine its resources and particularly the resources of its wealth, to attain larger and more comprehensive ends; these ends it desires to ensure for a period of future time, by the device of allowing those persons who have the control of the wealth devoted to the attainment of these ends to have no power of action recognised by law, except within the limits necessary for attaining those ends; while, on the other hand, new persons are constantly summoned to the management of the common stock within the same limits, in room of those who retire or die. Therefore, although it would be a serious matter if these so-called juristic persons were to get the upper hand, and positive legislation has often had occasion to interfere with them, still these organisations of legal activity are not to be regarded by any means as artificial, but rather as natural products of an advanced stage of activity in law and in civilisation; if states and nations are to walk in legal community with each other, they will *de facto* be forced to a mutual recognition of the juristic persons that are constituted or that have grown up in the territory of their neighbours, as possible objects of legal consideration. The practice of international law gives its sanction to this necessary recognition. It may be that it is only an international usage which exists on this point, although there is a sufficient chain of legal logic to prove the existence of a rule of law. Laurent denies this, and is of opinion that there is no proof of the assertion to this effect which I made in my former edition."

To the second sentence of that paragraph there is a note with a quotation from the work of a Dutch Jurist, Asser. It was translated into French by M. Rivier and in this book the French edition which contains a good deal more I understand than is in the original Dutch, is cited throughout as Asser-Rivier. It is so mentioned in the bibliographical notice at the beginning of the work, it is Asser-Rivier edited and enlarged by Rivier, and it is this:

"Compare in this sense Asser-Rivier, No. 100, page 198: 'Ainsi la societé civile qui a la personnalité civile d'après la loi de son siège social, conservera ce caractère en tout autre pays; ceci decoule d'un véritable droit coutumier concernant des personnes civiles que est admis dans une grande partie de l'Europe et que l'on ferait peut être bien de transformer en droit écrit.'"

That is to say it is laid down in that passage of M. Rivier's edition of Asser that a corporation has the personality of its *siège social*, that it is by international law recognized in other countries and the author adds his view, which perhaps may be questioned, that it would be a very good thing to put the law on that head into the form of a Code. However that may be still I submit that it is clearly established by international law as recognized in this country and in the British Dominions that the personality of a corporation is recognized in other countries.

VISCOUNT HALDANE: Does not that really amount to this, a British citizen has a full personality which, by the comity of nations, but only by the comity of nations, is recognized as giving rights outside Great Britain. So a corporation if it is fully created according to Asser-Rivier has the same unlimited recognition of its personality. For any restrictions of its personality you must look to the law of its *siège*. That is one thing. It is quite another thing to have a law saying you may create these full corporations and if they are created they will be recognized fully. It is another thing if you say you are not to create them in the country of the domicile and foreign laws would respect such self-imposed limitation. SIR ROBERT FINLAY: Yes, my Lord. This passage takes me as far as this, when you have a corporation created by one state, that ought to be recognized, by the comity of nations as part of international law in the same way as a natural person of another state is recognized. The foreign state need not allow either of them to carry on business or to own property there, but it must recognize its existence. Take, for instance, the question of suing. From very early time it has been recognized in this country that a foreign corporation can sue in England, and really in the same way as a natural person. Of course as regards imposing its objects upon them that is absolutely open to the foreign country.

VISCOUNT HALDANE: You draw a sharp line of demarcation between status and what goes beyond status, conferring civil rights—more status and civil rights. SIR ROBERT FINLAY: Yes, my Lord.

Then I do not know whether your Lordships would desire that I should go on and deal with the judgments before discussing the matter more at large.

VISCOUNT HALDANE: I do not know what my colleagues have done, I have read these judgments and there are some things which are very interesting but they are enormously long, there are about 70 pages of them. SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: I did not know whether it would be possible to pick out, assuming that we have read them, the special passages, because there are some things in the Chief Justice's judgment and Mr. Justice Anglin's, for instance, which are very interesting as illustrating the contrast of view. Of course if Mr. Newcombe wishes to draw our attention to any other passage he can do so. SIR ROBERT FINLAY: I shall shorten them as much as possible.

Before I go to them I should like to draw attention to an earlier decision of the Supreme Court where the majority was in favour of the view which I am advocating. I am not going to read the judgments of those Judges who are still on the Bench and who took part in this case, but I do desire to call attention to the judgment of Mr. Justice Maclennan who is since dead, which I submit is very much in point. The case is *The Canadian Pacific Railway Company* v. *The Ottawa Fire Insurance Company* in the 39 Supreme Court Reports, 405. I will just read the head note and then I will read at length only the judgment of Mr. Justice Maclennan, for the reasons I have indicated.

> "Held, per Idington, Maclennan and Duff, JJ., Fitzpatrick, C.J., and Davies, J., contra: that a company incorporated under the authority of a Provincial Legislature to carry on the business of fire insurance is not inherently incapable of entering outside the boundaries of its province of origin into a valid contract of insurance relating to property also outside of those limits. Per Fitzpatrick, C.J., and Davies, J.: Sub-section 11 of section 92, British North America Act, 1867, empowering a legislature to incorporate 'companies for provincial objects,' not only creates a limitation as to the objects of a company so incorporated but confines its operations within

the geographical area of the province creating it. And the possession by the company of a license from the Dominion Government under 51 Vict. chapter 28 (R. S. 1906, chapter 34, section 4) authorizing it to do business throughout Canada is of no avail for the purpose. Gironard, J., expressed no opinion on this question. An insurance company incorporated under the laws of Ontario insured a railway company, a part of whose line ran through the State of Maine, 'against loss or damage caused by locomotives to property located in the state of Maine not including that of the assured.' By a statute in that state the railway company is made liable for injury so caused and is given an insurable interest in property along its line for which it is so responsible. Held, affirming the judgment of the Court of Appeal (11 Ont. L. R. 465) which maintained the verdict at the trial (9 Ont. L. R. 493), that the policy did not cover standing timber along the line of railway."

That is not material for this purpose. Now, my Lords, with that preface as to the views of the Court I should ask permission to read the short judgment of Mr. Justice Maclennan which your Lordships will find begins near the bottom of page 455.

LORD PARKER: Were the majority in this case in favour of the territorial limits theory? SIR ROBERT FINLAY: In the present case they were.

LORD PARKER: No, in the case you refer to. SIR ROBERT FINLAY: In the case I refer to the majority was the other way, the most in favour of the view I contend for. Mr. Justice Maclennan was one of the majority.

THE LORD CHANCELLOR: Can you show me in the report the letters patent under which the company operated. SIR ROBERT FINLAY: It would be set out in the report below, in the 11th Ontario Reports. All that we have got here is this: "The Ottawa Fire Insurance Company is incorporated under 'The Ontario Insurance Act." MR. HELLMUTH: The Ontario Insurance Act is a general Act. SIR ROBERT FINLAY: One would reasonably conjecture there would be a charter empowering it to carry on the business of fire insurance in general terms. Then at page 455 Mr. Justice Maclennan says:

"On the merits of this case as presented and argued in the Court below, I agree with the reasons and conclusions of Mr. Justice Osler, delivering the judgment of the Court of Appeal.

"When the case came before us an additional argument was made, viz.: that the defendants as a company incorporated under a provincial statute, could not insure against a risk on property in the state of Maine, inasmuch as the power of the Provincial Legislature to incorporate companies is confined to companies with provincial objects. 'British North America Act,' section 92 (11).

"I do not find this objection mentioned or referred to in the Courts below, either in the pleadings or proceedings, or in the judgment at the trial, or in the reasons of appeal, or in the judgment of the Court of Appeal, and it is not mentioned or referred to in the appellant's factum in this Court."

I need not read the whole of this page.

"This new contention is inconsistent with the record, and with all subsequent proceedings down to the argument before us, and for that reason cannot in my opinion have effect given to it, even if we thought it well founded."

That is worth noticing only as showing how prevalent the practice was and how it never occurred to anyone until a late stage of the proceedings to take this objection. Then at page 457 Mr. Justice Maclennan goes on:

"But if this point be regarded as open, I am of opinion that it cannot prevail.

"If the construction contended for of the words 'provincial objects' is well founded, then it follows that while an individual or a partnership in Ontario may contract to do many things in a foreign country, a provincial corporation could do none of them; as for instance, the making of promissory notes, or the acceptance of bills of exchange payable in England or France, or in another Canadian province."

"A business corporation in Ottawa, on that interpretation, could not, unless incorporated by Parliament, make a valid contract for the purchase of goods in Montreal, or Hull; or give promissory notes for the price, payable in either place."

THE LORD CHANCELLOR: That does not meet your case at all. That deals with an argument which suggests that a company formed with provincial objects must confine the whole of its operations within the limit of the province. There is another argument against you I understand which is this. That company must be formed with provincial objects, but with all the rights and powers which are necessary for the purpose of doing what is necessary for carrying into effect those provincial objects. That does not touch that. SIR ROBERT FINLAY: That is formulated in some of the judgments, especially of the Chief Justice, under the head of "ancillary powers."

THE LORD CHANCELLOR: This argument does not touch that view. SIR ROBERT FINLAY: No, so far it does not.

THE LORD CHANCELLOR: That view would be just as fatal to your contention as the more limited one. SIR ROBERT FINLAY: I contend for a great deal more than what are called ancillary powers.

THE LORD CHANCELLOR: You could not succeed without so contending. SIR ROBERT FINLAY: No, my Lord.

THE LORD CHANCELLOR: The argument based on the consideration of ancillary powers is just as fatal to you as this more limited power, but this does not deal with it. SIR ROBERT FINLAY: When I come to deal with ancillary powers as developed in the judgment appealed against I shall submit the difficulty of applying that doctrine.

THE LORD CHANCELLOR: That may be, but this is dealing with something which it is much more easy to dispose of. SIR ROBERT FINLAY: Yes, I will just finish the judgment.

"I think such a result as that never could have been intended, and that the words used do not require or admit of such a construction.

"I think all that was intended was that as between the Dominion and the provinces the powers of the latter in incorporating companies should be analogous to those of independent countries; and that if a corporation desired to acquire extraordinary rights or powers of any kind, to be exercised in more than one province, those rights and powers must be obtained from Parliament, instead of from the other province or provinces, as would be required to be done in the case of independent countries."

That is exactly the view I submitted to your Lordships just now.

"I think the expression provincial objects is used in contradistinction to Dominion objects, and means no more than this; that just as Parliament in incorporating companies must confine itself to Dominion objects as between the Dominion and other countries, so each province not only as between itself and other countries, but between itself and the provinces, must confine itself to provincial objects; and as Parliament cannot empower a company to go into another country and there construct a railway or canal or a telegraph or telephone line, so neither can a Provincial Legislature confer any such powers on a company incorporated by it. And as a Dominion company, desiring to exercise such powers in Maine or Michigan, must obtain them from those states, so a company desiring to exercise such powers in more than one province must be incorporated by Parliament, instead of being first incorporated by a province and then applying for the required powers to the other province or provinces.

"It is not questioned that the defendants were lawfully incorporated, and capable of making lawful and valid contracts of insurance, and their charter contains no limitation or restriction as to the locality or situs of the property to be insured. That being so, I do not see what possible difference it can make where the subject to which the contract relates was situated.

"At common law an individual or a partnership could make such contracts, and in such cases it must be clear that the situs of the property is altogether immaterial.

"In insuring property in Maine the defendants were not assuming any power or jurisdiction in that country. They simply made a contract with the plaintiffs to pay them a sum of money on a certain event.

"The confusion arises from treating the property to which the contract relates as the subject of it, whereas the subject of the contract is the risk, or more exactly, the possible loss, which the assured may happen to suffer by injury to his property by fire. More than a century and a half ago Lord Hardwicke said:

"'It cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage. *Sadlers Co.* v. *Babcock.*

"And in *Rayner* v. *Preston,* Cotton, L.J., said the contract of insurance was not a contract, in the event of a fire to repair the insured buildings, but a contract, in that event, to pay a sum of money which the assured might apply as they thought fit.

"At common law, in my opinion, an individual, or a company of individuals, in one country, could insure a person in another country, against loss by fire to property in a third country, and in the absence of legislation, to property anywhere in the world. And I think there is nothing in 'The British North America Act' which would prevent an individual or a partnership in any province of the Dominion from making insurance contracts with the same freedom and scope as before, and it would be a strange thing if it were enacted that a company incorporated by a province, simply for doing such business should be restricted to property within the province while individuals and partnerships were left free."

Now I hope that in this case your Lordships will not arrive at any conclusion which would make it impossible for a company incorporated by a province with reference to insurance to insure property in other provinces or property in foreign states and to enter into such contracts even within the limits of such other provinces or foreign states.

VISCOUNT HALDANE: What you have read is a decision that insurance generally is not outside provincial objects? SIR ROBERT FINLAY: Yes, my Lord, and I submit to your Lordships that it would really be calamitous if any opinion were pronounced by this Board which would shake the authority of the decision in that case.

VISCOUNT HALDANE: The learned Judge seems to reason that a private citizen in the province would have a right to insure outside the province. We have therefore to look to see whether that is taken away from the artificial person created by the incorporation. Unless you find it is, the status which the incorporation confers is as good in one case as the other. It gives no "civil rights" for the civil right you have to look to the legislature outside the province—but it gives the status. SIR ROBERT FINLAY: Yes, my Lord, I had better refer first to the judgment of Mr. Justice Cassels at page 56.

VISCOUNT HALDANE: There is very little in it. SIR ROBERT FINLAY: It is very short, in fact he says he abstains from expressing his opinion because although he is not bound by any opinion expressed in a reference in answer to questions, yet he thinks he finds that the majority of the Judges in their answers implied that he ought to reach a conclusion in favour of the defendants.

VISCOUNT HALDANE: You need not read it. SIR ROBERT FINLAY: I need not read it. In doing that, as I pointed out, he misunderstood Mr. Justice Anglin. At page 61 Sir Charles Fitzpatrick, Chief Justice, says this:

"This is an appeal from a judgment of the Exchequer Court on a petition of right launched to recover damages in respect of breaches of agreements aand leases alleged to have been vested in the appellant by assignments in the circumstances set forth in great detail in the petition. The claim was disposed of in the Court below on the short ground that the appellant was without capacity to accept the assignments of the leases and collateral agreements or to carry on mining operations."—

VISCOUNT HALDANE: I think you may assume that we have read that. SIR ROBERT FINLAY: If your Lordship pleases. Then the two grounds of defence which are set out at the bottom of page 61 I think perhaps I ought to read.

VISCOUNT HALDANE: Yes. SIR ROBERT FINLAY: Line 25:

"In answer to the petition, two grounds of defence were raised which I think are fairly set out in the respondent's factum, as follows:

"(a) Want of corporate capacity on the part of the suppliant company to carry on its business in the Yukon Territory, and, in consequence thereof, incapacity to acquire the hydraulic leases already referred to, or any rights thereunder, or to enter into the agreements with the Government in respect thereof, also already referred to, or to acquire or maintain any rights thereunder, or to receive any certificates or licenses purporting to entitle the suppliant to carry on its business of mining in the Yukon Territory, or to acquire any rights under such certificates or licenses;

"(b) Want of authority on the part of either the Yukon or the Dominion executive to issue any such certificates or licenses to the petitioner, or to confer any such rights upon the petitioner, as the petition of right claims.

"This defence raises squarely in the first paragraph the important question so frequently considered here, and, in my opinion, now finally disposed of by the Judicial Committee, of the power or capacity of a company incorporated by a local legislature to carry on its operations in a territorial area over which the incorporating legislature has no jurisdiction."

THE LORD CHANCELLOR: What case is he referring to? MR. HELLMUTH: The John Deere Plow case.

VISCOUNT HALDANE: No, the Toronto case, because this judgment was before the John Deere Plow case. MR. HELLMUTH: No, my Lord, he mentions the case. SIR ROBERT FINLAY: "I adhere to what was said by me on this point in the Companies Reference, 48 Can. S. C. R. 339: 'The Parliament of Canada can alone constitute a corporation with capacity to carry on its business in more than one province.'"

THE LORD CHANCELLOR: I do not think he was right when he said that the John Deere Plow case finally disposed of that proposition. I do not think he was applying the right case at all. I do not think it is relevant to his observation. SIR ROBERT FINLAY: The power of incorporation by the Dominion was never contested.

THE LORD CHANCELLOR: It is exactly the opposite—nothing to do with it. SIR ROBERT FINLAY: Where there was an admittedly good incorporation by the Dominion a legislature could not say: You shall not carry on business in our province.

VISCOUNT HALDANE: "You shall not affect the status, as distinguished from the legislative capacity." SIR ROBERT FINLAY: There is nothing in the John Deere Plow case to interfere with the power of taxation by the Provincial Government. Then he says:

"'Companies incorporated by local legislatures are limited in their operations to the territorial area over which the incorporating legislature has jurisdiction. Comity cannot enlarge the capacity of a company where that capacity is deficient by reason of the limitations of its charter or of the constituting power. Comity, whatever may be the legal meaning of the word in international relations, cannot operate between the provinces so as to affect the distribution of legislative power between the Dominion and the provinces under the British North America Act.'

"'This does not imply that a provincial company may not, in the transaction of its business, contract with parties or corporations residing outside of the province in matters which are ancillary to the exercise of its substantive powers, I use the terms 'substantive' and 'ancillary' as descriptive of the two classes of powers inherent in the company, as these are used in the judgment of the Judicial Committee in the *City of Toronto* v. *Canadian Pacific Railway Co.*, 1908, A. C. p. 54.'"

THE LORD CHANCELLOR: What you say as I understand about this is that again he is wrong, that if a company were going to sue in a foreign country all that would be necessary would be to produce its certificate of incorporation and its certificate of incorporation need make no reference in the country of its origin. SIR ROBERT FINLAY: No, my Lord.

THE LORD CHANCELLOR: It would be nothing but a proof in fact that it was a corporate body. SIR ROBERT FINLAY: A juristic person.

THE LORD CHANCELLOR: And that is proved by the certificate of incorporation, and this is independent of its memorandum or articles? SIR ROBERT FINLAY: Yes, my Lord, and I take issue with the proposition which lies at the root of this judgment and of the other judgments agreeing with the Chief Justice.

VISCOUNT HALDANE: Just to clear up before you go on, I am not sure that I should be prepared to assert that in the case of an English company, for instance, what the foreign Court did in looking at the matter could be done without regard to the memorandum of association of the English company. That is the document which gives the ambit and vitality of its juristic existence, but if the memorandum set out the incorporation of the full juristic company, and what was done merely imposed municipal restrictions, that would be another thing. The thing is to get a full juristic persona. SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: But I understand the statement made by Bar at page 227, is that the foreign Court by the comity of nations recognizes a corporate body, and the only thing necessary to prove that it is a corporate body is the certificate of incorporation in the country where it is incorporated. SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: Can you put out of account all the terms of that certificate of incorporation? It is not so laid down in Bar. I should have thought it was inconsistent with the general principle of international law as to the domicile. SIR ROBERT FINLAY: What is practically important is this, if the foreign country makes a grant on the assumption as to the powers of the company similar to that which universally obtained in Canada till a comparatively recent period that must be recognized as conferring capacity in that country.

VISCOUNT HALDANE: On the face of it it confers full status, but in the case of a French infant of 18 coming here and proposing to contract marriage, or do something which requires authority, we should look at the French law.

THE LORD CHANCELLOR: I want to see if I am right in the suggestion I put about the certificate of incorporation. My recollection of the certificate of incorporation is that it has nothing to do with the memorandum and articles. It is a certificate that the company has been duly incorporated according to the laws of England. If I am right in suggesting that if that company wanted to sue in France all it had to do was to produce the certificate, it would follow that there would be no material matter for consideration of the French Courts as to what was contained in the memorandum and articles. The argument against you as I understand it, must be that that certificate could be displaced by examining the objects with which the company was incorporated, and then seeing that they will not allow you to sue in France. SIR ROBERT FINLAY: Yes, my Lord, I apprehend it would be unheard of that there should be any charter of incorporation or any Act of Parliament incorporating the company which deprived the juristic being called into existence of the capacity of suing in the Courts of any country in the world. The law of a foreign country may be such as not to allow it to sue.

VISCOUNT HALDANE: Once you have the juristic being that is so. SIR ROBERT FINLAY: It follows.

VISCOUNT HALDANE: I think what you said and what the Lord Chancellor said point to the same case, which may not be every case, of a full juristic being— SIR ROBERT FINLAY: The importance for my argument is this, that if the foreign country has made a certain grant even if on a careful examination of the documents relating to the company the conclusion might be reached that it was beyond the capacity of the company according to its charter of incorporation, in the foreign country where that grant was made that would be perfectly effectual,

because although they might have proceeded on a view which turns out on close examination to be erroneous yet in the foreign country they have done something which necessarily by implication confers capacity.

VISCOUNT HALDANE: I do not know that it is necessary for your argument to go into that proposition which seems to me to be more doubtful. Where a corporation is the creature of Statute you must look at the Statute empowered to call it into existence, Lord Cairns said. In your case you are taking a fully incorporated company—analogous to the Sutton Hospital case referred to in *Ashbury Railway Carriage, &c., Company* v. *Riche*, where it is pointed out the Crown calls a full corporation into existence by its grant and puts restrictions on it, and if they are violated it may give rise to the repeal of the charter, but it is a full corporation which cannot act *ultra vires* in the statutory sense. SIR ROBERT FINLAY: Yes, my Lord. The point I desire to call your attention to in the judgment which I have just read is contained in this sentence at line 8: "Companies incorporated by local legislatures are limited in their operations to the territorial area over which the incorporating legislature has jurisdiction."

VISCOUNT HALDANE: It begs the question. SIR ROBERT FINLAY: He adopts this here. Then I go on at line 25:

> "It is not, of course, suggested that a Provincial Legislature may not incorporate a company for one of the objects enumerated in section 92 of the British North America Act, which, upon incorporation, enters into existence as an entity clothed with corporate powers; but the question raised and which must be decided in this appeal is: Can such a company exercise its functions or pursue the activities of its particular organization beyond the jurisdictional limits of the constituting power? In other words can a properly constituted provincial company exercise its powers (purposes or objects) locally outside of the province of incorporation."

VISCOUNT HALDANE: He assumes there powers, purposes and objects are the same things. Your case is they are no more the same thing than provincial purposes in regard to direct taxation is the same thing as direct taxation itself. Provincial objects and provincial purposes are things to be looked at according to you having regard to the facts and circumstances and they are *prima facie* matters for the province to judge of. SIR ROBERT FINLAY: The test which the Chief Justice imposes is impossible of application to provincial purposes with reference to taxation. I submit it is equally impossible of application to the provincial objects with reference to incorporation.

> "It may be that a provincial company can with the consent of another province exercise its civil capacities within the area of that province, but I am still of opinion that a provincial company cannot either with or without that consent fulfil the purpose for which it was organized; that is, discharge what may be described as its functional capacities, in this case mine for gold, outside the limits of the constituting province. To admit juristic persons to the enjoyment of civil rights is not the same thing as to admit them to exercise their functions or to pursue the activities of their particular organization, or in other words, to transplant their institution to a foreign jurisdiction."

Then:

> "The Ontario Joint Stock Companies Act, under which the petitioner obtained its charter, enables a provincial charter to be granted 'for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends.'
>
> "The legislative authority of Ontario has never been deemed to extend to mining upon lands geographically or jurisdictionally situated beyond the province, and a provincial charter, issued to a company for the purpose of mining must find 'the object or purpose' for which it was created—within and only within the field to which the legislature itself has deemed its authority to extend."

As regards the right certainly. As regards the capacity no.

> "There is not, it is quite true, a geographical limitation in the appellant's charter as to the territory in which it may carry on its operations, but the

limitations of the constituting power must be read into the charter which must be construed as if it read: 'The subscribers to the memorandum of agreement are created a corporation for the purposes and objects described in the letters patent in so far as these purposes and objects are geographically and jurisdictionally situate within the province.' As the Lord Chancellor said in *John Deere Plow Company* v. *Wharton*, 1915, A. C. 330, page 339, 'the incorporation of companies with provincial objects cannot extend to a company the objects of which are not provincial.' The business of mining in the Yukon is not a provincial object with respect to Ontario. The Yukon Territory is not a province, and is exclusively with respect to its public lands under legislative jurisdiction of the Dominion.

"If this limitation is inherent in its constitution how could the appellant company acquire by transfer or otherwise hydraulic mining locations in the Yukon Territory or enter into agreements for the purpose of operating those mines with the Dominion Government.

"I agree with counsel for the Crown on the second branch of his defence for the reasons given in his factum.

"Assuming that the company had the power to engage in mining operations in the Yukon Territory it did not comply with the statutory conditions subject to which it was entitled to carry on its operations. No joint stock company is recognized under the statute and the regulations as having any right or interest in any placer claim, mining lease or minerals in any ground comprised therein unless it has a free miner's certificate unexpired. No joint stock company can obtain a free miner's certificate unless it is incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada, and I interpret the Statute, 61 Vic., chapter 49, section 1, to mean that a British company and a foreign company are the only sort of joint stock companies that could be licensed there."

That Statute is the first in the Joint Appendix. It was called attention to by Mr. Newcombe yesterday, but I submit this is fallacious, and as Mr. Justice Duff afterwards points out in some detail where the Statute which I read mentions a Canadian charter it means any charter granted either by a province or by the Dominion.

"The same argument applies to the license given by the Deputy Minister of the Interior. He was without authority to grant any such license. To be effective such a license could only be issued by the Government through the Secretary of State, and it is admitted that no such license was ever taken."

I do submit to your Lordships that that ground is quite untenable.

"In effect I hold that the company was not competent to take the assignment from Matson and Doyle upon which it bases its claim, to enter into the alleged agreement with the Dominion Government with respect thereto, and also that the company could acquire no right or interest in or to a mining claim in the Yukon because it was excluded by the Statute from obtaining a free miner's certificate."

THE LORD CHANCELLOR: Excluded by the Statute because it was not in his view a Canadian company by a Canadian charter. SIR ROBERT FINLAY: I submit that is quite wrong.

VISCOUNT HALDANE: We are practically hearing the two cases together. Would it be worth while to call attention to any passages in the judgment of the Chief Justice and Mr. Justice Davies in the general reference which amplify this? SIR ROBERT FINLAY: I think so. As regards the portion of the general reference which relates to the matter in issue here, I think the cases may be taken together. There are other matters in the general reference which I do not think could be taken here without rather encumbering the case of the Bonanza company. I propose subject to your Lordships' sanction to deal with the case on that footing, to bring in as much as is relevant to this case which will save the necessity of going over it again in the Companies case, but to leave the matters which do not relate to this to separate argument. I therefore refer to the judgment of the Chief

Justice in the Companies case. Your Lordships will find that at page 50 of the volume in that case Fortunately it is a very short judgment.

"The first two questions in this reference can be dealt with together, and this has been done by counsel in argument."

Your Lordships will find the questions at page 4 of the record in this book. The first question is this:

"What limitation exists under 'The British North America Act, 1867,' upon the power of the Provincial Legislatures to incorporate companies?

"What is the meaning of the expression 'with provincial objects' in section 92, article 11, of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?"

Then 2:

"Has a company incorporated by a Provincial Legislature under the powers conferred in that behalf by section 92, article 11, of 'The British North America Act, 1867,' power or capacity to do business outside of the limits of the incorporating province? If so, to what extent and for what purpose?

"Has a company incorporated by a Provincial Legislature for the purpose, for example, or buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province?"

We had no voice in the settling of these questions; they were settled I think for the Dominion.

VISCOUNT HALDANE: Were they settled for the Dominion or for the province. Do not I remember, Mr. Newcombe, you opposed our granting special leave to appeal? MR. NEWCOMBE: Yes, my Lord, but I am afraid we must take responsibility for the questions originally. We are not bringing them here now.

VISCOUNT HALDANE: My recollection is you said these questions were very inconvenient and very unsatisfactory. SIR ROBERT FINLAY: I am very glad of my friend's rather tardy repentence. MR. NEWCOMBE: I might say that the Supreme Court, as your Lordships will observe, in the case of the *Canadian Pacific Railway and the Ottawa Fire Insurance Company*, to which my learned friend has alluded, put questions substantially covering this ground, general questions, as arising in this case, and they called in all the authorities, both Dominion and provincial, to argue this question. Afterwards it transpired when they came to determine the case that these questions were not really pertinent, did not arise and were not necessary to the decision of the particular case. Therefore although some of their Lordships expressed their views, the case did not turn on that, and it was impossible to bring that case here for the purpose of having the constitutional difficulty cleared away. But then it was all stirred up and it was thought to be necessary that the question should be conclusively determined and so these questions were drafted and submitted to the provinces for their suggestions. At first they made suggestions and those were embodied, but afterwards they rather changed their policy and opposed the whole thing, and so it was in the end this reference was made.

THE LORD CHANCELLOR: They have here dealt with this question in the same way that some not over scrupulous people sometimes deal with an order of the Court—make it in such terms that it must be wrong in order that they may succeed in the Court of Appeal. The idea of suggesting that a company incorporated by a Provincial Legislature to grind grain cannot buy grain outside the province seems to me to be startling. I cannot help thinking that the provinces had a malicious design in introducing such a question. SIR ROBERT FINLAY: The provinces had nothing to do with it; my friend is entitled to the sole and exclusive credit of that question. MR. WALLACE NESBITT: It was contended that there was no right to submit questions at all.

VISCOUNT HALDANE: Was not it on this very question? SIR ROBERT FINLAY: Yes.

VISCOUNT HALDANE: When Mr. Newcombe had had experience of the Supreme Court he said he had had enough of the whole thing and did not want them to come here. SIR ROBERT FINLAY: My friend stoutly and successfully opposed the endeavour of the provinces—

THE LORD CHANCELLOR: We have the questions. It would not be fair to the province to settle this question by determining whether a company incorporated in Ontario to grind grain could buy grain outside. SIR ROBERT FINLAY: The provinces are entirely blameless in this matter.

THE LORD CHANCELLOR: That is to be carried to their credit. SIR ROBERT FINLAY: The Chief Justice says on page 50:

"To those two questions my general answer is: The words 'provincial objects' in section 92 (11) are intended to be restrictive; they have reference to the matters over which legislative jurisdiction is conferred by that section, i.e., matters 'which are, from a provincial point of view, of a local or private nature' (Lord Watson, Prohibition case, (1896) A. C. 359).

"The Parliament of Canada can alone constitute a corporation with capacity to carry on its business in more than one province. Companies incorporated by local legislatures are limited in their operations to the territorial area over which the incorporating legislature has jurisdiction."—

LORD PARKER: With regard to that passage it is worth while noticing where in section 92 (9) it speaks of "provincial, local or municipal purposes." SIR ROBERT FINLAY: That means, of course, for any objects which do not belong to the province as a whole.

LORD PARKER: The meaning is quite clear, but the words of the learned Judge are open to criticism for that reason. The Judge treats provincial as being equivalent to local. SIR ROBERT FINLAY: Yes, my Lord, the sentence I have just read suggests this question. Suppose that it was extremely in the interest of one province, say Ontario, that a company should be formed for fishing on the cod banks near Newfoundland, and bringing the fish into the Ontario market, would not that be a provincial object for the purpose of supplying the province with fish?

THE LORD CHANCELLOR: According to your argument it would not make the least difference whether it was for the purpose of supplying the province with fish. SIR ROBERT FINLAY: I referred to that only for the purpose of showing that the test on which the Chief Justice proceeds must be erroneous. He says its operations must be confined within the province. I put the case where the company would be formed for the benefit of the province for the purpose of securing imports required for the population of the province. The Chief Justice says it would be *ultra vires* to incorporate such a company.

LORD SUMNER: I do not think it goes as far as that because I think he would say a company incorporated to sell cod fish must get it—whether it buys it or catches it extra does not matter, it is ancillary. It does not take away the propriety of your criticism, but I do not think in justice to him, that he says that. SIR ROBERT FINLAY: I was speaking of a company formed for fishing.

LORD SUMNER: It is only a question whether it catches or buys the fish; its object is to sell it in Ontario. SIR ROBERT FINLAY: According to this test the company could not be formed to catch the fish, which might be far the most advantageous way of supplying the province; it would be *ultra vires* because, forsooth, the cod banks are outside the provincial limits. Then the Chief Justice goes on:

"Comity cannot enlarge the capacity of a company where that capacity is deficient by reason of the limitations of its charter or of the constituting power. Comity, whatever may be the legal meaning of the word in international relations, cannot operate between the provinces so as to affect the distribution of legislative power between the Dominion and the provinces under the British North America Act.

"This does not imply that a provincial company may not, in the transaction of its business, contract with parties or corporations residing outside of the province in matters which are ancillary to the exercise of its substantive powers. I use the terms 'substantive' and 'ancillary' as descriptive of the two classes of powers inherent in the company, as these are used in the judg-

ment of the Judicial Committee in *Toronto Corporation* v. *Canadian Pacific Rly. Co.*"

Then:

"It was contended on behalf of the provinces that a distinction must be drawn between trading companies or companies which simply buy or sell commodities, and companies such as manufacturing industries, the incorporation of which contemplates a physical existence within the province; but if the view above expressed as to the capacity of the provincial company is correct, no distinction can be made. In both cases, the substantive functions of the company must be confined to the incorporating province; but as incidental or ancillary thereto such provincial company would not be precluded from entering into contracts with persons or corporations beyond the province, or suing or being sued in another province."

Then the third and fourth and fifth I need not read; that will be dealt with when we come to the next case. Now, my Lords, there the Chief Justice relies on matters ancillary to the main purpose. I put some illustrations that I hope show that his views as to the main purpose having to be carried on within the territorial limits of the province cannot possibly bear examination, but I submit it is extraordinarily difficult to apply the doctrine of ancillary operations. They would vary from time to time and you never would know where you stood. Then the judgment of Mr. Justice Davies is the next judgment at page [illegible] the Bonanza case.

LORD PARKER: Do not you get into another difficulty on the [illegible] question. The province has no more right to grant ancillary rights outside the province than it has to grant substantive rights outside the province. If it can grant ancillary rights outside the province it might be argument for saying it can also grant substantive rights. SIR ROBERT FINLAY: The truth is it can grant neither outside the province.

THE LORD CHANCELLOR: That is the point: it still might be that it was within the powers of the company with provincial objects to do the thing that was ancillary to carrying on a provincial business. You may not be able to define the area. SIR ROBERT FINLAY: It could only do it by leave.

THE LORD CHANCELLOR: If grinding in Ontario, it could not buy grain outside unless it could by the law be at liberty to contract. It seems to my mind that you cannot define exactly what the "ancillary objects" necessarily means; you can only choose between a company with geographical limits and a company that can operate anywhere. SIR ROBERT FINLAY: I agree, but at the same time I submit it is a very cogent argument for the view that I content, it is extraordinarily difficult in practice to apply the ancillary doctrine and the best and simplest way of dealing with the matter is to say while the province can confer the right only within its own limits, the capacity it can confer and its exercise elsewhere—

LORD PARKER: Had not you better put "capacity and powers." It is no good it having the capacity if it has not the power to exercise it. SIR ROBERT FINLAY: Only that you know by comity you will be allowed to exercise it.

LORD PARKER: I am not sure of that because of what Lord Haldane said about the decision in *Ashbury Railway Carriage, &c., Company* v. *Riche*, the capacity may be limited. SIR ROBERT FINLAY: It may be limited undoubtedly, but I am talking of capacity in the sense of being *intra vires*.

LORD PARKER: That is slightly different, is not it, it is a question of powers? SIR ROBERT FINLAY: It is very difficult to get a phrase which exactly hits the distinction. The distinction I draw is between its being open to the company as *intra vires* to do a particular act—

LORD PARKER: There I agree, but it appears to me that with regard to the case on hand you can go even further than that, you can say even if it be not *intra vires*, if you have a Statute in France enabling the Government in France to recognize and give powers to English incorporations there is no question of *ultra vires* at all. SIR ROBERT FINLAY: I submit that that decides the Bonanza case. I was dealing with the wider question referred to by the Chief Justice.

VISCOUNT HALDANE: Your point is this attempt to distinguish "ancillary" from other powers is hopeless if you take the Chief Justice's line. That is your argument? SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: The true distinction is to take capacity. The meaning of "provincial objects" may be that if you have a good provincial object you may create a corporation with full capacity, and for the civil rights it has you have to look at the law of the province where it wants to operate? SIR ROBERT FINLAY: Exactly, my Lord, I pass on to the judgment at page 51 in the Companies' case of Mr. Justice Davies, I will just read his answers to the first and second questions. In the Bonanza case it is page 64.

VISCOUNT HALDANE: If you look at page 52 of the Companies case you will see what he says. SIR ROBERT FINLAY: He merely refers to his answer in the Companies case.

VISCOUNT HALDANE: He gives two judgments and he gives his reasons. SIR ROBERT FINLAY: I think it would induce to clearness if I read what he says at the bottom of page 51, giving in terms his answer to No. 1 and No. 2.

VISCOUNT HALDANE: He agrees with the Chief Justice does not he? SIR ROBERT FINLAY: He does not put it in exactly the same way but perhaps I may go at once to the reasons at the bottom of page 52.

> "This reference for the opinion of the Judges of this Court on the questions submitted involves a consideration and determination of the meaning of Canada's Constitutional Act and especially of sub-section 11 of section 92, 'The incorporation of companies with provincial objects.' We are asked whether there is any, and if any, what limitation expressed in this sub-section, and as to the meaning of the words 'provincial objects' together with a number of subsidiary questions to which I will later refer. The vital and substantial question, however, before us is as to the meaning of the words 'with provincial objects.' Is it necessarily a limitation? If so, is the limitation a territorial and provincial one or is it a limitation of a legislative character only covering all such subject matters as are assigned in section 92 to the exclusive jurisdiction of the Provincial Legislatures, but without regard to area."

VISCOUNT HALDANE: You need not read that. SIR ROBERT FINLAY: No, my Lord. I will read on at line 25:

> "The respective powers of the Dominion Parliament and the Provincial Legislature to incorporate companies has received some consideration by the Judicial Committee in the case of *The Citizens Ins. Co.* v. *Parsons*, 7 A. C., p 96, above referred to, and *Colonial Building & Investment Association* v. *Attorney-General of Quebec*, 9 A. C., page 457. In the former case"—

VISCOUNT HALDANE: We have had this passage. SIR ROBERT FINLAY: Then he says: "In the Colonial Building" case.

VISCOUNT HALDANE: Is that Lerenche's case? MR. NEWCOMBE: Yes, he was the Attorney-General at the time. SIR ROBERT FINLAY: I have it as the Attorney-General of Quebec.

VISCOUNT HALDANE: It is the same thing. SIR ROBERT FINLAY: Yes.

> "In the Colonial Building case Sir Montague Smith who again delivered the judgment of the Judicial Committee, after affirming their Lordships' adherence to the view expressed by them in the *Citizens Insurance Co. of Canada* v. *Parsons*, as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of companies, goes on to say at page 165:
>
> "'The company was incorporated with powers to carry on its business consisting of various kinds throughout the Dominion, *The Parliament of Canada could alone constitute* a corporation with these powers.'"

THE LORD CHANCELLOR: That is quite right if you consider what the word "power" means. It all depends on the meaning of the word "power." SIR ROBERT FINLAY: Yes, my Lord.

> "What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, these, viz., throughout the Dominion. Among

other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can acquire and hold it, the Act of Incorporation gives it capacity to do so."

I do not know whether your Lordships recollect that in that case a company had been formed to operate throughout Canada. It had began operations only in Quebec and never undertook any other operation elsewhere.

VISCOUNT HALDANE: They said its object was provincial and it was *ultra vires*, but the Privy Council said no. SIR ROBERT FINLAY: Yes. Your Lordships will recollect the petition of the Attorney-General to have the company restrained was based on the allegation that the charter of incorporation was illegal. He did not succeed with that ground in the Court below. The Court assumed that the incorporation was legal, but held that they had acted so in defiance of the law of Quebec, and they ought to be restrained. Then the case came on appeal to the Privy Council, and before your Lordships' Board the question as to the legality of the incorporation was not argued at all. The counsel for the injunction sought to fall back upon the infraction of the law of Quebec which had been relied upon by the Court below, and the Board said it was not open to the Attorney-General having launced his case on an allegation of an illegal charter to shift his front to a ground which is not stated in the petition. That is at page 54, line 13:

> "'Capacity' and 'powers' are here used as synonymous and the conclusion I draw from a careful study of these two judgments is that the Judicial Committee intended to affirm the proposition that the Parliament of Canada alone could confer a capacity upon a company exercisable in more than one of the Dominion's provinces."

I agree with that entirely reading "capacity" as meaning right.

> "In a later case which came before their Lordships, *La Compagnie Hydraulique de St. Francois* v. *Continental Heat & Light Co.*, 1909, A. C., page 198, their Lordships held that the respondent company incorporated by the Dominion Parliament could not be restrained from operating under its statutory powers at the suit of the appellant company which under later Quebec statutes had the exclusive power of so operating in the locality chosen by the respondent.
>
> "The judgment was based upon the broad ground that several decisions of the Board had established 'that where a given field of legislation is within the competence both of the Dominion and Provincial Legislatures, and both have legislated, the Dominion enactment must prevail over that of the province if the two are in conflict, as they clearly are in the present case."

VISCOUNT HALDANE: That wants a little amplification; it is to be condensed. SIR ROBERT FINLAY: I think the decision is really rather obscure as it is put.

VISCOUNT HALDANE: It was not necessary to lay down propositions quite so sweeping, and I think it wants expanding a little. SIR ROBERT FINLAY: "No distinction is here made between legislation by the Dominion Parliament under its general powers and legislation by it under some one of its enumerated powers. When legislating under these latter it is clear that Dominion legislation is paramount. I have not understood it to be so when legislating under its general power unless exercised with reference to a subject matter which had attained national importance. Mr. Lafleur suggested that in this appeal the Judicial Committee were dealing with a company incorporated under the exception to sub-section 10 of section 92, which formed part of the enumerated powers of the Dominion Parliament under sub-section 29 of section 91, and that this would explain the language of the judgment. But so far as the report of the case goes there does not seem any ground for the suggestion." The powers under the Statute were general and not confined to one province.

VISCOUNT HALDANE: He goes on to explain that in Parsons case it was rightly or wrongly that the Canada Temperance Act was exclusively within the competence of the Dominion Parliament because it fell out of section 92. Unless

you read this judgment with the context it would seem to have said that when the Dominion had legislated with regard to the unoccupied field there were powers which could be exercised by the Provincial Legislatures dealing with the more dominant aspect of that field which were afterwards exercised and which would not displace the Dominion legislation. Obviously they would if they came within section 92. SIR ROBERT FINLAY: That case was a very curious case. The Dominion Statute created a company with power to carry on the hydraulic works in any and all of the provinces.

VISCOUNT HALDANE: Then a monopoly was granted by the Quebec Legislature. SIR ROBERT FINLAY: Then Quebec by a later Statute gave to the Continental Company the monopoly of works within 30 miles beyond the town in Quebec on the southern side of the river St. Lawrence.

VISCOUNT HALDANE: It might have been said that was a local institution within the province. SIR ROBERT FINLAY: Yes, my Lord. I argued that case for the appellants, and Mr. Lafleur was on the other side, but we had not the advantage of hearing him because the Court decided against the appellants without calling on my friend. I have often wished that that case had been argued out because the view contended for by the appellants was that the Dominion Statute had merely conferred the capacity upon them together with the right to do it whenever they wished to do it, but that capacity would be subject to the local law in regard to civil rights, and that when the Quebec Statute had conferred on another company the exclusive right to do it, the Dominion company would be so limited.

VISCOUNT HALDANE: Do you remember whether the point that it was a local institution within the province was taken? SIR ROBERT FINLAY: I think it was, in fact I think that was the basis of the argument for the appellants.

VISCOUNT HALDANE: There is no trace of it in the judgment. SIR ROBERT FINLAY: The judgment is extremely meagre. I was going to ask your Lordships to look at the argument. I think the point Lord Haldane has referred to is covered by the argument.

THE LORD CHANCELLOR: You have pointed out that the appellant's arguments were not reinforced by the arguments of the respondents, and the case was decided without hearing them. SIR ROBERT FINLAY: Yes, Mr. Justice Davies goes on at page 54, line 38:

> "But so far as the report of the case goes there does not seem any ground for the suggestion. On the contrary the judgment seems to assume that it was merely formulating propositions which had already been approved of and acted upon by the Judicial Committee. The decisions on which their Lordships rely are not expressly given but I assume that they had in mind amongst others the Prohibition case of *Attorney-General for Ontario* v. *Attorney-General for Dominion*, A. C. 1896, page 348, where their Lordships upheld the validity of the Canada Temperance Act, 1886, enacted by the Dominion Parliament, and held that although it was not legislation within the enumerated powers of that Parliament, but was enacted under the general power to legislate for the peace, order and good government of Canada, still it was paramount legislation because it was on a subject matter unquestionably of national interest and importance and which had attained such dimensions as to effect the body politic of the Dominion, and further that in so far as the provisions of any provincial Statute came into collision with the Canada Temperance Act 'the provincial must yield to Dominion legislation, and must remain in abeyance until the Dominion Act was repealed by the Parliament which passed it.' Unexplained and accepted as reported simply this Hydraulic Company case would conclude and settle the difficulties as between Dominion and provincial legislation, as to which the vital questions on this reference are asked. In the late case of *The City of Montreal* v. *Montreal Street Railway*, A. C. 1912, page 333, Lord Atkinson speaking for their Lordships of the Judicial Committee at page 343, sums up the result of the various decisions of the Judicial Committee on the meaning of these two important sections, 91 and 92 of our Constitutional Act."

I have read that to your Lordships. Then line 20:

"I do not think, however, that their Lordships intended to reverse or overrule their previous decision with respect to the constitutionality of the Canada Temperance Act or to question the construction put in that decision upon the general powers of the Dominion to legislate upon matters not enumerated in the 91st section, but which unquestionably attained national interest and importance."

VISCOUNT HALDANE: It was not quite because the matters had attained national importance, but because they were so large in character that they fell outside section 92, and you will see that is so if you read the report of the arguments in the McCarthy case. The McCarthy case followed Parsons' case, and Sir Montague Smith who gave judgment in the Parsons' case explained very carefully as regards *Russell* v. *The Queen* and Parsons' case the *ratio decidendi*. SIR ROBERT FINLAY: Yes, my Lord, and of course it must be remembered that Lord Watson laid down in that case that under the arguments on the residual power they could not trench upon the enumerated things in section 92:

"If their Lordships did so intend then it would seem to me that the result would be tantamount to a declaration that the Canada Temperance Act was *ultra vires* of the Parliament of Canada. I venture to think that if their Lordships intended to deny the power of the Dominion Parliament when legislating under the general powers on matters unquestionably of national interest and importance, which have attained dimensions affecting the body politic of the Dominion to trench upon any of the enumerated powers of the provincial legislatures they would have used different language from that which they have used. Such a construction of the Act would practically deny to the Dominion Parliament power to grapple effectively with any great national evil or condition quite beyond the powers of the legislatures to deal with because the prohibition against trenching upon provincial powers would be fatal. I have no doubt that this was one of the grounds on which their Lordships in the Prohibition case, A. C. 1896, upheld the Dominion legislation as *intra vires*. That the Canada Temperance Act, 1886, did trench upon 'property and civil rights' seems beyond argument, and still as I understand it, the legislation was upheld because its subject matter had attained national importance and such dimensions as affected the body politic of the Dominion. Lord Watson did not find that it was legislation within any of the Dominion's enumerated powers, but accepted the previous decision of the Judicial Committee in *Russell* v. *The Queen*, 7 A. C. p. 829, as authority 'that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion must receive effect as valid enactments relating to the peace, order and good government of Canada.' Lord Watson went on to say further that their Lordships were unable to regard the prohibitive enactments of the Canadian Statutes of 1896" (that should be 1886) "as regulations of trade and commerce for the reason that the object of the Act was not to regulate but to abolish all retail transactions between those who trade in liquor and their customers within every area where the Act is brought into operation."

I submit that the whole of that passage is erroneous.

VISCOUNT HALDANE: There is an erroneous statement which caught my eye a little lower down. SIR ROBERT FINLAY:

"The validity of the Act was therefore maintained solely under the Dominion's general powers to legislate for the peace, order and good government of Canada, although it directly affected property and civil rights in provincial areas and was in conflict with provincial legislation in the same subject matter of legislation. And the ground on which its validity was upheld was that the subject matter was one of national importance affecting the body politic of the Dominion."

VISCOUNT HALDANE: Will you look at the next sentence. SIR ROBERT FINLAY:

"My understanding of the decision is that such legislation forms an exception to the general rule that legislation under the peace, order and good government clause must not trench upon the enumerated powers of section 92."

that is directly in the teeth of what Lord Watson says in that very case and directly in the teeth of every subsequent decision.

THE LORD CHANCELLOR: What is far more serious is that it is in the teeth of the Statute. SIR ROBERT FINLAY: Yes, my Lord.

"The result would be that while Dominion legislation generally under the peace, order and good government power might be good if it only affected incidentally the enumerated powers of the Provincial Legislatures, under section 92, it could only directly affect and overrule legislation under those enumerated powers, when enacted on such subject matters of unquestioned national interest and importance as had attained dimensions affecting the body politic of the Dominion.

"If the observations and decisions of the Judicial Committee in the several cases I have referred to as to the powers conferred upon the Provincial Legislatures with respect to the incorporation of companies are not conclusive as to the nature, character and extent of these powers and we construe sections 91 and 92 of our Constitutional Act broadly and generally and apart from authority we cannot fail to observe what care was apparently taken to assign to the provinces exclusive jurisdiction over all matters or subjects of a purely provincial or local or private nature while assigning to the Dominion jurisdiction over all other matters or subjects relating to the peace, order and good government of Canada as a whole. Bearing this in view and reading with critical care the 16 sub-sections of section 92 in which these exclusive powers are expressed, one fails to find anything to support an argument by which the exercise of any of them could have been intended to have a direct extra-provincial efficacy. Words of provincial limitation of some sort or character are to be found in each one of the 16 sub-sections. These words vary naturally as the subject matter requires; but whether the words or phrases used are 'for provincial purposes,' or 'for provincial, local or municipal purposes,' or 'of the province,' or 'in the province' or 'in or for the province, or 'with provincial objects,' they one and all indicate a consistent and uniform purpose of limiting the constitutional powers conferred to matters and subjects purely provincial or merely local or private as distinguished from those which were either Dominion wide in their extent or related to or affected more than one of the provinces.

"The special words of limitation as to the meaning of which we are asked are found in the 11th sub-section. 'The incorporation of companies with provincial objects.' The power given is an exclusive one. The words 'with provincial objects' are clearly words of limitation. The addition of the word 'only' or the words 'and no others' would not alter or charge the nature or extent of the limitation. In my opinion the limitation is as to area, the area is that of the province. The company to be incorporated is one with an object or functional purpose to be carried out within the province as distinguished from one with a more general object or purpose, that is one extending to two or more provinces or to the Dominion at large. The limitation has doubtless reference not only to the area within which the companies are to operate but to the subject matters over which exclusive legislative jurisdiction is conferred on the provinces by section 92. The argument for the provinces was that it related only to these subject matters and had no reference to area. I cannot so read it. As was said by the Judicial Committee in the case *Colonial Building Association* v. *Attorney-General of Quebec*, before referred to the Parliament of Canada an *alone* constitute a corporation with power to carry on its business throughout the Dominion."

That is quite right, "power" being read as the right.

THE LORD CHANCELLOR: It has been repeated more than once, and it is quite right. SIR ROBERT FINLAY: Yes, my Lord.

"If the provincial argument that the limitation was not intended to have a reference to area but solely to the subject matters assigned exclusively to the provinces to legislate upon is sound it is strange that the draftsmen and framers of the Act should have used such inapt language to express their intention as is to be found in sub-section 11. The phrase 'classes of sub-

jects' is used many times over in the Act and if the intention was to add a limitation to the power to incorporate companies which would have no reference to area but should apply only to the subject matters assigned to the exclusive legislative powers of the provinces one would imagine that the draftsmen would have continued the use of his favorite phrase and made the sub-section to read 'the incorporation of companies within any of the classes of subjects assigned exclusively to the legislatures of the provinces.'

"The result of the provincial contention if accepted would be of course that the provincial incorporated companies would have equal capacity with Dominion incorporated companies to carry on their business throughout Canada. The only difference would be that the provincial companies would do so by virtue of the comity or permission of the provinces other than the one incorporating the company while the Dominion companies would do so by virtue of the inherent powers it derived from its act or letters of incorporation."

That is very material and very important.

"Such a result would seem to me not to violate the cardinal principles adopted in the distribution of legislative powers between the Dominion and the provinces of confining the exclusive powers of the provincial legislatures to the province alone and assigning the residuum of legislative power to the Dominion Parliament, but is at variance with the rule of construction many times adopted with respect to legislation alike Dominion and provincial of prohibiting that being done indirectly which cannot be done directly.

"In the view, however, which I take of the character of the limitation contained in the provincial power to incorporate companies this question of the company carrying on its business beyond the area of the province which created it does not arise. If I am right that the limitation on the power of a province to incorporate companies is a territorial one and limited to the province as distinguished from the Dominion at large then it is plain that every charter granted by statute or letters patent under the Companies Act by the province must have that constitutional limitation read into it and I cannot understand how any doctrine of the comity of nations could avail either to enlarge the limited constituent powers of a company of the limited area within which the exercise of unlimited powers of a company were constitutionally confined."

The argument of inconvenience arising from the construction—

VISCOUNT HALDANE: Do you say if he had distinguished between capacity and right and confined himself to right as distinguished from capacity the reasons for his judgment would have been quite justified, but when you get to capacity quite different considerations arise. SIR ROBERT FINLAY: Yes, my Lord, and I say that that vitiates the argument of inconvenience—

"The amount of inconvenience arising from the construction of the Act I have reached was pressed very strongly and it was said at Bar that many companies with millions of capital had been incorporated by the provinces and would be seriously hampered if they were not allowed to carry on their business throughout the Dominion in all the provinces which did not expressly prohibit their doing so. In the first place the constitutional limitation upon the exercise by these provincial companies of their powers while preventing them from carrying on their business or exercising their functional powers outside of the province would not prevent them from doing everything within or without the province incidentally necessary to the carrying out of any of these functional powers.

"A provincial company incorporated for the manufacture and sale of any article while confined to the province creating it so far as the manufacture and sale of the article was concerned could doubtless purchase outside of the province the machinery and raw material necessary to enable it to carry out the purposes for which it was brought into existence and so while confined to the province in carrying on its business of selling its manufactured products could do so to any one willing to buy from any one outside of the province so long as it did not attempt to carry on its business in such outside province. But I

cannot see, unless my construction of our constitutional Act is entirely wrong, how a company incorporated for mining, or fishing, or lumbering, or milling, or manufacturing, say in Nova Scotia, could carry on the business of mining, fishing, lumbering, milling or manufacturing in, say Yukon or the province of British Columbia, or in any other province than Nova Scotia. To say that with regard to trading companies it is almost impossible for them effectively to carry on their business within the limits of a province, except with great inconvenience and possibly loss is merely to say that they should get a Dominion and not a provincial charter"—

that is a very strong reason for not thinking that the legislature intended in the British North America Act to impose such a state of things—

"But while I think the inconveniences and difficulties were greatly exaggerated at Bar I do not see in them any reason at all for adopting an improper construction of our Canadian Constitutional Act with respect to the division of legislative powers."

VISCOUNT HALDANE: That is all that is material, I think. SIR ROBERT FINLAY: Yes, my Lord. Then I will go back to the judgments in the Bonanza case. At page 64 Mr. Justice Idington says:

"The questions raised herein relate to the limits of the capacity of a company incorporated by provincial authority, acting within the powers conferred in section 92, sub-section 11 of the British North America Act, to acquire property outside the province, or to contract for anything to be done for its benefit or omitted by it or anyone else, to be done for its use or benefit outside the province.

"It has been heretofore usually assumed that men incorporated for any object might in their corporate capacity, acting within the scope of such object, do anything relative thereto for the purpose of serving such object, wherever the law of the country where done did not prohibit the doing thereof. This has been recently denied as far as provincial corporate creations are concerned. That denial is founded upon the discovery (long hidden from the ken of men) of manifold possible limitations inherent in said sub-section. It has assumed many shapes.

"That involved in the absolute denial of capacity for either contracting beyond, or contracting for anything to be done or to be got beyond the territorial limits, is easily understood, whatever may be thought of its legal validity.

"But this denial, of ordinary capacity which has assumed such various and varying shades of feaning that it is impossible to accurately define any line by which to bound the permitted operations of a limited sort beyond the territorial limits, is not quite so comprehensible.

"The facts involved herein are so complicated that they may give rise to the application of any one of these propositionss comprehended in such denial of capacity, or specific shade thereof, that I think better they should be set out with some detail."

Then his Lordship refers to the incorporation of the company in 1904, and goes on at line 7, page 65:

"All we are concerned with is that what was specified either in said clauses (a) and (b)"—that is the meaning and nothing less—"or the other subsidiary clauses, or both combined, contemplated the exercise, without saying where, of contracting powers and the acquisition of such kind of rights and properties as involved in the issues raised herein. The place where operations of any kind were to be carried on is not stated further than that the head office of the company is to be at the city of Toronto. That must therefore be taken as the home wherein it carried on its business.

"From the pleadings"—

VISCOUNT HALDANE: You need not read all this. SIR ROBERT FINLAY: It is very important I think, but I think I have stated the substance. My friend Mr. Hellmuth, who is concerned for the companies, will see if there is anything that has been omitted in the short statement that I have made. Then at page 67, line 40, he goes on:

"The learned trial Judge assigns as reason for said dismissal, the answers given by the majority of this Court in the Companies case, 48 Can. S. C. R. 331.

"With great respect I do not think that position is tenable unless by first forming an opinion which the learned trial Judge disclaims. If a person approaches the problem of ascertaining what the Judges meant with the preconceived opinion that a limitation is necessarily implied in the appellant's charter, or in any other provincial charter, then his conception of what the majority had agreed in is possibly warranted, but not otherwise. However, as expressed by the Court above, these opinions bind no one. And unless approached in the way I suggest there is not a majority maintaining the view the learned Judge acts upon.

"On the other hand this Court had decided in the concrete case of the *Canadian Pacific Railway Company* v. *Ottawa Fire Insurance Company*, 39 Can. S. C. R. 405, against the view which the learned trial Judge adopts as that of this Court. True in that case, if the refusal of the late Mr. Justice Girouard to express an opinion is counted against what seems to have been the opinion of three members of the Court, it would then be an equally divided Court and the appeal resting upon the like contention set up herein failed. In such a case in appeal the negative thereby established the rule of law binding it for the future, for whatever it may be worth.

"It is not for the mere triviality of the marshalling, so to speak, of judicial opinion in this Court with which I am concerned. It is the fact that the seat of the Dominion Government is in Ontario."

VISCOUNT HALDANE: I thought some arrangements had been made with regard to Ottawa, which made it not quite extra-territorial. MR. HELLMUTH: No, my Lord, Ottawa is in the province of Ontario. It sends two legislative members to the Ontario house. It is as much an Ontario town as Toronto.

VISCOUNT HALDANE: Who keeps up the Parliament House? MR. HELLMUTH: It is kept up by the Dominion Parliament, but the civil rights for Ottawa are those of the province of Ontario. Ottawa is separated from the province of Quebec by the Ottawa River, and Hull, the town on the other side, is in the province of Quebec.

VISCOUNT HALDANE: Ottawa consists of two parts, the main part being in Ontario. MR. HELLMUTH: The city proper is only in the province of Ontario.

SIR ROBERT FINLAY: There have been very considerable discussions to make the district including both cities of Ottawa and Hull which are really one city divided into two by the river, as they have done in the case of Washington into a federal district, but there are great constitutional difficulties. MR. HELLMUTH: Ottawa is in the province of Ontario. All letters are addressed "Ottawa Ontario."

VISCOUNT HALDANE: Did not the Government once go out over this question? MR. HELLMUTH: There was a great question raised, but I do not think the Government went out on it.

VISCOUNT HALDANE: It was before Confederation. The Government came in on this question, and it went out in 48 hours I think. SIR ROBERT FINLAY: I think the Governments of the old province of Canada were of very short duration, the voting power was so evenly balanced.

THE LORD CHANCELLOR: We must trust you to tell us what is in those judgments which is new. Your argument of course has covered very large ground before the board. It will not be much use reading the judgments merely to repeat what you have said. If there is anything outside what you have said it is important to bring that before us. SIR ROBERT FINLAY: There are a good many arguments used by Mr. Justice Idington, which I am rather anxious to quote. I will shorten it as much as possible. It is rather a long judgment I confess:

"It is the fact that the seat of the Dominion Government is in Ontario, the home of appellant, and that the transactions in question herein took place with that government there and by virtue thereof, and that the appellant paid moneys to respondent which at all events it is entitled to recover

back on the principle this Court almost unanimously followed in the said case. More than that the same principles as supported by a majority of this Court in that case would, I submit, entitle appellant to take an assignment of a lease and of a claim such as those parties had under whom appellant claims. How far the facts would have carried the matter and entitled the appellant to relief I cannot say.

"It is to be observed further that the matter of a contract being *ultra vires* and hence uninforceable is not the same as one to be held void by reason of what may more accurately be described as illegal."

VISCOUNT HALDANE: Is there anything until you come to line 14, page 69?

SIR ROBERT FINLAY: No, my Lord, I do not think so. I will pass on to there:

"Passing these considerations let us come to the broader issues presented by the denial of the inherent capacity of any provincial corporate company going beyond the territorial limits of its parent province, either to contract there, or acquire there, property or rights of any kind, serving its uses in pursuit of its objects. Such companies are incorporated by virtue of the power in sub-section 11 of section 92 of the British North America Act, expressed as follows:

"'The incorporation of companies with provincial objects.'

"Such a view as involved in that denial I rather think was never presented in any Court in Canada till the *Canadian Pacific Railway Company* v. *The Ottawa Fire Insurance Company* case already referred to. Assuredly the contrary view was acted upon for forty years to such an extent as to involve in the aggregate enormous sums of money in the way of contracts by and with companies, which must be held *ultra vires* and void if the contention set up should prevail.

"A microscopical examination of the phrase 'provincial objects' cannot help much.

"It is to be observed, however, that the word 'objects' had been used prior to said Act, both in the English Joint Stock Companies' Act of 1862 and the Canadian Act in chapter 65, section 1, of the Consolidated Statutes of Canada, as an apt description of what by the articles of association must form the basis of incorporation in either case respectively falling thereunder. And the word 'provincial' can be given full force and effect, in the way I am about to submit, without further qualifying or restricting the well known use of the word 'objects' in relation to companies so as to produce something as curious as contended for.

"No one pretends the whole item No. 11, can apply to anything relative to the purposes, aims or affairs of the Government or its direction of the public institutions of the province, which are *prima facie* the only 'provincial objects as such. Counsel for the Dominion in the Companies' case, by introducing history, let us see how the unhappy phrase was begotten. If permissible to refer thereto, I have recorded it in pages 362 and 363 of 48 Can. S. C. R. containing the report of that case.

"Is there another possible meaning of the phrase 'provincial objects'? Seeing it is an incorporation of companies that is designated it can surely mean nothing else than a provision for the incorporation of persons likely to develope the business activities of any kind seeking such development in any province. Does that necessarily imply that the business in any such case seeking development is to be confined in all or any of its operations within the territorial limits of the incorporating province? Surely such a limitation is and always has been since before the British North America Act, something quite inconsistent with the requirements and expectations of business men looking to commercial success.

"But why should we suppose it was thereby by the word 'provincial' intended to engraft upon each provincial incorporation of a company the limitation that it could not transact any business beyond the limits of the incorporating province? Those provinces which negotiated and arranged for this creation of a federal system and thereby determined what as result thereof should appear in the Act, had each up to its enactment coming

into force, absolute power over the subject of the creation of incorporate companies. It is somewhat difficult to understand why they should be supposed to have intended to surrender that power essential to their local prosperity says in so far as necessary to facilitate the furtherance of the purpose had in view.

"Can it fairly be said that such extreme limitations and restrictions as argued for herein were so necessary? Was there not something else to be guarded against?

"In assigning the control of property and civil rights in the provinces to the exclusive jurisdiction of Provincial Legislatures which would impliedly carry with it the right of incorporation, it may have been thought that the power of incorporation relative to the subject-matters assigned to the Dominion might be impaired, or indeed render it necessary for its Parliament to look to the province possessed of such far reaching powers, relative to property and civil rights, to aid it in that regard. To have thus by any possibility impliedly rendered Parliament subservient to the will of any legislature would have been embarrassing.

"Again it may have been conceived undesirable that there should be the possibility of any conflict between the provinces by reason of one asserting as of right the power over or against another to invade its territory against its will, by any such legislation relative to companies. That view was upheld later by Ministers of Justice for the Dominion as will presently appear.

"By framing the enactment as it is, these, and possibly other contingencies, were averted and the general rule of private international law (which I submit was well know) relative to the recognition of corporations abroad by virtue of what has been called the comity of nations, was left to work out the solution of the question; as it has been in each individual case for nearly half a century with great benefit to all and detriment to none.

"Some such reasons as well as the desirability of marking the contradistinction between the provincial corporations, which ought not to have for their objects any of the subject-matters assigned to the Dominion, and Dominion corporations, or such of them as relate to any of the subject-matters assigned to the exclusive legislative jurisdiction of the Dominion, one can understand as having been deemed, if not necessary, yet desirable to facilitate the working out smoothly of the scheme as a whole. But why should that necessity have reached to the wholly unnecessary exclusion of trading either with the mother country or its colonies or the United States or any other foreign country; as had been done for many years by provincial companies?

"In short why should it be supposed to have been intended to render training by provincial companies impossible?

"The scheme of the Act was primarily to arrange for the federal union of four or five provinces until then having very large powers of self-government. The framers thereof followed the example of the United States Constitution and its method of assigning very large powers of legislative or administrative control to the governments to be created, by merely specifying the subject-matter over which such powers were to be exercised, without elaboration of how: and in like manner prohibiting in terse terms the exercise of power over other subject-matters.

"They departed, as experience had then dictated in a marked degree, from the substance of the model. All I here desire to press is for a realization of the fact that they made the best use they could under the circumstances, of such a model, endeavouring to avoid rocks ahead, while trying to cure the ills the provinces laboured under.

"Incidentally thereto it is not conceivable that they shut their eyes either to the commercial necessities, to which I have already adverted, or to the history of the development of the recognition of corporate capacity both in the United States and elsewhere when transacting business beyond the limits of the corporate creating state. That question had theretofore, both in England and Canada, as well as in the United States, received much

consideration. In the United States the question had also been considered with relation to the constitutional limitations of the incorporating state as it is now presented relative to the powers of the provinces.

The discussion it gave rise to in the United States was long and keen. It culminated there in the decision of the case of *Bank of Augusta* v. *Earle*, 13 Peters, 519, decided in the United States Supreme Court in 1839, which stands good law to-day."

That case pointed out that the action of a corporation beyond the limits of the state which created it depended upon the good will or comity, or whatever expression may be used, of the other states. The case is reported at very great length. I have got the book here, but unless your Lordships desire it I will not stop to go into it. The headnote is extremely long and contains some expressions which if one read one part of it would seem to deny that the Company has an existence beyond the limits of the state which has created it, but if you take the judgment as a whole I think it clearly emerges that the decision was to the effect I have stated.

"The argument there as here was that the company should not go beyond its home state to do business, and the limitations of state powers were also relied upon. That eminent and able Court held it could go wherever the comity of state or nations might permit. The very different question of a foreign company, by its constitution inherently incapable of going abroad, had been presented to our old Upper Canadian Court of Queen's Bench in the case of *Genesee Mutual Insurance Company* v. *Westman*. Indeed some *obiter dicta* therein would go further, but the day was young then. Shortly after Confederation there arose in same Court, the case of *Home Machine Company* v. *Walker*, where the issue of the right of a foreign corporate company to do business in Canada was likewise presented, and the right maintained with the proper distinction made between that and the Genesee case. This was in 1873."

I rather think that that case virtually overruled the Genesee case. MR. HELLMUTH: Yes, it did. SIR ROBERT FINLAY:

"The decision is only of significance here as indicative of the view then taken and thus likely to have been held six years earlier by those framing the clause now in question. The English view is presented by the authorities collected in Westlake at section 305 of his work on Private International Law.

"Is it conceivable that men, presumably holding the views of English law as thus expressed by either Canadian or English authorities, and knowing how that had been applied and worked out at that time under a federal system, deliberately designed the creation of something new and wonderful to be operated with under the Canadian Federal System? I cannot assent to such a proposition. Those men had sense, and some of them, wide experience and great grasp of public affairs. To say that they had not in view the daily experience of Canadian trade and industries before their eyes and the futility of providing therefor by a new kind of corporate creature which it would take forty years to discover, is paying them a compliment which, I submit, is undeserved.

"The relevancy of all this is that the instrument under consideration is not an ordinary contract or Act of Parliament, but one which if we would rightly understand it must be read with the eye of the statesman measuring the future range of its effective yet harmonious operation in all its parts so as to make each and all productive of the best results when put in actual practice.

"Then there is another practical aspect to be considered along with and consistent with that general survey of the question from a legal or constitutional point of view. It is this: In each of the provinces there are industries peculiar to its people. The adaptation of legislative contrivances needed to aid such people in promoting the development of its resources, whether of an agricultural, mining, fishing, lumbering, mercantile or mere financial (not banking) character, may have to be suited thereto and to the

peculiar character or habits of life, of the people of the province. That which would meet the wants of Nova Scotia might be quite unsuited to the requirements of Ontario or that suited to either fall short of promoting the welfare of the farmer on the western plains.

"The promotion of any scheme needing legislation for its assistance, is most likely to bear speedy results when an appeal is made to those most directly interested."

THE LORD CHANCELLOR: This does not carry us very much further. SIR ROBERT FINLAY: If your Lordship pleases. There is a paragraph at the bottom of page 72.

"Having regard to the situation of the then Canadian provinces, and what was then present to the minds of those acting, can anything more absurd be conceived, than to suppose that those men realizing such a situation and looking to the future, deliberately planned that the incorporating power to be given the legislatures of the provinces for such objects as I have outlined, should be hampered by such limitations as are contended for herein, and never had existed elsewhere in the constitution of any legislature to which the like subject-matters had been intrusted?

"A company incorporated with the object of exploring as indicated in appellant's charter might seek something in the United States or Mexico, for example. That is conceivable as a business enterprise."

THE LORD CHANCELLOR: It seems to me this is an expansion of what you have said rather than a condensation of it. SIR ROBERT FINLAY: Yes, and it refers to the broad aspects of the case looking at it having regard to the circumstances of the Colonies as they existed before Confederation, and to the practice for at least 40 years since. Then I think I may go to line 28, page 73:

"It is said, however, that the word 'provincial' so plainly indicates that it was designed that such corporations could not carry on business beyond the province that there is an implied limitation in the capacity of each precluding it from availing itself of the advantages of recognition by virtue of the doctrine of comity. It is hard to get two to agree exactly in what that proposition does mean. If it ever had been conceived as once suggested in argument, but which no one has been bold enough judicially to affirm, that nothing could be done or be contracted for being done outside the territorial limits of the province, the situation of each province and the commercial relations of its people with those of the other provinces and of countries beyond the Dominion, were and remain such as to forbid a moment's serious consideration for such a curious proposition. Besides, such a simple conception if ever entertained could have been concisely stated.

"I, therefore, discard once and for all this very improbable conception of territorial limitations as ever having been intended to rest in the language used.

Let us then proceed to consider the theory of the implied limitations restricting business within lines including only that which may be ancillary to the main object and be an 'incidental necessity' thereof as, for example, the buying abroad of raw material, etc., and possibly the marketing of a company's goods, without regarding other refinements which might be suggested; and see how it will stand the practical test.

"If we apply our common knowledge to the actual facts in an attempt to realize what such corporate activity means, we may find how impossible it would be to make the theory a workable success.

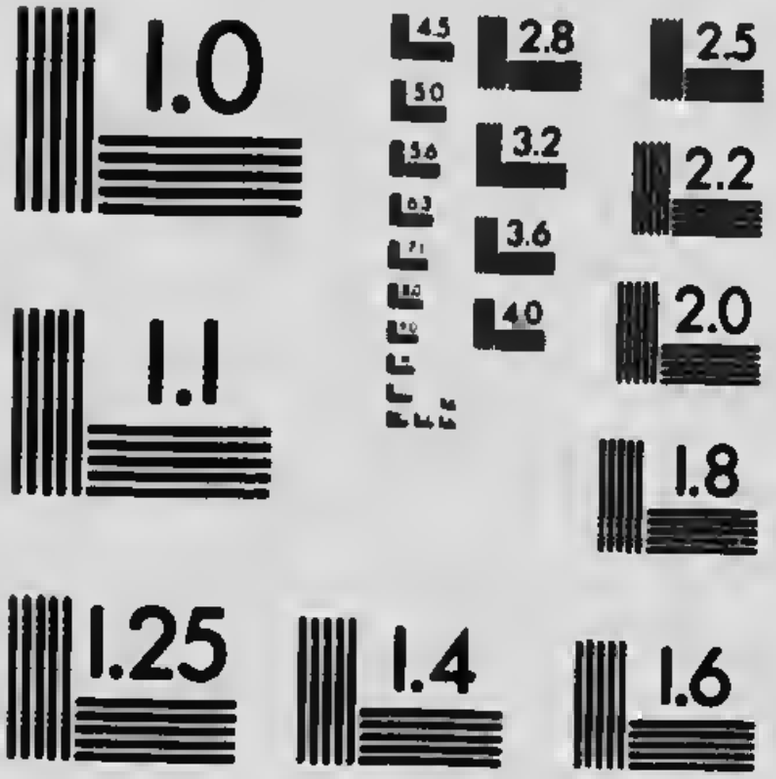
"The actual operations of these industrial concerns, of provincial origin, daily furnish us with illustrations.

"Of the vast and ever increasing volume of business done by them with people in other provinces or abroad, more than one-half of what it represents is an actual carrying on, by the agents of such companies, of business outside the province. The production of the articles is but a part of the business operation in order to reap the gain for which the corporation was created.

"If, as has been suggested."

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

VISCOUNT HALDANE: I think this is very rhetorical. I do not think you need read it until you get to line 34. SIR ROBERT FINLAY: The judgment may embody sound business sense though the form is rather more rhetorical than that which we are accustomed to.

LORD PARKER: It is an argument *ad inconvenienti.* SIR ROBERT FINLAY: To some extent, but to the extent to which Mr. Justice Idington goes I think it is legitimate. He says: We are confronted with the necessity of putting a meaning on these words; are we to choose the meaning which occasions very great inconvenience? It is a legitimate argument to that extent. It would not prevail against clear words, of course, but I submit the words rather tend the other way. I think I might read the paragraph at the bottom of page 74 because it does illustrate what often happens.

> "We also know from common knowledge that the miner has often to send his raw product abroad to be treated and then marketed, and in such cases bargains have necessarily to be made abroad involving a great deal more expense and variety of business transactions than the mere expense of digging it out of the earth. In the same way the incorporated lumberman may, indeed often does find his timber in one province and his mill in another and his market in a third province, or abroad, and occasionally he has to be an importer from abroad of his raw material."

Then at line 13 on page 75 he says:

> "Take another mode of testing this alleged limitation. The province is given, by item No. 10, the exclusive power of legislation relative to local works and undertakings except those of an interprovincial character, as specified. Railways and other works have been constructed by companies which had to rest, I submit, on no other authority than this item No. 11. It is all comprehensive or nothing. It will not do to say the grant of power to incorporate might be implied in No. 10 itself, without resorting to No. 11. I admit the province as such could undertake such works.
>
> "I am referring to the numerous cases of railroads"—

THE LORD CHANCELLOR: Why does he say railways? They are under 10 surely. SIR ROBERT FINLAY: He is referring to the construction of the railways. It is plain from the next sentence.

> "I submit such companies rest upon this very item No. 11 or nothing. For if implications relative to 'companies' are to be permitted in item No. 10, then likewise, does No. 13, 'property and civil rights,' carry in such case the like implication, and so would end all this contention.
>
> "It seems generally conceded that this specific enactment excludes such implications so far as 'companies' are concerned under provincial legislation, and, if so, I do not see how they can exist relative to No. 10 any more than independently under No. 13.
>
> "Now these companies, beyond question, have gone abroad for almost everything, including the money got from stockholders and bondholders, as well as rails and all else. Who ever thought they were acting *ultra vires?* Are their contracts void?"

Then at the top of page 76:

> "Moreover, what must never be lost sight of, there is the fact, that the interpretation which I submit should prevail, has in actual practice been so long observed and acted upon and so much depends thereon that even if otherwise doubtful it should be upheld.
>
> "The products of our industrial activities of every kind have been and still are handled by provincially incorporated companies and sold abroad and commercial exchanges effected. Are these transactions all *ultra vires,* and these companies engaged in doing so liable to be met by the foreign dealer with a plea such as respondent sets up herein? These companies have often exchanged such products abroad for other goods, or bought goods abroad with the money so got. Are they in any or all of these transactions liable to be met by such a plea?
>
> "And perhaps quite as frequently they have been, by the credit thus acquired, able to buy goods on credit; and are they in such cases entitled

to say they were not liable as they were acting *ultra vires* in thus abusing their credit?"

That is amplified and illustrated in the judgment which, I submit, is well worth reading, although I do not desire to occupy time by reading it.

VISCOUNT HALDANE: It is all summed up at line 19 on page 78. SIR ROBERT FINLAY:

"With every desire to condense, so far as consistent with perspicuity, I find this opinion already too long drawn out.

"Yet the neat point involved herein is within a very narrow compass."

It necessarily involved a little detail, but the enormous importance of the subject from the practical point of view is keenly appreciated there.

THE LORD CHANCELLOR: The question we have to decide is what is meant by "incorporation of companies with provincial objects"? There is a great deal of this which does not bear directly on the question. SIR ROBERT FINLAY: No, it is incidental or ancillary. The next judgment is that of Mr. Justice Duff.

VISCOUNT HALDANE: Would you like to follow the practice of looking at Mr. Justice Idington's judgment in the Companies Reference. There is a long argument based on considerations which are not really relevant here. We might get rid of it perhaps. It is at page 61. First of all he protests against our answering the questions on the ground that they are abstract and speculative. You may pass over the whole of page 62. Then he refers to the Insurance case. You have already told us about that. SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: Then there are some quotations from that. I think we may pass on to what is, not only interesting, but it is quite legitimate, that is to say, the definition of what took place before the matter was sent up for review. SIR ROBERT FINLAY: I will read any part if your Lordship desires it.

THE LORD CHANCELLOR: He deals with this case again as the other Judges have done from what is, not exactly your point of view, but a middle course. He says at page 65, line 32:

"If such a man had been asked to join an Ontario milling company and did so, he would never have imagined such a thing as that his company could not buy wheat in Chicago, grind it in Toronto and carry the flour to Liverpool, or Constantinople, if it chose."

That is all consistent with the middle argument that lies between yours and your opponents, that is to say, the company may do anywhere what is ancillary to its carrying on its business in Ontario. SIR ROBERT FINLAY: Yes, my Lord; at the same time Mr. Justice Idington, as I submit, has shown that the doctrine of the ancillary powers in practice is of extremely difficult application.

THE LORD CHANCELLOR: Here he is attempting to use it. SIR ROBERT FINLAY: What he is criticising is the view presented by Mr. Newcombe.

THE LORD CHANCELLOR: To establish the decision on that footing would not satisfy you. SIR ROBERT FINLAY: No, but I do not think he is putting it on that footing. He is pointing out the weakness of the opposite position. The judgment I have read does, I submit, express a position identical with my own.

VISCOUNT HALDANE: Will you go to the top of page 67? SIR ROBERT FINLAY: If your Lordship pleases.

"I there also tried to show that 'provincial objects'"—that is in the Ottawa case—"could not be held to refer to any of the purposes of government"—

THE LORD CHANCELLOR: I do not understand that—"I there also tried to show that 'provincial objects' could not be held to refer to any of the purposes of government." SIR ROBERT FINLAY: That refers to this. He says it in a rather more extended form in the judgment I have just read. He says 'provincial objects' properly speaking, would begin with the province.

THE LORD CHANCELLOR: Is that argued against you? SIR ROBERT FINLAY: I do not know that it is, but all Mr. Justice Idington is doing here is referring to the proposition which he says, although it might be the proper meaning of "provincial objects," is quite untenable.

THE LORD CHANCELLOR: I do not understand it. What is the meaning of it—"I there also tried to show that 'provincial objects' could not be held to refer to any of the purposes of government which in a sense are the only

'provincial objects' most appropriately covered by such a term." SIR ROBERT FINLAY: He means having regard to the extraordinary limitations that were involved. One can imagine the Government of a province for the purpose of carrying out some Government purpose, might think it convenient that a company should be incorporated.

THE LORD CHANCELLOR: Why? SIR ROBERT FINLAY: It is possible.

THE LORD CHANCELLOR: You mean that the Government of the province might incorporate itself a company. SIR ROBERT FINLAY: No, my Lord, they incorporate a company for the purpose of carrying out some public works.

THE LORD CHANCELLOR: Who would the shareholders be? SIR ROBERT FINLAY: Anybody I suppose. Take the case of Commissioners. As my friend, Mr. Lafleur, says, the Harbour Commissioners of Montreal are a corporation.

THE LORD CHANCELLOR: At any rate, the answer shows it would be possible that such a thing should be the meaning of it, but it is highly improbable. SIR ROBERT FINLAY: It is highly improbable it should be confined to it.

THE LORD CHANCELLOR: The Government can do anything. If it likes to work through a company it can. SIR ROBERT FINLAY: It constantly does in this country. There are Commissioners here.

THE LORD CHANCELLOR: That is not the incorporation of a company. SIR ROBERT FINLAY: No, my Lord, but you might have Government business carried out by a company.

VISCOUNT HALDANE: I understand the meaning of it to be this. "Provincial" if it does not mean territorial means the legislature of the province and the provincial objects, and, therefore, what were public purposes as opposed to private uurposes. SIR ROBERT FINLAY: Yes, you might have a company incorporated for such public purposes.

VISCOUNT HALDANE: I think you can go to line 21, page 68.

> "To sum up what I have said and furnish such answers, qualified and limited, as that so said, indicates, the best reply I can give to these questions is as follows:—That a Provincial Legislature cannot incorporate a company to do any of the things which lie within the exclusive power of Parliament, and hence cannot be provincial objects (though possibly Parliament may use such companies acting within their capacity for executing any of its purposes), but its corporate creations have each inherently in it unless specifically restricted by the conditions of the instrument creating it, the power to go beyond the limits of the province for such purposes and transactions as are needed to give due effect to the business operations of the company so far as within the scope of what they were created for. And if they be formed for the purpose of buying and selling grain, they can do so in any place where their business will carry them, and the comity of nations permit them. And those formed to grind grain can, subject to the like limitations, grind it where deemed desirable.
>
> "I submit that I have substantially answered all the riddles in questions 1 and 2, yet the subject has no clear limitations that my limited range of vision can reach and outline."

Then he goes to the other questions. Then I will go to Mr. Justice Duff's judgment in the Bonanza case next.

> "Two minor points, were taken by Mr. Newcombe which I will dispose of first. 'The regulations touching the disposal of mining locations to be worked by hydraulic process' approved 3rd December, 1898"—that is at page 13 of the Joint Appendix—"which admittedly govern the appellants in respect of the rights in question in this action provide, by paragraph 4, that one of the conditions of the right to acquire any such location is the obtaining of a free miner's certificate under the 'regulations governing placer mining.'"

those are at page 11 of the Joint Appendix.

> "Paragraph 1 of the regulations governing placer mining then in force authorizes the issue of free miner's certificates to persons over 18 years of age and to joint stock companies, and 'joint stock company' is defined in the interpretation clause as meaning 'any company incorporated for min-

ing purposes under a Canadian charter or licensed by the Government of Canada.' Mr. Newcombe's contention is that 'Canadian' here means 'Dominion,' and 'Canadian Charter' means an Act of the Parliament of Canada, or an instrument emanating from the Government of the Dominion or deriving its validity from a statute of the Dominion Parliament. I think this contention is not well founded. It is no doubt proper to read the adjective 'Canadian' as describing the kind of charters intended to be included by reference to the authority from which they emanate; and 'Canadian' in this connection may doubtless be read in two different ways. It may be treated as indicating the relation of the authority to Canada as an entity—to the Dominion of Canada. On the other hand it is quite capable of being read as embracing every lawful authority in that behalf exercised within the territorial limits of Canada. Reading 'Canadian' in this latter sense 'Canadian charter' would mean a 'charter' emanating from any lawful authority in Canada—capacity to acquire the right to pursue the business of mining in the Yukon being of course assumed. I think this is the meaning that ought to be attributed to it. The proposed construction would exclude not only companies incorporated under provincial authority, but a company incorporated by Yukon authority or by the North-west Territories' Council before the erection of the Yukon into a separate territory. It would likewise disqualify companies incorporated by the provinces of Canada before Confederation, by British Columbia, for exemple, before 1871. These consequences appear to me to afford a sufficient reason for rejecting the proposed construction.

"The other contention is that by force of 61 Victoria chapter 49, an Act of the Parliament of Canada"—

that is at page 1 of the Joint Appendix—

"the carrying on of mining operations in the Yukon by any joint stock company or corporation excepting companies or corporations owing their existence to some Act of the Parliament of Canada or licensed under the statute is prohibited. The statute is permissive only. It does not contain a single word expressing prohibition. Nor can I find a single word in which seems to imply a prohibition such as that contended for. If indeed there were any implied prohibition it is difficult to understand upon what ground the implication could be limited in the way suggested. If this statute is to be read as conditionally prohibiting the carrying on of mining operations, as it most certainly does under the construction proposed, by a company incorporated by the old province of Canada, or by the province of British Columbia before Confederation, or by a 'chartered company' in the strict sense, such, for example, as the Hudson's Bay Company, it is difficult to imagine what principle can justify such a construction which would not equally involve a like prohibition as against companies existing at the time the Act was passed and owing their existence to some Dominion statute. Any distinction between the two classes of cases could rest upon nothing in the statute itself, but must be founded upon mere speculation as to the policy of it.

"As to the point of substance.

"The specific authority conferred by section 92 (11) (the incorporation of companies with provincial objects) in relation to the subject there dealt with cannot be enlarged by reference to the more general terms of 92 (15) and 92 (16) 'property and civil rights within the province' and 'matters merely local and private within the province.' (*John Deere Plow Co.* v. *Wharton*, 19th Nov., 1914; 1915, A. C. 330; *C. P. R. Co.* v. *Ottawa Fire Ins. Co.*, 39 S. C. R., at pages 461 and 462). This appeal turns upon the answer to the question, what is the effect of the qualification 'with provincial objects' as regards the capacity of the appellant company to enter into the contracts which the appellant company's suit is brought to enforce and upon the validity of those contracts. The word 'company' obviously does not embrace every kind of corporation. (See items 7 and 8 of section 92 and section 93, but the appellant company is indisputably a 'company' within

the meaning of the clause. 'Provincial' means, I think, provincial as to the incorporating province; and although it is perhaps conceivable that as regards companies formed for some communal or governmental purpose, the word 'provincial' might be read as having reference to the province as a political entity, I think that as regards companies formed for the purpose of carrying on some business for private gain it must be read as having reference to the province as a geographical area.'

I have already submitted to your Lordships that that would be a most unreasonable meaning, because it would forbid the formation of a company for the purpose of getting cod from the cod banks and bringing it to Ontario.

"It results, I think, from a series of dicta (which, if they have not the force of decisions, are still of such weight that it is my duty to follow them), that the undertaking or business of such a company and the powers and capacities conferred upon the company must when considered as an entirety be so limited that the 'objects' of the company fall within the description 'provincial' in the sense mentioned."

That is the territorial or geographical sense. Then at line 14:

"I think that whether the 'objects' of a company under a given constitution or 'charter' are 'provincial' in this sense (or whether the possession of capacity to enter into a given transaction is compatible with the condition that the *company's 'objects' shall be 'provincial'*), is a question to be determined upon the circumstances of each case as it arises; and I doubt whether upon this point any more specific test than that supplied by the language of section 92 (11) itself can usefully be formulated now."

I submit my Lords, there is absolutely nothing in these cases that are there referred to which supports the geographical area theory.

"The appellant company's title to relief rests upon the proposition that the letters patent (by which it is incorporated), granted under the authority of the Ontario Companies Act authorizing it to acquire mines and to carry on the business of mining generally without restriction as to locality, do confer upon it capacity to acquire the right to carry on the business of mining in the Yukon Territory or elsewhere under the territorial law as established by competent authority or that such capacity has been derived from some other source. I think the possession of such capacity does not flow from the letters patent on the ground that the business of mining (i.e., working mines) generally without restriction as to locality is not a business that is 'provincial' as to the province of Ontario, and that a company having as one of its objects the carrying on of such business would not be a company 'with provincial objects' within the meaning of section 92 (11); and that consequently letters patent professing to create a company to carry on such business could not be validly granted under the Ontario Companies Act. I do not think it follows as a consequence that the letters patent of the appellant company are void, but only that the description of the objects of the company in the letters patent should be read as subject to the restriction necessarily imported by the reason of overriding enactment in section 92 (11). It follows that the appellant company, a company incorporated pursuant to the provisions of the Ontario Companies' Act to carry on the business of mining must be deemed to be a company created with the object of carrying on that business only as a 'provincial' (i.e., Ontario) business, in the sense mentioned."

That is the geographical sense.

"What then is the effect of this restriction as regards the validity of the contractual engagements entered into between the appellant company and the Crown upon which the appellant company's suit is based? It has never been doubted in this country that the doctrine of *ultra vires* applies to companies incorporated under the Ontario Companies' Act, and that it does so apply was not disputed by the appellant's counsel and, indeed, it is not arguable that the reasoning of Lord Cairns, in *Ashbury Railway Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653, by which his Lordship reached the conclusion that the doctrine governs companies formed under the Com-

panies' Act, 1862, does not apply to the provisions of the Ontario Companies' Act. It results inevitably that the company had no capacity to enter into the contracts upon which the action is brought unless some additional capacity over and above that imparted to the company by the Ontario Companies' Act has been acquired by it from some other source.

"It does not appear to me to be necessary to consider for the purpose of this case whether the Yukon Council or the Dominion Parliament, from which the Yukon Council derives its legislative capacity, has the power constitutionally to legislate with regard to a company 'incorporated' by a province 'with provincial objects' in such a way as to change fundamentally its corporate nature and capacities. Our attention has not been called to anything in the Yukon law which properly construed can, in my opinion, be held to profess to authorize extra-territorial companies to carry on within the territory any business which such company would otherwise be disabled from carrying on by reason of restrictions upon its capacity laid down in its original constitution. The ordinance relating to the registration of extra-territorial companies cannot, I think, be held to contemplate any such enlargement of the corporate powers of companies taking advantage of its provisions.

"This appears to be sufficient to dispose of the appeal. But an observation or two may be proper upon the contentions advanced on behalf of the appellant company.

"First, it is argued that assuming it would be incompetent to a province exercising the powers conferred by section 92 (11) to incorporate a company for objects other than 'provincial objects' in the sense above mentioned, still that clause does not necessarily subject companies effectively incorporated for 'provincial objects' to the principle of *ultra vires* in such a way as to incapacitate such a company from entering into valid transactions having no relation to such 'provincial objects.'

"The doctrine of *ultra vires* reposes upon statute."

Then he refers to several cases. Then at page 83, line 3:

"I find, however, two (to me) insuperable objections to this contention as applied to the present controversy: (a) A company having capacity to enter into valid transactions having no relation to any 'objects' which can be described as 'provincial,' does not appear to me on the assumption above stated, to be a 'company with provincial objects,' within the meaning of section 92 (11); and (b) Assuming a province to be competent to limit the application of the doctrine of *utlra vires* in the way supposed, still there remains the difficulty that if the 'objects' of the appellant company as stated in the letters patent are read as the carrying on of the business of mining as an Ontario business and not without restriction as to locality (as they must be read to bring the 'objects' under the category 'provincial'), then since it is not disputed that the doctrine of *ultra vires* applies to companies incorporated under the Ontario Companies' Act (and it is self-evident, as I have said, that Lord Cairns' reasoning in *Riche* v. *Ashbury Carriage & Iron Co.*, L. R. 9 Ex. 224, applies to that Act), the appellant company must be held to possess only such powers and capacities as have relation to the 'objects' so construed.

"2nd. It is argued that 'with provincial objects' does not define the class of companies in respect of which the legislative powers conferred upon the provinces by section 92 (11) are exercisable. The construction put upon section 92 (11) according to this contention is this: The clause is read as dealing with two subjects (a) the incorporation of companies, (b) the 'rights' (as distinguished from the corporate capacities with which the incorporating province may endow the company when incorporated. Such 'rights,' it is said, must fall within the designation 'provincial objects,' but that restriction has nothing whatever to do with corporate capacities which may include every capacity (excepting capacities that by section 91 (enumerated heads) can only be conferred by the Dominion) with which an incorporeal subject of rights and duties can be endowed. And 'objects' according to this interpreta-

tion is 'provincial' which can be carried out within the limits of the province, provided at all events that it is not one committed by the British North America Act to the exclusive control of the Parliament of Canada. While in this view the province cannot invest the company with the right to carry out 'objects' which are not 'provincial,' it can nevertheless endow the company with capacity to acquire rights and powers having no relation to such 'objects' from any other competent legislative authority.

"I have already indicated certain passages in the judgments of the Privy Council which appear to me to be incompatible with this construction and to which I think effect ought to be given in this Court, whether they strictly possess or do not possess the authority of decisions."

I most respectfully submit there are no such dicta.

"As may have been collected from what I have written above, I think that fairly read the observations referred to mean that the limitation expressed by 'with provincial objects' has reference to the business or undertaking the company is capable under its constitution of carrying on, and the powers and capacities with which the company is for that purpose endowed, looked at as a whole; in other words, that by force of the phrase 'with provincial objects' such a company is affected by a 'constitutional limitation' which makes it incapable of pursuing 'objects' not 'provincial.'"

(Adjourned for a short time).

SIR ROBERT FINLAY: Following the plan that your Lordships have thought advisable, I propose to refer very shortly to the judgment of Mr. Justice Duff in the Companies case. It is at page 80 in that volume.

VISCOUNT HALDANE: He states the question. SIR ROBERT FINLAY:

"Questions 1 and 2 may be conveniently answered together. It must be premised that by force of the enumerated heads of section 91 the Dominion has exclusive jurisdiction with respect to the creation of certain kinds of corporations, e.g., banks, and by section 91 itself apart from any limitation to be found in the language of section 92 the power to create such coporations is withheld from the provinces. What follows must be taken subject to this.

"The general authority of the provinces in relation to the incorporation of companies formed for the purpose of carrying on business for the profit of their members is given by No. 11, 'the incorporation of companies with provincial objects.' 'Objects' here means the undertaking or the business which the company by its constitution is given the capacity to carry on; and that business or undertaking must be 'provincial'—provincial that is to say in relation to the incorporating province. The characteristic which brings the business or undertaking within the description 'provincial' may be found in its relation to that province as a geographical area. The business of a milling company that owns and works mills for grinding grain which are situated in one province only is by virtue of that fact 'provincial' as to that province. Such a business if the mills were in several provinces would not be 'provincial' as to any one of the provinces. The authority conferred by No. 11 would enable a province to create a company to carry on the first business but not the second."

If that is what it meant, it would have been perfectly simple to refer in 11 to the geographical limits of the province.

"The business of a company carrying on the trade of a grain merchant whose places of business are confined to one province is *prima facie* 'provincial' in the sense above mentioned. The business of an insurance company is *prima facie* provincial if its offices and agencies are confined to a given province in the same sense.

"Given a business or undertaking which is *prima facie* provincial in relation to a particular province a company formed to carry it on may receive from that province capacity to acquire such rights and exercise such powers in relation to that business or undertaking outside the province as are not incompatible with the 'provincial' character of the business or undertaking when looked at as a whole."

May I pause for a moment to point out what a tremendous fetter that would be on a provincial insurance company? He says the offices and agencies must be within the province. Surely that would be most unduly limiting the powers of the province. The agencies must necessarily be outside the province.

"Whether in any particular case a given power or capacity is of this character is virtually a question of fact. As to the concrete case put above, it is not necessarily incompatible with the 'provincial' character of the business of a company carrying on the trade of a grain merchant at places of business in one province only that the company should buy and sell grain wherever it suits it best to do so."

VISCOUNT HALDANE: That is not a very bad observation from your point of view, because he draws the distinction implicitly between capacity and power. SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: Two different things. SIR ROBERT FINLAY: Two different things. Then he goes to the other question.

VISCOUNT HALDANE: These we are not concerned with. SIR ROBERT FINLAY: I do not think I need read any more.

VISCOUNT HALDANE: There is one passage you ought to read at the bottom of page 86 in the judgment of Mr. Justice Duff. SIR ROBERT FINLAY: In the Companies case:

"The argument that the rights of a company incorporated to carry on trade in more than one province even although in fact it carries on its trade in one province only are (by virtue solely of the fact that it has corporate capacity to carry on trade in more than one province) matters other than matters of local interest in any province, in which the company does carry on its business even although they are *prima facie* matters falling within the subjects enumerated by section 92 is an argument which cannot be supported. The argument would lead to the conclusion that the rights of an unincorporated partnership or of an individual carrying on business in more provinces than one, must in each province with respect to the business carried on there, be considered a matter in respect of which the Dominion could legislate to the exclusion of provincial jurisdiction. There is no warrant in the Act for this novel theory now apparently for the first time advanced, that the Dominion has authority, in addition to its authority under the enumerated heads of section 91, to legislate (in respect of persons natural or artificial who happen to carry on business in more provinces than one) in derogation of the provincial authority in relation to matters which would *prima facie* fall within the provincial jurisdiction. Similar considerations lead to the rejection of the contention that such legislation as that we are considering is legislation in relation to the subject of interprovincial trade. The argument would equally apply to a natural person carrying on business in more provinces than one. (Mr. Justice Duff has given reasons for his answers in addition to the above summary)."

VISCOUNT HALDANE: What does that mean? SIR ROBERT FINLAY: My friend Mr. Lafleur says they are in the reports of the Supreme Court of Canada; I do not know that we have got that here.

VISCOUNT HALDANE: The parties seem to have thought they would not assist. SIR ROBERT FINLAY: This is rather an abstract I understand of the whole judgment and one would not have a separate passage to read in addition. One would not to go through it where you would find what we have set out here together with other matter in his reasons.

VISCOUNT HALDANE: What do you take him to mean in the first part of the last paragraph? SIR ROBERT FINLAY: What he means, I think, is this; suppose a company carries on business in several provinces, that does not give the Dominion jurisdiction to legislate with reference to the carrying on of its business, a company or an individual—I mean, it does not become matter subject to Dominion legislation because of the fact that he carries on matters which are provincial in their nature in several provinces.

VISCOUNT HALDANE: I took it to be that it means it would be *ultra vires* of the Dominion to give the powers. SIR ROBERT FINLAY: I am glad that your Lordship called attention to that paragraph.

Then Mr. Justice Anglin at page 84 of the Bonanza case says this—

VISCOUNT HALDANE: I think we need not read his setting right of Mr. Justice Cassels. SIR ROBERT FINLAY: No, it is rather good reading, but I do not think I ought to occupy time with it. I think I should read at page 85, line 41:

> "The allusion—sufficiently obvious, I thought—was to the passages in my opinion where I had discussed this question and stated the grounds on which I based my affirmative answer."

VISCOUNT HALDANE: Should not you go straight to Mr. Justice Anglin's judgment in the other case? SIR ROBERT FINLAY: I think it would be desirable because this is largely taken up by pointing out that the misconception of Mr. Justice Cassels was complete with regard to what he said; I think it will save time if I go straight to his judgment in the other case. There is one passage which my friend thinks I should read at page 87:

> "The recent decision of the Judicial Committee in *John Deere Plow Co.* v. *Wharton* was pressed upon us by counsel for the respondent. After a careful study of the judgment in that case I fail to find in it anything which conflicts with the views above expressed. All that was there decided is that a 'province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and power of a Dominion company as such cannot be destroyed by provincial legislation.'
>
> "Certain provisions of the British Columbia Companies' Act requiring the appellant, a Dominion company, 'to be registered in the province, as a condition of exercising its powers or of suing in the Courts,' were held to be 'inoperative for these purposes.'
>
> "'The question,' says the Lord Chancellor, 'is not one of enactment of laws'"—

VISCOUNT HALDANE: Then he quotes the Lord Chancellor, and he quotes himself. SIR ROBERT FINLAY: Line 19, page 88:

> "I am, for these reasons, of the opinion that question (a) should be answered in the affirmative.
>
> "This case affords a striking illustration of the undesirability of having the Judges of this Court express opinions upon abstract questions."

Then, my Lords, in the Companies' case, page 87,—

VISCOUNT HALDANE: It is really a very good judgment. SIR ROBERT FINLAY: Yes, my Lord: Mr. Justice Anglin:

> "In this reference we are confronted with what the Judicial Committee has characterized as 'a series of searching questions'"—

VISCOUNT HALDANE: I think you need not read that; he is simply quoting our reflections. SIR ROBERT FINLAY: I think I had better begin probably at the top of page 88:

> "The only clauses in the British North America Act in which any reference is made to the incorporation of companies are No. 15 of section 91, 'banking, incorporation of banks,' and the issue of paper money,' and No. 11 of section 92, 'the incorporation of companies, with provincial objects.' If the 'incorporation of banks' had been omitted from the enumeration of legislative powers of Parliament, and section 92 did not contain clause 11, in my opinion, the faculties of the Dominion Parliament and of the Provincial Legislatures, in regard to incorporation, would under the other provisions of the British North America Act, have been the same as they are with these two clauses in the statute. The creation of a corporation may be regarded as a means appropriate, convenient and sometimes necessary to the efficient exercise of plenary legislative power in regard to many of the enumerated subjects of legislation comprised in both categories of powers federal and provincial—under the British North America Act. The power of the Dominion Parliament to create corporations other than banks is unques-

tionable under 'the peace, order and good government' provision if not under several of the enumerated clauses of section 91. *Citizens Ins. Co.* v. *Parsons*, 7 A. C. 96, 116, 117; *Colonial Bldg. Association* v. *Atty-Gen. of Quebec*, 9 A. C. 157, 164-5. Is it open to doubt that, if the words 'the incorporation of banks,' in clause 15 of section 91, had been omitted, the power—and the exclusive power—of incorporating banks would have belonged to the Federal Parliament? I think not."

VISCOUNT HALDANE: Why not. SIR ROBERT FINLAY: I think that he means this, if they had been give sole jurisdiction with regard to banks that would have carried with it the power of incorporating banks, and your Lordships recollect there have been several cases in which it has been pointed out that the power of incorporation does not necessarily carry with it the power to legislate with regard to the subject of incorporation. Then line 20:

"If clause 11 of section 92 had not been inserted in the statute could the exclusive right of Provincial Legislatures to create municipal corporations, or charitable or eleemosynary corporations (probably not covered by the word 'companies' in clause 11), or companies for purely local purposes be questioned? Again, I think not. And it is I think, equally clear that, although the word 'companies' in clause 11 should not be taken to include such bodies as municipal corporations or charitable or ecclesiastical corporations, the presence of that clause in section 92 does not negative the provincial power of incorporating these or other provincial corporations to which it does not apply.

"What then was the purpose and effect of the introduction of clause 11 amongst the enumerated exclusive legislative powers in Provincial Legislatures? I think it was intended to preclude the contention that, if the power of incorporation should be regarded as a substantive and distinct head of legislative jurisdiction, it was wholly vested in the Dominion Parliament as part of the residuum under the 'peace, order and good government' provision of section 91, (see *Citizens Ins. Co.* v. *Parsons*, 7 A. C. 96, 116, 117), because not expressly mentioned in the enumeration of provincial powers and to make it clear that this power, if so regarded, is divided between the federal and provincial jurisdictions as conferred in part on the latter by clause 11 of section 92, and in part on the former, in the case of banks by clause 15, and in case of other Dominion corporations, under the 'peace order and good government' provision of section 91.

"When it was deemed advisable to introduce into the list of provincial legislative powers a reference to the incorporation of companies the delimiting or qualifying words 'with provincial objects' were added in order to preclude the contention that the exclusive legislative power expressed in clause 11 comprises the whole field of incorporation, to assure the Dominion its jurisdiction in regard to incorporation as a convenient means of effectively legislating in regard to the subjects assigned to it and to serve as an index of the line of demarcation between the two legislative jurisdictions. It was thus made clear that from provincial jurisdiction there was excluded the incorporation of companies with Dominion objects—companies for the carrying on of works and operations within the legislative jurisdiction of the Parliament of Canada—companies formed for the transaction of affairs 'unquestionably of Canadian interest and importance.'"

"Notwithstanding the introduction of this clause, I think, the powers of the Dominion Parliament and the Provincial Legislatures, respectively, in regard to incorporation are precisely what they would have been had it been omitted from the Act, and had the power of incorporation been treated not as a distinct and substantive head of legislative jurisdiction—an end in itself—but as a means for the working out of legislative power in respect of the enumerated subjects and as such conferred as incidental to legislative jurisdiction over them. I regard clause 11 as an instance of the express declaration in a statute of what the law would imply made in the hope that all doubt as to the intent of Parliament should be removed. *Abundans cautela non*

nocet. Yet, assuredly, language of more certain import and less provocative of controversy might have been chosen.

"The Judicial Committee has, on at least four occasions, affirmed the exclusive power of the Dominion to incorporate companies whose capacities, as set forth in their constating instruments, expressly entitle them to operate in more than one province. *Colonial Bldg. and In. Association* v. *Atty.-Gen. of Ont.*, 9 A. C. 157, 165; *Citizens* v. *Parsons*, 7 A. C. 99, 116; *Dobie* v. *Temporalities Board*, 7 A. C. 136, 152; *Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Co.*, 1909, A. C. 194. A similar view was taken by the late Chief Justice of this Court in *Hewson* v. *Ont. Power Co.*, 36 Can. S. C. R. 596, 604. Yet had the object of such companies not been expressed as intended to be carried out in more than one province they might properly be regarded as provincial.

"It is argued, and with much force, that if a Provincial Legislature may not in express terms confer on its corporate creature power to operate outside the territorial limits of the province, and if a provincial charter purporting to confer such extra-territorial powers is *ultra vires*, it follows, that in every provincial charter there must be implied the limitation that the exercise of the power of the company (at least what have been called 'functional' powers or objects, as distinguished from incidental powers), shall be confined to the territory of the province, and that a provincial corporation upon whose objects or powers no territorial restriction is expressly imposed is, nevertheless, subject to the same limitation as if its operations were by its charter expressly confined to the province. No doubt that is the case when the nature of the objects of the corporation indicates that they are to be carried out in a certain locality within the province, e.g., the establishment and maintenance of a hospital or the building of a railway. But I find nothing in the language of clause 11 of section 92 of the British North America Act which compels us to hold that the ordinary mercantile trading or manufacturing company incorporated by a province to do business without territorial limitation is precluded from availing itself of the so-called comity of a foreign state or of a province which recognizes the existence of foreign corporations and permits their operations in its territory. Of course, such foreign operations must be of the class authorized by the constating instrument of the company and not in contravention of the law or policy of the State in which they are carried on."

VISCOUNT HALDANE: That is the view of the law we have been discussing this morning, that you can apply the doctrine of *Ashbury Railway Carriage, etc. Company* v. *Riche*, so that if the instrument creating the corporation limits its existence, the outside State cannot add anything to that corporation inconsistent with its nature; on the other hand, that if it is not so and you constitute a corporation in full, then they can take advantage of what an outside State does. SIR ROBERT FINLAY: Yes, my Lord. On the other hand, it is fair to remember that Mr. Justice Anglin was not in this passage considering the effect of the quasi-incorporation, if I may use the expression, which may result from the act of a foreign State in making a grant nominally to the old corporation, it may be that the effect of creating what is so to speak a new corporation—

THE LORD CHANCELLOR: Your point has been, as I followed it, so far as the validity of the grant is concerned, it makes no difference whether the company was limited by its charter or memorandum; it was an entity, and if the foreign Government chose to treat it as a corporation to whom a grant was made, that was made. SIR ROBERT FINLAY: That is my position. I say within or without the powers of the Ontario charter what was done in Yukon was sufficient to constitute the company a quasi-corporation there, so that the Government could not dispute the validity of its grant, just as in the case of the British company in France.

VISCOUNT HALDANE: You must bear in mind we are not dealing with an outside foreign Government, but the Dominion under distribution of powers which is itself a matter of Statute. It may make a difference. SIR ROBERT FINLAY: It may, but at the same time there are very cogent reasons I submit for not con-

cluding that the very stringent restriction which has been contended for of late years should be imposed upon the provincial powers of incorporation.

THE LORD CHANCELLOR: At any rate, the grant by the Dominion of a lease to this company incorporated in Ontario could not possibly infringe upon the provincial rights: nobody could say it was in derogation of the provincial rights. SIR ROBERT FINLAY: No, as regards Yukon and the grant of territory by the Crown I submit it is quite impossible for the Crown in face first of its license to carry on mining operations in Yukon, secondly in the face of the grant of the free miner's certificate, and thirdly in the face of its recognition of this company as assignee of these three leases and its receipt of rent during all these years, to set up the case which it seeks to set up by the first and second paragraphs.

VISCOUNT HALDANE: Suppose you are right, does not this consequence happen, assuming that by the Ontario law the capacity of the corporation had been definitely limited so that it was not within its power to accept this concession, would not it be the case that in the Ontario Courts they would have to say the acceptance was not the act of the corporation? SIR ROBERT FINLAY: They probably would.

VISCOUNT HALDANE: If so would not there be a conflict between the Dominion and province? SIR ROBERT FINLAY: I submit not; the rights would have to be worked out; the effect of what was done in Yukon was really to give something for the benefit of the shareholders in the Ontario company which by the terms of its incorporation had no authority to take such a benefit.

VISCOUNT HALDANE: You go into the Exchequer Court, which I think is a Dominion Court, and there different law is applied. This corporation is recognized as having no capacity by Ontario law, but by Dominion law as having capacity. That is what has troubled me throughout this part of the argument. SIR ROBERT FINLAY: Yes, but I submit that does not affect the cogency of the arguments under the first branch of the case resting under the recognition in Yukon of the title being complete as against the Crown and the invalidity of paragraphs 1 and 2 of the answer of the Petition of Right.

THE LORD CHANCELLOR: The point, it seems to me, if I understood your argument aright is this, that as between the company and the Dominion the only thing to be considered was, was there a corporate entity to whom the Dominion could convey land, and that was independent entirely of whether or no the corporate entity was entitled by its memorandum of association to hold land. SIR ROBERT FINLAY: Certainly. Even if it was *ultra vires* of the company to hold land in Yukon, if you look only at the Ontario charter, yet the Crown grant in Yukon supplied that deficiency.

THE LORD CHANCELLOR: Conferred the right on it. SIR ROBERT FINLAY: Conferred the right on it.

THE LORD CHANCELLOR: At any rate as between the Crown and the company. SIR ROBERT FINLAY: At any rate as between the Crown and the company, which is all we are concerned in in this Petition of Right.

VISCOUNT HALDANE: Even so, supposing the Ontario Legislature had said affirmatively it was not to be within the capacity of the corporation to accept a grant and the Dominion had done it, having regard to the fact that in Canada the legislative powers are distributed under a Statute, could it have been said in any of these Courts that that corporation had capacity— SIR ROBERT FINLAY: For this reason, if I might refer to illustration put early in the case of a French company coming to England, and the Crown making a grant, and it turned out that the Crown supposed it had a capacity to take it by its French charter which it did not possess. Inasmuch as the Crown has the power of incorporating in England, that grant of the Crown would confer upon the Company power to hold, creating, if it may be, a new company.

VISCOUNT HALDANE: We are thinking of different things. That is probably so by French law; it would be so by the English common law where there was a prohibition, as in the Sutton Hospital case—I am thinking of the doctrine laid down by Lord Cairns in *Ashbury Railway Carriage, etc. Co.* v. *Riche*, where he said the whole existence of the corporation arose from the words of the Act of Parliament—under the memorandum.

THE LORD CHANCELLOR: He was dealing there with domestic matters pure and simple. See if I have my mind clear on the point. The validity of this grant as between the Crown and the Ontario company must be determined according to the law of the place where the grant was made. SIR ROBERT FINLAY: Yukon.

THE LORD CHANCELLOR: For that purpose it is not necessary to invoke the laws of Ontario at all. Therefore if by the laws of that place the grant could have been made in that place, the grant cannot be challenged. SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: The Act itself contemplates that a grant may be made to a certain class of juristic persons. As long as the Ontario company fell within that class the power to grant the lease was perfect according to the Yukon law. SIR ROBERT FINLAY: Yes, my Lord. I therefore submit that for the purposes of this case the title of the Bonanza company is complete as against the Crown, and that the objection to this Petition of Right raised in the first and second paragraphs entirely fails. But then I go further, and I say that on the general question the company by the law of Ontario had capacity to take.

THE LORD CHANCELLOR: Success is not all that you desire in this case. SIR ROBERT FINLAY: I want to succeed in this case.

THE LORD CHANCELLOR: As well as the other. SIR ROBERT FINLAY: I want to succeed on both grounds. The first ground is enough for success in this particular case, but I want the general principle.

LORD PARKER: Why do you put that the company had according to the law of Ontario capacity to take? You get into a difficulty there. No state can legislate what the capacity shall be of any of its creations outside its own Dominions. SIR ROBERT FINLAY: No, I should have been more accurate if I had said what it got from the Legislature of Ontario coupled with what it had from Yukon. You had in Ontario a juristic being created. That juristic being could take the grant from the Government of Yukon.

VISCOUNT HALDANE: If you take Lord Cairns' judgment he says in *Ashbury Railway Carriage, etc., Co.* v. *Riche* (L. R. 7 House of Lords, at page 670) this of the incorporation memorandum:

> "It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified."

That wholly distinguishes the case from an English common law corporation or from a French company, as we may presume it to be—I do not know about that. SIR ROBERT FINLAY: In the case of the French Company it would be a matter purely of the French law; the advisers of the Crown might have made a mistake as to what the French law allowed the corporation to do.

VISCOUNT HALDANE: They might, but take what we have here. Take an Ontario company which was prohibited from receiving this grant so that it did not exist for the purpose of receiving this grant; the question whether it could receive must be decided according to Ontario law. SIR ROBERT FINLAY: As regards the internal constitution of the Company.

VISCOUNT HALDANE: As regards everything. SIR ROBERT FINLAY: Not as regards the validity of the grant by the Crown in Yukon according to the law of Yukon.

VISCOUNT HALDANE: It may be my stupidity, because other people seem to think otherwise, but I cannot understand the doctrine if the law applicable is Ontario law, and we are dealing with the constitution and the law as distributed. SIR ROBERT FINLAY: The law applicable is not merely Ontario law, because in Yukon the Crown possess the power of incorporating.

VISCOUNT HALDANE: If you say a new corporation is made, I understand what you mean, but I say the Act is not the act of the company in question. SIR ROBERT FINLAY: I agree scientifically, I think it is a new corporation.

VISCOUNT HALDANE: It is scientifically that we must deal with this. SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: It is certain we shall be up against the broader proposition in the other case, but to answer this case the point I understand is nothing but this: the Dominion have in fact made a grant in Yukon to a corporate entity, and according to the law of Yukon they are now saying it is bad. The validity of that grant must be determined according to the law where the grant was made. SIR ROBERT FINLAY: I submit so.

THE LORD CHANCELLOR: It does not necessarily follow that the law of Ontario comes into consideration—

VISCOUNT HALDANE: They may have made a new corporate entity; they cannot enlarge the power of the Ontario entity.

THE LORD CHANCELLOR: That may be the question ultimately to be determined in a dispute between the shareholders and the company, but if the Crown have said, here is a corporate entity that we will recognize and have made a grant to that corporate entity in a place where the Ontario laws do not exist and cannot prevail, it may be difficult to see how it is asserted in that very place that the grant is bad. SIR ROBERT FINLAY: I submit it cannot, and I realize what is to be said for the view that it really is the creation of a new corporation because it is conferring upon that corporation, the Ontario corporation in Yukon, a right which *ex hpothesi*—contrary to my argument on the other part of the case, of course—it did not possess by its charter of incorporation in Ontario.

LORD PARKER: You get this question of re-incorporation, which is more or less a metaphysical question; you may have it in all sorts of other cases; you may have a Crown creation of certain powers and you may have a supplementary charter with other powers. From the point of view of abstract learning it may be two; because the powers are the same. It depends whether you view the powers as part of the provincial corporation or whether you do not. SIR ROBERT FINLAY: Strictly it is a new corporation where there is a supplementary charter, but practically speaking it enures for the benefit of the shareholders in the old corporation, and no one can doubt that such a grant in Yukon would be available for the benefit of the shareholders in Ontario; it could not be derelict, so to speak. The shareholders in Ontario are all shareholders in what may be called the new company in Yukon, and in their capacity as shareholders in the company in Yukon they are entitled to the benefit of these grants. I submit the thing would work out with perfect strictness in practice and you avoid imposing that tremendous fetter upon the operations of provincial companies which the view for the Dominion would impose.

VISCOUNT HALDANE: You may avoid having to decree the documents in this case as nullities, but it does not follow that you throw any light on the construction of the British North America Act on the abstract question. SIR ROBERT FINLAY: That depends on the second head, independent of the other.

VISCOUNT HALDANE: The larger head. SIR ROBERT FINLAY: The first head is one of very great importance; it relates to the rights that may be acquired in other provinces by Crown grant.

But apart from that altogether, which I say decides this case in favour of the company, when you come to the construction of the British North America Act I submit that the Legislature of Ontario could create a corporate entity and that that had power and capacity to take any grant that might be made to it.

VISCOUNT HALDANE: That argument I understand. SIR ROBERT FINLAY: If the other is not intelligible it must be my fault. Surely where the Crown of this country gave a grant to a French corporation which has not capacity by its charter to take land in England, that grant would not be inoperative. The Crown possessing the power of incorporation must be taken to have impliedly incorporated anew in England the French company for the purpose of taking the grant.

VISCOUNT HALDANE: That may well be so, but if you went to France they would say, this is not our incorporation. You are dealing here with sections 91 and 92 of the British North America Act. SIR ROBERT FINLAY: I think the French Courts in dealing with any proceedings in France would hold, the shareholders in the new company in England being the same persons as the shareholders in the French company, whatever they had got they would compel them to hand over to themselves in the capacity of shareholders in the French company.

VISCOUNT HALDANE: How would this question be answered: The question raised is whether it is within the power of the Dominion Government under the peace, order and good government words, to amplify the power of a provincial company incorporated within exclusive provincial powers. Is that within the competence of the Dominion Government? Offhand I should have said certainly not. SIR ROBERT FINLAY: Your Lordship must look at it with reference to the particular territory or province where the grant is made. Here in Yukon the leases are granted by the Crown. Yukon is the territory and the licenses are granted by the Crown partly in right of the territory, partly in right of the Dominion, and in fact one may say altogether in right of the Dominion, because the territory is administered by the Dominion; any power the Legislature of Yukon has is only delegated by the Dominion Parliament. I submit that under these circumstances it must be within the power of the Dominion Government to make the grant to any juristic person it finds, whether by the law of the province of creation that juristic person would or would not have had it *intra vires*, to take land in the particular locality. Lord Cairns at page 673 refers to what Mr. Justice Blackburn said and his statement that if a Statute, the Statute incorporating the corporation, expressly forbade a particular thing, it would take away the right to do it. The whole passage in Mr. Justice Blackburn's judgment in the Exchequer Chamber is very important in this connection, if I might refer to it at this moment. It begins at the bottom of page 262 of the report in the Law Reports, 9 Exchequer.

VISCOUNT HALDANE: It is a very important judgment and much too seldom referred to. SIR ROBERT FINLAY: Everything that Mr. Justice Blackburn said in point of principle is accepted by Lord Cairns, the only point on which he differed from Mr. Justice Blackburn was on the question whether the effect of the Companies' Act was an enactment overriding what the common law powers would have been.

> "I do not entertain any doubt that if, on the true construction of a statute creating a corporation, it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void; and to hold that a contract wholly void cannot be ratified."

VISCOUNT HALDANE: That does not leave any loophole for a foreign contract or a foreign consent. SIR ROBERT FINLAY: No, but the way Mr. Justice Blackburn applies that in construing the enactment is this. He was not dealing at all with the effect of a Crown grant to a foreign corporation, or a Crown grant to a corporation created by a province of such a Dominion as Canada. What he was dealing with was purely English corporations, and he says that for the purpose of seeing whether the Statute does impose that limitation it is of very great importance to ascertain what the common law power of a corporation is.

VISCOUNT HALDANE: On that point he was overruled by Lord Cairns. SIR ROBERT FINLAY: Not on the question of the propriety of looking at the common law, but he was overruled on the construction of the Act that the effect of the Act was to override the common law.

VISCOUNT HALDANE: Yes, but I think the reason was that Lord Cairns said you must find the whole meaning of what is done within the words of the statute. SIR ROBERT FINLAY: He so read the statute. I should like to make good what I said by reading on a little in the following paragraph at the bottom of page 262:

> "But it is of great importance, when we come to construe a statute creating a corporation, to consider what would be the incidents at common law conferred on a corporation created by charter. The leading authority on this subject is the case of Sutton's Hospital." There were many points raised in that case. Those which I think material to the present point arose on a part of the charter set out in the special verdict, by which the King incorporated the first governors of the charterhouse, and expressly provided: 1. That they should have power to purchase, etc., as well goods, chattels, etc., as lands. 2. To sue, and be sued. 3. To have a common seal, 'whereby

the same corporation shall or may seal any manner of instrument touching the said corporation and the manor lands, etc., thereto belonging or in any wise touching or concerning the same. Nevertheless, it is our true intent and meaning that the said governors for the time being and their successors, nor any of them, shall do, or suffer to be done, at any time hereafter, any act or thing whereby or by means whereof any of the manors, etc., of the said incorporation, or any estate, etc., shall be conveyed, etc., to any other whatsoever contrary to the true meaning hereof, other than by such leases as are hereafter mentioned, and that in such manner and form as is hereafter expressed, and not otherwise.' The King, therefore, by this charter not only did not in express terms give a power of alienation, but by express negative words forbad any alienation except by lease. But the resolution of the Court, as reported by Coke (at p. 30 b), was that 'when a corporation is duly created all other incidents are tacitly annexed . . . and, therefore, divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As, 1, By the same to have authority, ability, and capacity to purchase; but no clause is added that they may alien, etc., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, etc.; that is also declaratory, for when they are incorporated they may make or use what seal they will. 4. To restrain them from aliening or demising, but in a certain form; that is an ordinance testifying the King's desire, but it is but a precept and doth not bind in law.' This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case. If there are conditions contained in the charter that the corporation shall not do particular things, and these things are nevertheless done, it gives ground for a proceeding by *sci. fa.* in the name of the Crown to repeal the letters patent creating the corporation: see *Reg.* v. *Eastern Archipelago Company.* But if the Crown take no such steps it does not, as I conceive, lie in the mouth of the corporation, or of the person who has contracted with it, to say that the contract into which they have entered was void as beyond the capacity of the corporation. I am aware of no decision by which a corporation at common law has been permitted to do so. I take it that the true rule of law is, that a corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at common law has a capacity to contract to the extent given it by the instrument creating it, and no further, the question would be, 'does the statute creating the corporation by express provision, or by necessary implication, show an intention in the legislature to confer upon this corporation capacity to make the contract?' But if a body corporate has, as incident to it, a general capacity to contract, the question is, 'does the statute creating the corporation by express provision, or necessary implication, show an intention in the legislature to prohibit, and so avoid the making of, a contract of this particular kind? I think this is the real question, and for that I refer to the judgment of Parke, B., in *South Yorkshire Railway Company* v. *Great Northern Railway Company,* and the various other cases cited by my late brother Willes and myself in *Taylor* v. *Chichester and Midhurst Railway Company.* And when we are construing a statute creating and regulating a corporation, it is right to bear in mind that, as Lord Coke, says: 'It is a maxim in the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law': 2 Inst. 200. Affirmative words may no doubt be used so as to imply a negative, see Plowden, Com. 113, but I take it the general principle is that

thus laid down by Cresswell, J., in the *Eastern Archipelago Company* v. *Reg.*, 'that to make the words giving an express liberty or right have the effect of controlling or limiting that which would otherwise exist, they must be very plain.'" Then he says: "I now come to consider the construction of the Act of 1862."

THE LORD CHANCELLOR: I want to ask you a question on this case. There had been a concession by the Belgian Government to construct a railway, and as I read the facts the benefit of that concession together with the benefit of certain contracts had ultimately been assigned to the company, The Ashbury Railway Carriage, etc., Company. SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Upon one of those contracts an action was brought against them by a Belgian subject? SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Do you say there would have been any difference if that action had been brought in Belgium? SIR ROBERT FINLAY: Yes, I say that there would.

THE LORD CHANCELLOR: Why? SIR ROBERT FINLAY: It is a grant from the Crown.

THE LORD CHANCELLOR: I know it is.

LORD PARKER: I gather that the concession had been granted in Belgium validly to a certain person by a series of assignments and ultimately by an English assignment it had become vested in this company?

THE LORD CHANCELLOR: No. SIR ROBERT FINLAY: I understood the Lord Chancellor's question to have been, if the concession had been granted in Belgium by the Crown to the company.

THE LORD CHANCELLOR: Assume it if you will that way; I do not think myself that the thing ever came through an English assignment; I think it came through a Belgian assignment. I do not think there ever was an English assignment. SIR ROBERT FINLAY: I think it was a purchase by the company. If your Lordship will look at page 224 in the head note, the second paragraph says:

"The defendants' directors in January, 1865, entered into contracts on behalf of the company, by which the company became purchasers of a concession"—

THE LORD CHANCELLOR: But I think they had bought from the Belgian. SIR ROBERT FINLAY: Yes, I think so.

THE LORD CHANCELLOR: That contract therefore fell to be determined by Belgian law. SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: There is nothing said about Belgian law in the case? SIR ROBERT FINLAY: No, my Lord.

THE LORD CHANCELLOR: If by Belgian [illegible] as been competent to assign to a corporate entity such as this according to [illegible] view this case was wrongly decided? SIR ROBERT FINLAY: No, my Lord, because the grant was not made by the Crown to the company.

THE LORD CHANCELLOR: That is not the question for the moment. That is a question whether the Crown would be estopped, but for the purpose of determining whether there had been a good assignment in Belgium to this company I understood you to say that has to be determined by Belgian law, therefore if the comity of nations recognizes the company as a corporate entity to whom such an assignment could be made it is good, notwithstanding that it would be bad here. SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: That would completely alter the whole decision. SIR ROBERT FINLAY: Surely not, because you had not there the vital element that the grant was direct from the Crown to the Company.

THE LORD CHANCELLOR: For the purpose of my hypothesis that does not matter, because the hypothesis I make is that you can deal with a corporate entity in Belgium according to the law of Belgium as though it were an ordinary Belgium citizen.

LORD PARKER: The difficulty is that you get into a conflict of what is called private international law. In everything that is concerned with the status of a company in this country we treat our own law as regulating its capacity. We

should do it with regard to a foreign corporation as a rule and if Belgium adopts that same principle of international law the question is answered. If it does not we cannot say what would happen. But the point of this particular case that we are dealing with here is, by what has the force of an Imperial statute the Governor of the territory of Yukon has the power to grant these leases or licenses to a provincial company without inquiring into the capacity of that company in the province?

VISCOUNT HALDANE: By a Dominion statute. SIR ROBERT FINLAY: By a Statute of the Dominion.

VISCOUNT HALDANE: It is only made under the powers of section 91.

LORD PARKER: If it is within those powers it has the force of an Imperial statute.

VISCOUNT HALDANE: Any legislation under that must be read consistently with legislation passed validly— SIR ROBERT FINLAY: Surely the power of legislating for a territory like Yukon is vested in the Dominion Parliament.

VISCOUNT HALDANE: Not so as to interfere with powers under section 92. SIR ROBERT FINLAY: Well, if it were absolutely in conflict, but I say it is not. The question really does not arise. There is no actual conflict because you may perfectly well even if there were some lack of power make the grant.

THE LORD CHANCELLOR: The worst that can be said against you is that there are no powers of the Provincial Government outside and consequently there is no interference at all.

VISCOUNT HALDANE: No power outside, and no corporation. If Sir Robert takes the smaller proposition and say that this is an *Ashbury* v. *Riche* case there is the difficulty it seems to me, the conflict between Dominion and provincial legislation. The province says the ambit and vitality is so and so. The Dominion says: We are going to make it larger. Can you do that? SIR ROBERT FINLAY: The bearing of *Ashbury Railway Carriage, etc., Company* v. *Riche* on the present case is only this. Mr. Justice Blackburn said in construing the statute you must bear in mind what powers the corporation had at common law.

VISCOUNT HALDANE: That was wrong. SIR ROBERT FINLAY: No, I do not think Lord Cairns said that that was wrong, but he said that the construction of the statute was erroneous.

VISCOUNT HALDANE: But that was the point. It was for the purposes of construction Mr. Justice Blackburn took the thing into account and Lord Cairns said that was wrong. SIR ROBERT FINLAY: Lord Cairns said taking all that into account the words of the statute are clear and they overbear. All the effect of *Ashbury Railway Carriage, etc., Co.* v. *Riche*, on the present case is this, that in construing this statute you must bear in mind what the general powers would be and must endeavour to arrive at a reasonable interpretation which will not render void what has been done.

VISCOUNT HALDANE: I am testing your argument by putting an extreme case. I am saying that suppose the province had enacted, by direct statute if you like because they might have done it so, that this company which was incorporated for provincial purposes was not to take a lease in Yukon, and then it had gone to Yukon and the Dominion had said: 'Oh, yes, we have residual powers under section 91, and we will enact that this company may take a lease in Yukon, do you suppose for a moment Dominion powers would have prevailed against provincial? SIR ROBERT FINLAY: I submit they would not exactly prevail against the provincial, but it would have created what in every case of the grant of a new charter happens, a new company.

VISCOUNT HALDANE: I am not sure that it would not have been in the first place *ultra vires* legislation. It may create an entirely new body, that is quite true, but what power has it of any sort or kind to modify anything which is done under the exclusive capacity?

LORD PARKER: Legislation that a company incorporated by one province are not to do a thing in another province is interfering with the other province. SIR ROBERT FINLAY: It is not interfering with Ontario it is only dealing with Yukon.

VISCOUNT HALDANE: If the exclusive power of incorporating is given to the province it can say that the company is estopped.

LORD PARKER: You can construe that by saying, the other province shall not make a grant if it chooses to. That interferes with the power of the other province.

VISCOUNT HALDANE: Not in the least. Suppose the province has said it is not to be done, how can any other province do this? SIR ROBERT FINLAY: May I put it in this way, that the incorporation of companies in Yukon is exclusively for the Legislature of Yukon.

VISCOUNT HALDANE: You are talking of the incorporation of the new company? SIR ROBERT FINLAY: Yes.

VISCOUNT HALDANE: If you are talking of the provincial company, then I have more difficulty. SIR ROBERT FINLAY: You really have to face this case. You have to consider whether, if this action had been brought in Belgium, the result would have been the same.

VISCOUNT HALDANE: I have no doubt it would.

LORD PARKER: If the law of Belgium had been different, it would not.

THE LORD CHANCELLOR: According to the argument you are discussing, it does not depend upon the identity of laws. Your suggestion is that a foreign country can grant to a corporation power to carry on business outside the area within which it is incorporated. SIR ROBERT FINLAY: No, my Lord.

THE LORD CHANCELLOR: That depends upon the law of the foreign country. Applying that to this case of the *Ashbury Railway Carriage and Iron Company* v. *Riche*, the contract was made in Belgium and made with a corporate entity and the corporate entity being registered in Belgium, the contract would have been there.

LORD PARKER: But *non constat* according to the Belgian law they could grant it in this particular case. There is a statute enabling it to be done.

THE LORD CHANCELLOR: That would depend upon whether the concession and contract were good for another reason altogether, namely, the power of the person to grant it. That is a different thing. SIR ROBERT FINLAY: In Yukon you have in force a statute which, beyond all question, is good, and that says that licenses and certificates may be granted to provincial companies. Those licenses, those certificates and those leases are granted to the provincial company of Ontario.

VISCOUNT HALDANE: I should have doubted very much whether it was in the power of the Dominion to enact that it could make grants to provincial companies when their province said they were not to accept them. SIR ROBERT FINLAY: That does not in the least trench upon the capacity of the company in Ontario. It does not in the least trench on the law of Ontario.

VISCOUNT HALDANE: Supposing the only capacity to accept it was the Ontario law. SIR ROBERT FINLAY: I cannot accept that restriction.

VISCOUNT HALDANE: You must say it is within the capacity of the Dominion to enlarge the powers of a provincial corporation. SIR ROBERT FINLAY: Whichever way it is taken I submit it comes to this, that what was done was lawful by the laws of Yukon.

LORD PARKER: It has been held over and over again that if the Crown grants to a fluctuating body of men who are not capable at common law of holding land, they create them a corporation. SIR ROBERT FINLAY: Otherwise, it would be inoperative. Having regard to one of the maxims that Coke lays down for construing statutes, you must regard the state of things that existed before the Act was passed, the law before the evil which was intended to be remedied, and the nature of the remedy. Here you must look at the state of things when this Act was passed, and I submit we are entitled also to look at the uniform practice for, I suppose, very nearly half a century with regard to these companies and the consequences that would follow from the contention of the Dominion. I think that it has always been recognized that where words are capable of one meaning only *cadit questio*, but where a statute can be construed in two ways there is a proper inclination to the construction which does not entail grave public inconvenience. It is enough for me that, viewing it as a new corporation, it is beyond challenge, but one gets into very nice questions of identity whenever

one considers a continuous identity of any article. There is the famous illustration of the knife. It is a very nice question indeed.

VISCOUNT HALDANE: I do not think it was ever contemplated by the British North America Act that the Ontario Courts should decide a question in one way and the Yukon Courts decide it in another. They were to find out what was the law. SIR ROBERT FINLAY: It is not really the same question.

THE LORD CHANCELLOR: Will you for a moment assume it was outside the power conferred by the Ontario charter. Supposing you had liquidation of a company in Ontario what would happen to its property? SIR ROBERT FINLAY: I think it would be made available for the Company.

THE LORD CHANCELLOR: Surely, according to the law of Ontario, that is not possible. SIR ROBERT FINLAY: I may be wrong about that.

THE LORD CHANCELLOR: That is rather important. SIR ROBERT FINLAY: It would belong to the same individuals.

THE LORD CHANCELLOR: The grant being made to a corporation. SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: You are going to wind up the corporation. SIR ROBERT FINLAY: The corporators are the same.

THE LORD CHANCELLOR: They may or may not be. The shares may have changed hands between the time when the property was acquired and the time when the company is wound up. SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: What happens when it is wound up? SIR ROBERT FINLAY: I should have thought perhaps it was more a sense of crude natural equity that it would be made available for the credit of the Ontario company. It may be that is wrong.

THE LORD CHANCELLOR: That will not agree with the decision in *Ashbury Railway Carriage and Iron Company* v. *Riche*. They held in that case that it was perfectly impossible for the corporate body to hold the property. SIR ROBERT FINLAY: Supposing a corporate body has got a property, surely that property may be made available. It is always made available because they have got it. If they have been stopped in the process of getting it, it is another matter, but when they have got it it goes in the assets of the company.

LORD PARKER: I have never known a Court throw it away for the benefit of somebody else. SIR ROBERT FINLAY: The question that one has to deal with is: Did it get it?

THE LORD CHANCELLOR: Would not the position be this in the winding up: They would say the directors of the company have misappropriated the funds of the company in acquiring this concession; they must make them good to the company at once. SIR ROBERT FINLAY: Of course, proceedings of that kind may be taken, but having regard to the fact that they have got the property, could not it be made available for the credit of the creditors if there was a winding up? I should submit to your Lordships they could, because the thing has been carried through. What would be the result of the other view? That the Yukon grant is good as against the Crown does not admit of doubt. That being so, who has got the property; is it the new corporation? the old Ontario company rehabilitated so as to be in law a new creature in Yukon having the same shareholders and the right to enjoy the property and withhold it from their creditors in Ontario.

VISCOUNT HALDANE: In a winding up what would the Court do when the directors apply funds *ultra vires*? Does it do anything more than say the directors are to put back the funds? SIR ROBERT FINLAY: They could do that, I agree, but supposing the property acquired with the funds is available they can follow the funds into the property.

VISCOUNT HALDANE: Or they can make the directors hand it back. SIR ROBERT FINLAY: That was pointed out very elaborately in a series of judgments in the House of Lords in that recent case about the Birkbeck Bank. Your Lordships recollect that the powers of the company had been exceeded, and it was pointed out in a series of judgments which go into the whole thing most elaborately, that you can follow the property, while, on the other hand, you could

not bring an action for money had and received on any implied contract inasmuch as the matter being *ultra vires*, you could not imply a contract. My point is this: Here you have the land. The assets of the company have been applied in getting it. You can follow that.

VISCOUNT HALDANE: You can follow and get a charge on what they have invested it in. In the Birkbeck case, money had been lent to various individuals for an illegal purpose, and it was held that you could follow the money in their hands. SIR ROBERT FINLAY: I submit to your Lordships that my offhand answer with regard to the rights in a possible winding up in Ontario was right.

THE LORD CHANCELLOR: You would not dispute, would you, that assuming it was *ultra vires* of the power of the company formed in Ontario, at the very least the shareholders would repudiate it. There is no doubt about that. SIR ROBERT FINLAY: No.

THE LORD CHANCELLOR: If the shareholders it, to whom would it belong then? SIR ROBERT FINLAY: If they repudiated the whole transaction and sought to make the directors repay the money?

THE LORD CHANCELLOR: Yes. You would then say possibly that the directors if they paid the money would be entitled to a conveyance from the company of the land. SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: They might be entitled to hold it under the laws of Yukon. What would happen then? SIR ROBERT FINLAY: It would be almost unsaleable.

THE LORD CHANCELLOR: It is a very improbable position. SIR ROBERT FINLAY: I should hope not because under the laws of Yukon they could get a license and the directors would be entitled to have it.

LORD PARKER: These abstract questions do not arise as a matter of fact. The property is either valuable or not. If it is not valuable you go against the directors, if it is valuable, you take the property. SIR ROBERT FINLAY: This property is the property of nobody. It is not property of the Crown because it is given away. It is not the Company's property because the company is non-existent for this purpose.

THE LORD CHANCELLOR: Your opponents deny the first proposition. SIR ROBERT FINLAY: I submit I have established that.

Now, my Lords, having had this discussion I will return to the judgment of Mr. Justice Anglin. I was reading at page 90 in the Companies case. It is the second paragraph on the page:

> "If the operations or activities of any foreign corporation should depend for their validity upon the power conferred on it by the law of the incorporating State, it would, in my opinion, be difficult to sustain them, inasmuch as 'the law of no country can have effect as law beyond the territory of the Sovereign by whom it was imposed.' But the exercise of its powers by a corporation extra-territorially depends not upon the legislative power of its country of origin, but upon the express or tacit sanction of the State or province in which such powers are exercised and the absence of any prohibition on the part of the legislature which created it against its taking advantage of international comity. All that a company incorporated without territorial restriction upon the exercise of its powers carries abroad is its entity or corporate existence in the state of its origin coupled with a quasi-negative or passive capacity to accept the authorization of foreign States to enter into transactions and to exercise powers within their dominions similar to those which it is permitted to enter into and to exercise within its state of origin. Even its entity as a corporation is available to it in a foreign State only by virtue of the recognition of it by that State. It has no right whatever in a foreign State except such as that State confers.
>
> "When the British North America Act was passed the doctrine of comity in regard to foreign corporations was well established as a rule of international law universally accepted. It had been long acted upon in English Courts, and had received parliamentary recognition."

That is exactly in conformity with what is suggested in paragraph 104 of Bar and in River's edition of Asser.

"Modern law acknowledges this capacity of every corporation, not expressly or impliedly forbidden by its state of origin to avail itself of privileges accorded by international comity, as something so inherent in the very idea of incorporation that we would not, in my opinion, be justified, merely by reason of the presence in the clause expressing the provincial power of incorporation of such uncertain words as 'with provincial objects,' in ascribing to the Imperial Parliament the intention in passing the British North America Act of denying to provincial legislators, otherwise clothed with such ample sovereign powers, the right to endow their corporate creatures with it. The impotency which such a construction of the Statute would, in many instances, entail upon provincial companies, affords a strong argument against adopting it. Had Parliament intended in the case of the provincial power of incorporation to depart from the ordinary rule by confining the activities of every provincial corporation within the territorial limits of the province creating it, it seems to me highly improbable that the words 'with provincial objects' would have been employed to effect that purpose. Some such words as 'with power to operate only in the province' would have expressed the idea much more clearly and unmistakably. Inapt to impose territorial restriction the words 'with provincial objects' may be given an effect which seems more likely to have been intended and which satisfies them, by excluding from the provincial power of incorporation such companies as have objects distinctly Dominion in character either because they fall under some one of the heads of legislative jurisdiction enumerated in section 91, or because they 'are unquestionably of Canadian interest and importance.'

"The provincial company is a domestic company and exercises its powers as of right only within the territory of the province which creates it. Elsewhere in Canada, as abroad, it is a foreign country, and it depends for the exercise of its charter powers upon the sanction accorded by the comity of the province in which it seeks to operate which, although perhaps not the same thing as international comity, is closely akin to it."

THE LORD CHANCELLOR: "The exercise of its charter powers"—it is a very limited statement. SIR ROBERT FINLAY: What he means is, it was a mining company and it is for the exercise of its mining powers. I think that is what he means taking it with the context in the previous paragraph. He goes on:

"The Dominion company, on the other hand, is a domestic company in all parts of Canada. It exercises its powers as of right in every province of the Dominion. While a Dominion company is, generally speaking, subject to the ordinary law of the province, such as the law of Mortmain . . . while it may be taxed by the province for purposes of provincial revenue, while it may be required to conform to the reasonable provisions in regard to registration and licensing, a Provincial Legislature may not exclude it or directly or indirectly prevent it from enjoying its corporate rights and exercising its powers within the province, as (subject perhaps in the case of alien corporations to the provisions of any general Dominion legislation dealing with them under clause 25 of section 91), it may do in the case of other corporations not its own creatures. It may be that there is some distinction to be drawn, in regard to the extent to which they are subject to provincial law, between corporations created by the Dominion as incidental to the exercise of legislative power under some one of the enumerated heads of section 91, and other corporations created by it solely in the exercise of its power to make laws for the 'peace, order and good government' of Canada. For instance, a Dominion railway company in regard to the acquisition and tenure of its right of way" and so on. "In its transactions outside the jurisdiction of the legislature to which it owes its existence"—

VISCOUNT HALDANE: Is it necessary to read any more? I do not think it is. SIR ROBERT FINLAY: I think just the conclusion. There is only one more paragraph at line 30 on page 92 which I want to read.

"Having regard to the extent and importance of the interest which may be affected by the opinion of this Court, and which have not been represented before it, to the difficult and complex nature of the subject submitted for our

consideration and to the utter impossibility of preconceiving all the questions surrounding that subject which may arise, or the varying aspects and circumstances under which they might present themselves, it is, I think, inadvisable to add to the foregoing general statement, which contains many propositions that are obviously elementary as well as some views which I am fully aware have been seriously controverted. It will probably suffice, however, to make clear the reasons upon which are based the following answers to the questions submitted."

Then in answer to the first question he says:

"The legislature of a Canadian province cannot validly incorporate a company which (a) is expressly empowered to exercise its activities in any other part of Canada or abroad, or (b) is empowered to carry on works or operations within the enumerated legislative powers of the Dominion Parliament, or business or affairs 'unquestionably of Canadaion interest and importance.'

"The latter limitation—(b)—is expressed in clause 11 of section 92 of the British North America Act in the words 'with provincial objects'."

Then the second question he answers—

"Yes—subject to the general law of the State or province in which it seeks to operate and to the limitations imposed by its own constitution, but not 'by virtue of (its) provincial incorporation.'"

VISCOUNT HALDANE: That it is not prohibited by the law of the province.

SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: The real point of this is to be found at page 92 between lines 5 and 10.

"Where the exercise of its corporate powers is territorially limited by the legislature which creates it a company cannot obtain from another legislature the right to exercise those powers beyond the territorial limit so imposed. It is only by re-incorporation, which is nothing else than the creation of a new and distinct body corporate, that another legislature may enlarge the powers or capacities of a company as defined by the legislative authority which created it."

SIR ROBERT FINLAY: Yes. Of course, in the earlier part of his judgment he he is dealing with another proposition, that is, that this head 11 of section 91, must be construed as giving them power to create a juristic body which would take grants always. Then he says, if the grant is expressly in conflict with the enactment of the legislature, it is only by re-incorporation that it can be effected.

LORD PARKER: There is some little confusion there. Supposing the instrument of incorporation said: The company shall, for the purpose of considering what is *ultra vires*, have power to go anywhere, but for the purpose of considering their power of operation, he said the area must be confined to the province. SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: There are all sorts of powers. SIR ROBERT FINLAY: "Power" is ambiguous.

LORD PARKER: There are cases where you have capacity but no power between yourself and your shareholders. SIR ROBERT FINLAY: Yes. These words run into one another so much that it makes it difficult. Mr. Justice Brodeur was not a party to the decision in the Bonanza case, but he was a party to the decision in the Companies case, and his decision begins at page 94. His judgment is a very short one, and I will read some parts of it. He refers to the history of the enactment and then he says at line 25 on page 95:

"The creation of an association would then belong essentially to the provinces; but the British North America Act, as well as the fathers of Confederation, put in a restriction that the provinces could incorporate companies for matters that fell under their legislative control.

"The word 'provincial' in section 11 of section 92 is not used in its geographical sense"—

that, of course, is the great conflict between the Judges in this case—

"the objects are not territorial; but that word 'provincial' is used with regard to the legislative powers of the province; and provincial objects are those that the provincial legislature can authorize or confer.

"The 'provincial objects' carry the suggestion that they should be distinguished from Dominion objects. They could be defined as all objects which as subjects of legislation are assigned to the province. That restriction has been put in in order to avoid the construction that would have allowed the province to incorporate companies to carry out Dominion objects.

"There would not have been in the enumeration in section 91 anything relating to the incorporation of companies, with the single exception of banks, and it could have been that that exclusive jurisdiction had been assigned to the province. We would have seen then interprovincial railways connecting one province with another under the legislative control of Dominion Parliament but the companies that control those railways would have required provincial charters. Such a state of affairs would have brought a serious confusion, and in order to avoid that it was declared that the provincial authorities could incorporate companies whose objects were of the legislative domain of the provinces.

"When we examine another sub-section of section 92, we see that the Provincial Legislatures may exclusively make laws in relation to . . . property and civil rights in the province.

"There again we see a restriction. Does it mean that the capacity of a person should be determined in a neighbouring province or in a foreign country by federal legislation? No, certainly not. The capacity of a person is determined by the law of its domicile, and that law is the provincial law; and when that person goes into another province or into another country his capacity to contract is based upon the law of his province.

"The comity of nations recognizes the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation, and not prohibited by its charter, and not inconsistent with the local laws of the country in which the business is carried on. As to the comity of nations, each province should be considered as a country.

"All the powers granted by a province on a company are generally recognized in the other provinces, and so long as the powers which that company seeks to exercise are not inconsistent with these granted by the incorporating province, and with the laws of and policies of the other provinces, the company can carry on there its business.

"When a company receives its original incorporation from a Provincial Legislature, then the breath of life has come into it; it becomes equivalent to a natural person, and has the power to do business outside the province which incorporated it.

"A province could as well incorporate a company and that company could go and carry on business in a neighbouring province by the laws of courtesy or comity, as a bank incorporated by the Dominion Parliament could go and carry on business in a foreign country."

I suggest that that last remark is very important. The power of the Dominion Parliament is to incorporate banks. The power of legislation of the Dominion Parliament is for the peace, order and good government of the Dominion. I submit that that would certainly introduce the right of a Dominion corporation to establish branches in London.

THE LORD CHANCELLOR: Has not the Bank of Montreal got a branch in New York. SIR ROBERT FINLAY: Yes.

THE LORD CHANCELLOR: According to this they cannot have. SIR ROBERT FINLAY: What he says is that the argument on the other is that.

THE LORD CHANCELLOR: I thought he meant it could not. SIR ROBERT FINLAY: No, what he means is that the contention on the other side would lead to the absurd conclusion that it could not do it. I will read the sentence again at line 25:

"A province could as well incorporate a company, and that company could go and carry on business in a neighbouring province by the laws of courtesy or comity, as a bank incorporated by the Dominion Parliament could go and carry on business in a foreign country."

THE LORD CHANCELLOR: I thought he meant that the other thing could not happen. I see what you mean. SIR ROBERT FINLAY: What he says is both can be done and, inasmuch as a bank incorporated by the Dominion Parliament can carry on business in a foreign country, therefore, it follows—

THE LORD CHANCELLOR: It is absolutely equivocal as expressed and might mean either one thing or the other. SIR ROBERT FINLAY: I never read it except in the one way.

THE LORD CHANCELLOR: That is the conclusion of this case case undoubtedly. SIR ROBERT FINLAY: Perhaps I should read the next paragraph. It bears on one question which has been a good deal discussed.

"Now with regard to the enlargement of the powers of a company, I am of opinion that those powers could not be enlarged. A company authorized by its charter to do a certain business could not be authorized by the provinces or by the country in which it operates to do another kind of business. It is a question of capacity and by the rules of private international law the capacity of a person is determined by the law of its domicile. I would not hesitate then to answer in the negative to sub-section (b) of section 5, unless the extension by the legislature of another province to a company of the courtesy should be deemed an enlargement of its corporative powers."

He says: Looked at from a legal point of view, they could not enlarge the powers conferred by the province.

THE LORD CHANCELLOR: He says, if the true construction is that the powers are limited to Ontario, he does not think they can be enlarged outside. SIR ROBERT FINLAY: If you come to look at these powers as an enlargement of the corporate powers, that is another matter. I think it means it would not be *intra vires* of the legislature of another province to say: We take an Ontario company and we enlarge the ambit of what is *intra vires*, but he says it might do what would be the same thing. If any grant to that company can be construed as an enlargement of its corporate powers, that is re-incorporation. I think that is what he means.

VISCOUNT HALDANE: It is re-incorporation or nothing. SIR ROBERT FINLAY: I think that is what he is dealing with.

LORD PARKER: Is there anywhere in these books a copy of the Companies Act of Ontario under which these letters patent were granted? The only point of it is if we have to go into the Ashbury case. It depends upon the construction of the Statute. SIR ROBERT FINLAY: The Ontario Companies Act is a very long Act. It is chapter 191 of the Revised Statutes of Ontario, 1897. That is the old Act. The new one is chapter 178 of the Revised Statutes of Ontario, 1914. The 9th section of that Act is printed at page 6 of the appendix to the appellant's case in the Bonanza case.

(Adjourned to to-morrow at 10.30.)

SEVENTH DAY.

SIR ROBERT FINLAY: My Lords, it only remains for me, I think, to refer to one or two authorities, but I shall be extremely brief in that, because most of the cases I have read before to your Lordships.

VISCOUNT HALDANE: There is one thing you have not called our attention to specifically, and that is the nature of the Ontario Companies Act. It may give a general power to the Crown in the province of Ontario to create corporations generally, analogous to common law corporations, statutory corporations, under a power so wide that the corporations are analogous to common law corporations; then such a corporation would have the capacity to receive powers. I do not know whether it is so, or not, but I should like to know. SIR ROBERT FINLAY: The most important section in the Ontario Act is printed in the appendix to the appellants' case.

VISCOUNT HALDANE: We had better look at the whole Act, because it is very important. SIR ROBERT FINLAY: Certainly, my Lord. It is at page 6 of the appendix to the appellants' case. It is section 9 of the Joint Stock Companies Ontario Act, 1897, chapter 191.

"The Lieutenant-Governor-in-Council may, by letters patent, grant a charter to any number of persons, not less than five, who petition therefor, creating and constituting such persons and any others who have become subscribers to the memorandum of agreement, a body corporate and politic for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends except the construction and working of railways within the province of Ontario, the business of insurance and the business of a loan corporation within the meaning of The Loan Corporations Act."

THE LORD CHANCELLOR: The odd thing is that in the Statutes I have, the words "within the province of Ontario," are not to be found. SIR ROBERT FINLAY: Has your Lordship got the later edition?

THE LORD CHANCELLOR: I have the Revised Statutes of Ontario, 1897. MR. NEWCOMBE: That was introduced by an amendment in 1899.

VISCOUNT HALDANE: Was not this the one under which this company was incorporated? SIR ROBERT FINLAY: Your Lordships will see, at page 6 of the appendix to the appellants' case the s.. .te is given "as amended by 62 of Queen Victoria, chapter 11, section 21."

THE LORD CHANCELLOR: Does that introduce the words: "Within the province of Ontario"? MR. HELLMUTH: Yes, my Lord. I think that is the only alteration in this section. SIR ROBERT FINLAY: It does not alter the sense. MR. NEWCOMBE: I think the purpose of that amendment was to exclude a power, which they thought they had, to incorporate railways to work outside of Ontario.

VISCOUNT HALDANE: Let us look at the amending Act and see what change it makes in section 9. Where is the section which relates to the memorandum of agreement? SIR ROBERT FINLAY: It is 62 Queen Victoria, chapter 11, section 21.

VISCOUNT HALDANE: There is a schedule to the Act to which things are to conform. I do not see anything about it in the schedule. SIR ROBERT FINLAY: Is your Lordship speaking of the schedule to the Ontario Companies Act

VISCOUNT HALDANE: Yes.

THE LORD CHANCELLOR: It is quite true, Sir Robert, that the amending section simply introduces those words, "within the province of Ontario." Is the incorporation of companies for the purpose of constructing railways within the province or the incorporation of companies for the purpose of carrying on the business of insurance or loan companies dealt with by another Statute? MR. HELLMUTH: Yes, my Lord.

VISCOUNT HALDANE: The amending words are inserted after the word "railways" in the eighth line; the words, "within the province of Ontario." SIR ROBERT FINLAY: If your Lordship would look at the schedule to the Ontario Companies Act, your Lordship will find the form of petition.

VISCOUNT HALDANE: Let us clear it up. The section reads, "for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends." Have we anything to do with the exception. SIR ROBERT FINLAY: No, my Lord, nothing.

VISCOUNT HALDANE: It is the power to extend that we are concerned with. SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: The agreement is to be, by a subsequent section, in the from of the schedule as nearly as possible. SIR ROBERT FINLAY: I think what the schedule gives is the form of petition.

VISCOUNT HALDANE: Let us take it step by step. Section 10 says that the applicants for incorporation must present a petition for the issuing of letters patent, and that the petition is to show certain things, among other things, the object for which the company is to be incorporated. Then it can be accompanied by a memorandum of agreement, which is to be like the schedule. Now we want the form of the charter. SIR ROBERT FINLAY: I was about to point out that

in the schedule to this Act you have in schedule A the form of the memorandum of agreement.

VISCOUNT HALDANE: That is what we have been reading. SIR ROBERT FINLAY: It is this: "We, the undersigned, do hereby severally covenant and agree each with the other to become incorporated as a company under the provisions of the Ontario Companies Act under the name of The Company of , Limited, or such other name as the Lieutenant-Governor in Council may give to the company, with a capital of dollars" and so on.

THE LORD CHANCELLOR: There are no objects set out. SIR ROBERT FINLAY: No, my Lord. Schedule B gives the form of the petition, which does set out the objects.

VISCOUNT HALDANE: Which, of course, is not conclusive. SIR ROBERT FINLAY: No, my Lord. Then the prayer of the petition, your Lordships will see, is this: "Your petitioners therefore pray that your Honour may be pleased by letters patent under the Great Seal to grant a charter to your petitioners constituting your petitioners, and such others as have or may become subscribers in the memorandum of agreement and stock book of the company thereby created, a body corporate and politic for the due carrying out of the undertaking aforesaid."

THE LORD CHANCELLOR: They may grant any charter they please on that footing, either more or less or something different.

VISCOUNT HALDANE: The question is, first: What can the Crown grant; and, secondly, what has it granted. What it can grant is shown by the passage down to the word "extends." SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: That is very important. It is "any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends." Let us look at the form of the charter. SIR ROBERT FINLAY: The schedule to the Act gives no form of charter. It simply follows the petition. The letters patent in this case your Lordships will find at page 30 of the Record.

THE LORD CHANCELLOR: That is the one we have seen. The general powers are to carry on the business of mining. SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: The legislative authority of the province extends to mining, but not to mining outside the province. SIR ROBERT FINLAY: My submission is that while they could not confer the right to mine outside the province anywhere except in the province, yet they may constitute a company, and, if that company can get leave from the authorities of any other province, they may mine there.

VISCOUNT HALDANE: You read section 9 as meaning, may create such persons a body corporate and politic, and then you read in "for any of the purposes" as limiting the motives rather than the grant itself. SIR ROBERT FINLAY: Yes, my Lord, as a matter of fact within the province only, of course, but if they can get leave from the Government of any other province, or of any other country—it might be a company formed, among other things, for carrying on mining in South Africa—

THE LORD CHANCELLOR: We might go round and round in a circle unless we are quite certain what section 9 means. If it means that they may create a body corporate for any of the purposes or objects for which the Provincial Parliament has power to grant under section 92—that is one thing; but, if it means that it may only grant it for objects which may be covered by the legislative authority of the Legislature of Ontario, that is quite another thing, because they never could have legislated about mines outside the province. SIR ROBERT FINLAY: No, my Lord, but they might legislate about the creation of the juristic person, who may get leave from the Government of another province.

THE LORD CHANCELLOR: It is, "for any of the purposes or objects to which the legislative authority" extends. If it means that you can do whatever comes under section 92, that is one interpretation. SIR ROBERT FINLAY: Does not it come to this, that this would fall within the words, the creation of a company with the right to mine in Ontario with the capacity to mine elsewhere if it could get the leave of the Government?

THE LORD CHANCELLOR: If you take that meaning, that they can legislate for the objects reserved to them in section 92, but if that is not the meaning, and

supposing the meaning of it is that they might legislate for any of the purposes or objects, which are the subject of and within the legislative authority of Ontario, that is one thing; but it is another thing to say it is only to extend to the objects which can be controlled by the legislative authority of Ontario. SIR ROBERT FINLAY: I submit it means, any of the purposes and objects for which the Legislature of Ontario could exercise incorporation.

LORD PARKER OF WADDINGTON: If it had said it would be all right. If it had said: For all the purposes and objects for which the Legislature of Ontario can in fact make companies, then it would be all right from your point of view, but it does not; it says, all the subjects with regard to which they can legislate. They can only legislate with reference to section 92. SIR ROBERT FINLAY: I submit the words, as they stand, are quite susceptible of the meaning which I put upon them. What they are doing is to give authority to the Lieutenant-Governor to grant letters patent creating the persons in question a corporation "for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends." Surely that means that they may incorporate them for any of the purposes for which the Legislature of Ontario has authority.

VISCOUNT HALDANE: Take it step by step. Your contention is that the reference to "the legislative authority of the Legislature of Ontario" is merely descriptive of the class of purposes and objects for which the corporation may be incorporated. SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: The question is whether the words which we have here are similar to the words of the Companies Act of 1862. The doctrine in the Ashbury case is a doctrine based solely on the words of the Companies Act of 1862. Lord Blackburn said you ought to construe language with reference to the general law. Lord Cairns said that the words of the Companies Act, 1864, are too precise. This is not too precise, and, therefore, Lord Blackburn's doctrine applies. SIR ROBERT FINLAY: In the Consolidating Act, which I have here, of 1908, the sections are in the same form as they were at the time when Lord Cairns was dealing with the case of *The Ashbury Carriage and Iron Company* v. *Riche.*

VISCOUNT HALDANE: We have had the Statute of 1908.

THE LORD CHANCELLOR: This is the British Statute you are referring to. SIR ROBERT FINLAY: Yes, my Lord. I am only referring to it in deference to the suggestion your Lordship made that one ought to compare section 7 with this. "A company may not alter the conditions contained in its memorandum except in the cases and in the mode and to the extent for which express provision is made in this Act." Then there is section 8 dealing with the name of the company and the changing of the name. Then section 9 is: "Subject to the provisions of this section a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it (a) to carry on its business more economically or more efficiently; or (b) to attain its main purpose by new or improved means; or (c) to enlarge or change the local area of its operations."

LORD PARKER OF WADDINGTON: What is the incorporating section? SIR ROBERT FINLAY: Section 3: "In the case of a company limited by shares (1) The memorandum must state (i) The name of the company, with 'limited' as the last word in its name; (ii) The part of the United Kingdom, whether England, Scotland or Ireland, in which the registered office of the company is to be situate," and then "(iii) The objects of the company."

LORD PARKER OF WADDINGTON: That is not the incorporating section: that is the condition of incorporation. Where is the section which makes them a body corporate? SIR ROBERT FINLAY: Section 2. "Any seven or more persons (or, where the company to be formed will be a private company within the meaning of this Act, any two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability." Then section 3, "In the case of a company limited by shares (1) The memorandum must state (i) The name of the company," and "(iii) the objects of the company."

LORD PARKER OF WADDINGTON: Then there is a section later on which confers powers. What is the form of that section? SIR ROBERT FINLAY: Is there any section other than section 9, which gives the power of enlarging the objects subject to the limitations contained in that section.

LORD PARKER OF WADDINGTON: I know there is a section about the holding of land, and there is a section about general powers somewhere. SIR ROBERT FINLAY: There is section 14 under "General Provisions." "The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and of the articles, subject to the provisions of this Act." That is the section.

VISCOUNT HALDANE: They accept the memorandum of association as the charter of incorporation of the company. SIR ROBERT FINLAY: Yes, my Lord, they accept it as something more than the common law charter would have been, because as has been explained by Lord Cairns, it would not restrict the powers of the company, although it might form, if it exceeded them, a ground for *scire facias*, but here, as Lord Cairns says, it is *ultra vires* for them. It is not merely directory; it is a condition of their existence and they cannot add anything beyond the memorandum of association.

VISCOUNT HALDANE: At page 668 in his judgment he says this: "My Lords, this is the first section which speaks of the incorporation of the company; but your Lordships will observe that it does not speak of that incorporation as the creation of a corporation with inherent common law rights, such rights as are by common law possessed by every corporation, and without any other limit than would by common law be assigned to them, but it speaks of the company being incorporated with reference to a memorandum of association; and you are referred thereby to the provisions which subsequently are to be found upon the subject of that memorandum of association." SIR ROBERT FINLAY: I do not know whether that Act has been in any way varied in expression. I thought that the sections were the same so far as this point was concerned. This Act altered the law in some particulars, but as regards this, I suppose it merely left the sections existing.

VISCOUNT HALDANE: It assumes that intending corporators enter into a covenant to prevent competition and on that the right of the Crown arises to grant a charter under section 9. The question is whether that is a charter of the kind referred to by Lord Blackburn, or of the kind to which Lord Cairns referred. SIR ROBERT FINLAY: Yes, my Lord. I submit the section should be construed in the manner I have suggested, that the letters patent may be granted for any of the objects for which the Legislature of Ontario conld incorporate a company.

LORD PARKER OF WADDINGTON: For which they could legislate.

VISCOUNT HALDANE: Unless it is merely descriptive.

LORD PARKER OF WADDINGTON: They could only legislate within their own province.

VISCOUNT HALDANE: Unless it is merely descriptive of the class.

THE LORD CHANCELLOR: It must have this limited meaning of objects within the province. SIR ROBERT FINLAY: The consequences would be so remarkable if it were confined territorially within the province that I submit it cannot be so.

LORD PARKER: It may be said it means: Any purposes for which the Legislature of the province could incorporate a company, because otherwise you would get into this sort of thing that you might have a company for amending the constitution.

LORD PARKER OF WADDINGTON: Or for levying taxes.

THE LORD CHANCELLOR: Or for borrowing money on the public credit of the province. SIR ROBERT FINLAY: I submit the words should be read in the way I suggest and I further submit to your Lordships that the rigid rule which was deducible and was deduced by Lord Cairns from the wording of the English Companies Act does not apply here. What I submit is the reading of this section 9 is as follows: That the Lieutenant-Governor may create a corporation for any of the purposes or objects to which the legislative authority of the

Legislature of Ontario extends, with reference to the creation of a corporation. That, I submit, is the natural meaning of the words, and it does not require any introduction into the section to show that that is the meaning, because the natural meaning of words saying that the Lieutenant-Governor may create a corporation for any of the purposes to which the legislative authority of the Legislature of Ontario extends is, that the object must be one for which the Legislature of Ontario could create a corporation.

LORD SUMNER: Why is "purposes" put in? SIR ROBERT FINLAY: To limit it. It is to be for some purpose for which the Legislature of Ontario could have created a corporation.

LORD SUMNER: If they are only referring to section 92, why do not they stick to the words of that? SIR ROBERT FINLAY: What they must mean is that the scope of this Act, of course is, in this respect, to enable the Lieutenant-Governor in Council to do it by letters patent instead of having a special Act on every occasion.

VISCOUNT HALDANE: From what you say there is this possible law, that the right to grant a charter at common law belongs to the prerogative of the Crown, and, unless taken away, the right is there SIR ROBERT FINLAY: That is so, my Lord.

VISCOUNT HALDANE: That question does not arise under the Companies Act, which leaves the Crown free to grant charters and prescribes a statutory mode of forming a corporation, which has nothing to do with grants from the Crown. SIR ROBERT FINLAY: That is so.

VISCOUNT HALDANE: Here what you do is that you recognize the prerogative of the Crown as still existing and you put in a limit which must be construed in favour of the Crown. You cannot take away the prerogative of the Crown except by clear words. May not that mean that the power of the Crown to grant a common law corporation, with all its common law capacities, remains, but that the Crown is no longer to grant a charter unless the purpose of the grant is some purpose or object comprised in the legislative authority. SIR ROBERT FINLAY: That is to say, could the Legislature of Ontario have incorporated a company by special Act.

LORD PARKER OF WADDINGTON: The province has power to restrict the civil rights within the province. SIR ROBERT FINLAY: Yes, my Lord, and it is only within the province that a natural person domiciled in Ontario, or a company in Ontario can work as of right.

VISCOUNT HALDANE: *Prima facie* he may transfer himself to Yukon and work there, and then I do not know whether the province can get at him, but his civil rights outside the province, under section 92, they cannot deal with. SIR ROBERT FINLAY: They would deal with an Ontario corporation within the province, but if the corporation got itself recognized in Yukon what happened in Ontario might not affect the privileges and rights conferred upon it in Yukon.

VISCOUNT HALDANE: Possibly it might abolish the corporation; I do not know. SIR ROBERT FINLAY: What effect that would have upon the body which the Legislature of Yukon had recognized is another matter. I respectfully submit to your Lordships that that is really the whole scope of this section. It defines the objects for which the company may be incorporated by letters patent as being those objects for which the Legislature, by special Act, might have incorporated a company. Then you have a juristic person with all the rights which a natural person would have outside the province.

VISCOUNT HALDANE: I agree with Lord Sumner that I wish the legislature had used more unambiguous words. SIR ROBERT FINLAY: I respectfully agree with that criticism, but at the same time it was quite natural to use the language they did.

LORD SUMNER: I should think it is quite plain that what they intended to do was to say that, by the grant of letters patent to a certain number of persons, the governor might grant a charter which would have the effect of exercising all or any of the powers of incorporating companies which the province of Ontario possesses. Why they did not say that I do not know. They certainly could never have intended, in passing this Act, to empower the Lieutenant-Governor to do

less in the way of incorporating companies than the province could do. SIR ROBERT FINLAY: No, it was merely for convenience that the Lieutenant-Governor is empowered to do whatever they could have done by special Act.

LORD SUMNER: Sections 91 and 92 speak about objects and subjects and purposes and it is very doubtful what they exactly mean. SIR ROBERT FINLAY: There are many occasions on which one feels inclined to say that the draftsmanship is too cunning to be understood.

VISCOUNT HALDANE: The Crown has the power to create corporations at common law by charter, and all the British North America Act did was to say, we will distribute the exercise of the prerogative. SIR ROBERT FINLAY: Yes, my Lord.

On this head of the case there are really no additional authorities that I need cite. The very name of the Parsons case is apt to bore one. The Colonial Building Association case, in 9 Appeal Cases at page 157, your Lordships are perfectly familiar with.

VISCOUNT HALDANE: That adds nothing. SIR ROBERT FINLAY: Then Dobie's case in 7 Appeal Cases, at page 136, I do not think is very material for this purpose. All that was decided there was this. There had been a corporation created for administering the moneys of the Presbyterian Church in a part of Lower Canada. That was created by an Act of the legislature of the province which, before the Confederation, comprised both Ontario and Quebec. Then there came the Act of 1867, and then then Legislature of Quebec passed an Act dealing with the portion of the funds that were in Quebec and it was held that that was incompetent for them to do because it was organized into the corporation created by the Act of the old Parliament of the province of Canada, and neither Ontario nor Quebec could, by legislating with regard to the matter, affect that Act; it was *ultra vires*. It was for the Parliament of Canada to affect it, and they went so far as to say that, even if each Legislature, the Legislature of the province of Ontario, and the Legislature of the province of Quebece, after 1867 had passed separate Acts dealing with that it would have been *ultra vires*. It must be dealt with by the Parliament of Canada. It is a very interesting case, but I do not think it is directly relevant to the present case. Then the Compagnie Hydraulic case has been dealt with. Then the *Ashbury Railway Carriage & Iron Company* v. *Riche*, has been dealt with, and I mentioned to your Lordships the case in which the doctrine of *ultra vires* was so much discussed, the Birkbeck case.

THE LORD CHANCELLOR: I think we all know that. Those of the Board who did not decide it were counsel in it. SIR ROBERT FINLAY: It is in the Appeal Cases for 1914, at page 398. I have really no other authorities on that head of the case.

Then, my Lords, with regard to the effect of what was done in Yukon there is one decision of the Supreme Court of the United States to which I should like to call attention. It is the case of *Comanche County* v. *Lewis*, which is reported in 133 United States Reports. It is referred to by Mr. Justice Idington. It was a question with regard to a county in Kansas and the creation of new counties. I will read a small part of the head note. "Full control over the matter of the organization of new counties in the state of Kansas is, by its constitution, given to the legislature of the state which has power, not only to organize county in any manner it sees fit, but also to validate by recognition any organization already existing, no matter how fraudulent the proceedings therefor were. When a legislature has full power to grant corporations its Act, recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to an organization and makes a *de jure* out of what was before only a *de facto* corporation." The only passage I need read from the judgment is at page 208. "If these were all the facts, a very interesting enquiry would arise as to how an organization fraudulent in fact but regular in form, and duly approved by the executive, could bind the county by an issue of bonds *prima facie* valid, and passing into the hands of a *bona fide* holder."

THE LORD CHANCELLOR: What is meant by "an organization fraudulent in fact but regular in form"? SIR ROBERT FINLAY: An organization professing

to set up a county which had not complied with the steps necessary. "But that enquiry is not before us. The ample power delegated by the constitution of the legislature enabled it, and only to organize a county in any manner it saw fit, but also to validate by recognition any organization already existing, no matter how fraudulent the proceedings had been. This proposition has been distinctly ruled by the Supreme Court of the state."

THE LORD CHANCELLOR: How does that help us? SIR ROBERT FINLAY: I think the next passage shows the more general application. "Nor is this ruling peculiar to the jurisdiction of Kansas. It is universally affirmed that when a legislature has full power to create corporations, its act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and makes it a *de jure* out of what before was only a *de facto* corporation. It is true that there must be a *de facto* organization upon which this recognition may act, as was held in *State ex rel. Attorney-General* v. *Ford County*, 12 Kansas 441, 446; and in this case it appears from the findings, as well as from the testimony, that there was such *de facto* organization. There being this *de facto* organization, there was ample recognition by the legislature."

LORD PARKER OF WADDINGTON: I suppose you are quoting that on the first point. SIR ROBERT FINLAY: Entirely, my Lord. Then there is one paragraph in the great American book on corporations, Thompson on Corporations, the second edition, the first volume, at section 269.

> "Effect of legislative recognition on corporate existence. It is well established that defects in the proceedings to incorporate may be cured by subsequent recognition of the existence of the corporation by the legislature of the state under whose authority the defective organization was had, provided the defective corporation is in the exercise of its corporate functions at the time the act of recognition is passed by the legislative. But this legislative recognition only operates to cure such defects in the organization of the corporation as merely prevent its being one *de jure*. It does not create a new corporation where there is not even a *de facto* corporation on which it can act. As said by one of the Courts in passing upon this question: 'Such recognition has relation to a corporation *in esse* waiving the irregularity and forfeiture. An Act of the legislature relating to a corporation, not creating or authorising one, may well have the effect of condonation, but not of creation. It goes by way of confirmation or release; and there must be a corporation *de facto* to be confirmed or released.' The case in favour of recognition will be stronger where the legislature intended that the Act, should have this effect, and it was passed after the legislature had been fully advised in the premises."

Then paragraph 270:

> "Recognition by transactions between Government and alleged Corporation. A *prima facie* case of corporate existence may be established by evidence of transactions between the Government or state on one hand and the alleged corporation as a corporation on the other. There is an illustration of this principle in cases where the Federal Government or the state through some of its departments has done some act showing a recognition of the existence of the corporation—as, for example, by issuing a patent to a company as a corporation. And a deed executed by such a grantee, legal in form, has been held *prima facie* proof of such grantee's existence as a corporation at the time of its execution."

I have looked with the assistance of my learned friend, for any further authority, but there is singularly little bearing upon this apart from the common law rule to which Lord Parker referred yesterday.

VISCOUNT HALDANE: The American doctrine as to *ultra vires* is different from ours. SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: You will find that from the text books but I do not think it matters. SIR ROBERT FINLAY: In conclusion I have to submit to your Lordships that, as regards this particular company, what took place in Yukon is decisive, and, secondly, that, on the general question, the wider view for which

we contend is the only one that will be tolerable in practice and quite consistent with the words of the section. MR. HELLMUTH: May it please your Lordships. My clients, the Bonanza Creek Company, obtained from the Crown the right to bring this petition of right in reference to the matters alleged therein, and by way practically of demurrer the first two paragraphs in the defence filed by the Attorney-General were directed to be tried before the merits were gone into. Therefore it must be assumed, I submit, that the facts as set out in the petition are to be taken, for the purpose at all events of the decision here, to be correct. On that I submit we are in an entirely different position from what may be the position of the parties in the general or companies case. They are really asking, as between the Dominion and the provinces, for a decision from this Board as to the rights of the two parties, the Crown in right of the Dominion and the Crown in right of the province. That is not our position at all. That question may be involved in our case, but we do not depend upon the result of that decision for the decision here. The Crown in right of the Dominion had absolutely recognised us, knowing what class of corporation we were. Ours is practically an action between the company and the Crown. The Crown say in the first paragraph of their answer to our petition that we have not any right under letters patent, license, free miner's certificate or otherwise to carry on the business of mining, to acquire any mines or any interest by way of lease, or otherwise, and yet it has to be admitted that the same Crown had granted to us a lease after we had obtained from the Crown in right of the Dominion licenses to carry on business under the free miner's certificate and had obtained from the Crown in right of Yukon a license to go into business of that kind. I say it is not open to them to say, this is a fictitious person, when that person, according to the Petition of Right, which I suppose is to be taken as proved, has paid moneys to the Crown and has performed all its obligations. The Bonanza Gold Mining Company have actually paid to the Crown sums of money and have complied with the conditions, and my submission is that the Crown must be taken to have known what the law was in regard to our corporation at the time when they entered into these transactions with it. They recognized, I do not want to go over it again, by the agreement referred to by Sir Robert Finlay at page 46 of the record, that we are a corporation incorporated under the laws of the province of Ontario. They have said: [illegible] give you this lease. I adopt the argument that has been made here: that the Crown is not in a position to say we are not a *de facto* corporation. If we were in any way previously limited we have recognized that you may accept these licenses, and may perform those duties. One other point only is raised, but that is included in the first; that is the point that we had not capacity to accept these free miner's certificates. They say: "Should a free miner's certificate have been issued to the suppliant the respondent claims that the same is, and always has been invalid, and of no force or effect—that there was no power to issue a free miner's certificate to the suppliant, a company incorporated under provincial letters patent, and that there was no power vested in the suppliant to accept such a certificate." I submit the reasoning of Mr. Justice Duff in the Supreme Court in regard to that is sound, but he has not dealt with what I submit is conclusive in this respect; that assuming we had the certificate then surely the Crown who issued to us those certificates either in right of the Dominion or in right of the Yukon are not in a position to say that those certificates carry nothing with them, assuming we had capacity. My friend has not dealt with that. I am not touching the major point in this respect; that we could not at all go into the Yukon, but if we had any capacity at all under the recognition by the Dominion by way of either reincorporation or recognition as a common law or quasi common law corporation under the Ontario Act, then I submit the second point is not open to the Dominion. The practice in Ontario in regard to the incorporation of companies is to put in a petition, and then the Lieutenant-Governor, having the petition, does not necessarily follow the exact purpose or objects which are therein set out. He may alter or amend that; he may qualify it in some way, and give other purposes. Here we have, as your Lordships have seen in our charter, the right to mine without any limitation in the charter itself. The Chief Justice in the Supreme Court states that we have the statute limitations read into the

charter. I submit that is not so, whatever it may be. It may be on the other branch the question may arise as to what the Ontario Legislature could grant us, but I submit that in no other case is there any limitation to be read as he puts it into the charter itself. In regard to the reasoning on the second point I am not going into it in any detail, because we have the judgments of all the Judges who are in the majority with us on it, and there is only the Chief Justice against us. Mr. Justice Duff, who forms one of the majority against us is with us on the second point, and there is only the Chief Justice in that respect. I am really not appellant in regard to the second point at all. It would be impossible for trading corporations in the province of Ontario to become incorporated at all under the laws of Ontario if what is contended for on the other side is right. Ontario is bounded on its northern part, what is called the Hinterland of Ontario, by the state of Michigan on one side, and the province of Quebec on the other; and mining or lumbering companies incorporated by the province of Ontario very frequently require in carrying out their work to take up timber limits in Michigan. Ever since Confederation, and before Confederation it has been a common thing for companies incorporated in that way by the province of Ontario to go to the neighbouring state of Michigan, and, recognized by comity, carry on their work. A mine might very possibly start on the boarders of Ontario, and its seam might run into the state of Michigan; and nobody ever thought there was any necessity for an Ontario corporation because it wanted its workman to follow the line of its seam into the state of Michigau—to go to the Dominion Government to get another incorporation. In the same way mining or lumbering was carried into Quebec, and the Ontario corporation, or the Quebec corporation, as the case may be, passed from one province to another with perfect freedom. No question was ever raised by either province or Dominion in regard to the rights of these Ontario corporations until, as your Lordships will see, the argument in the case of the Canadian Pacific Railway, which has been referred to by Sir Robert Finlay. That was the first time the question was ever raised in our Courts, as far as I know, that an Ontario corporation could not accept from a foreign country, or from a sister province, comity to carry on its business, and that was only in the Supreme Court. So that ever since the time of Confederation it was assumed, whether rightly or wrongly, that what had been done prior to Confederation by the provinces—it was done in the independent provinces, that is Old Canada, Nova Scotia, and New Brunswick—could still be done by the new provinces. Every one acted on that supposition, and no one more so than the Dominion Government itself. The best evidence of that is that in this very case the Dominion Government practically invited this corporation to come into the Yukon and there mine. Your Lordships will find in the record here an Order-in-Council, passed by the Dominion Governor-in-Council, dealing with the hydraulic process in reference to this company, that is to the assignees, and we were the registered assignees of Matson & Doyle. Large obligations were thrown upon the company by the Dominion by this Order-in-Council. We had to expend 5,000 dollars in one place on a certain work. As I have said it would work cut almost to a national calamity; I do not think that is too strong an expression to use, to say now that all the operations of all these companies through a series of over forty years are all *ultra vires*. An illustration occurs to one. We have very big trust corporations in the province of Ontario, which is a province of about two and a half million inhabitants. In Toronto there is a corporation called the General Trust Corporation. That corporation has extended its proceedings throughout the entire west. It has hundreds of thousands of dollars of trust funds invested in its own name on mortgage throughout all Manitoba and the North-West, and indeed I think it goes into the province of Quebec. All of those transactions would be *ultra vires*, and all of those transactions would be absolutely void.

THE LORD CHANCELLOR: I am not quite satisfied that that is so. A trust company formed in the province of Ontario might very well have the power, as an incident to its business in Ontario, to invest in property elsewhere. It would be the very essence of its constitution. MR. HELLMUTH: If it did what the business of a trust company does primarily; it acts as executor and administrator. It has

acted as administrator in Manitoba and the West, and I will not say what other provinces because I do not know. It has put those moneys into investments in those provinces, and it has also invested the trust funds that have come into its hands from individual assets in Ontario in western real estate.

THE LORD CHANCELLOR: I do not see why it is not strictly a provincial object for a man in Ontario to invest his money in some security outside. MR. HELLMUTH: A man, yes.

THE LORD CHANCELLOR: And a company the same. A man would do it as a provincial object. I do not see why a company should not invest its money where it pleased. MR. HELLMUTH: If one takes the answer of Mr. Justice Duff in the case he says: If a company is incorporated for the purpose of buying, grinding, and selling grain, all of those being functional, he cannot buy, or grind, or sell outside Ontario; but apparently if he was appointed to grind grain in Ontario it might be incidental to buy in one province and sell in another. It leads to such an absurdity that you have to look at the constituting instrument to find out whether a certain object has been made functional, or whether it is ancillary; but after all are not the ancillary powers only those that are implied from the granted powers. The Chief Justice gives the illustration of the *City of Toronto* v. *Canadian Pacific Railway*, a case in which the City of Toronto had been ordered by the Privy Council of the Dominion to pay the cost of turning a level crossing into a subway, and they contended that it was beyond the powers of the Railway Board or the Privy Council to order that to be done as it was something interfering with property and civil rights in the province of Ontario, and the Court held that as railways such as the Canadian Pacific Railway were within the jurisdiction of the Dominion everything that was necessary to the carrying out of the railway was incidental, or ancillary, and that the Board in directing railway matters could order that the cost should be apportioned even although it did interfere in a sense with the rights of the municipality of the city of Toronto.

VISCOUNT HALDANE: It is a very fine distinction. It was in the Bonsecour's case, was it not? MR. HELLMUTH: No, that was the case of the ditch. This was another case.

VISCOUNT HALDANE: There was a subtle distinction in the ditch case. MR. HELLMUTH: Supposing the Dominion had not had the power to deal with railways no one would have suggested that the ancillary power would have been there at all. If you cannot grant the main power, if you cannot grant the functional power, how can you grant a power to exercise some civil rights in another country? Does not that come from the comity that is extended by the other province? It has always been submitted under the heading of property and civil rights that one province has accorded to a foreign corporation, or to another provincial corporation the right to sue in its Courts, and the right to do anything there at all. It is the grant from one body under property and civil rights in the province, and the other corporation or individual comes into the province and exercises any of those rights. My submission to your Lordships would be that nobody has questioned the power of the province to say to a United States corporation in Michigan, or New York, you may come here and pursue your corporate activities in this province; yet it is now questioned whether a province can say that to her sister province's creation in this case for the first time. I do submit that in this matter the consequences to my clients are almost appalling. They have practically put their entire funds into the leases and agreements. They are not at all events guilty of any bad faith. This is not a case of the Crown saying they were deceived in their grant in any shape or way. There was no attempt to disguise where we had come from, and with a decision adverse it means that after the many hundreds of thousands of dollars that we have put into this in good faith, and relying upon the lease from the Crown, having followed in every respect all the requirements that the Crown put upon us, we are now met with the statement: You have faded out of existence the instant you crossed the provincial border, and we were dealing with a purely imaginary person to whom the benefits that have come in the way of payments and performances belong to us and no obligation rests upon us to carry out—any of the agree-

ments we made with you. One does not want to use any expressions one should not, but it certainly seems an extraordinary position to have placed these appellants in.

THE LORD CHANCELLOR: You say that the defence of the Crown is: You were imaginary people, and we knew it, and we made the grant to you knowing it was no use? MR. HELLMUTH: Yes, my Lord, and they must be taken to have known the law.

THE LORD CHANCELLOR: They do not suggest they did not know it? MR. HELLMUTH: No, my Lord, and we were in fact in the province of Ontario a *de jure* as a *de facto* corporation. Nobody denies that. We made our contract with them in the province of Ontario, where we were a *de jure* as well as a *de facto* corporation.

THE LORD CHANCELLOR: Does that appear on the face of the document? MR. HELLMUTH: Yes, my Lord; the lease on page 46 was made in the jurisdiction.

THE LORD CHANCELLOR: It was made in the province? MR. HELLMUTH: Yes, and there at least we were unquestionably, and no one denies it, under our charter, a body corporate and politic at least to mine in Ontario. Of course we go a good deal further than that.

THE LORD CHANCELLOR: The same thing is true of the free miner's certificate? MR. HELLMUTH: Yes, my Lord. Perhaps your Lordships have noticed that when the Crown issued our license in the Yukon, which is at page 51 of the record, they stated that the amount was received as incorporation fees of the Bonanza Creek Gold Mining Company Limited; that is to say when we got out license under the Yukon statute.

THE LORD CHANCELLOR: They treated it as a re-incorporation? MR. HELLMUTH: Yes, my Lord.

LORD PARKER OF WADDINGTON: They refer in one of the documents to your being a company incorporated in Yukon? MR. HELLMUTH: Yes, they do. They call us the Bonanza Creek Gold Mining Company of Dawson, Yukon. Under those circumstances, and with that recognition, is it possible to say that the Dominion Government, or the Crown in this case, have not given to us, whatever kind of corporation we are, or whatever kind of juristic person we are, recognition, and that they cannot now deny it.

LORD PARKER OF WADDINGTON: You say it is not necessary to assume anything at all with regard to the intention to re-incorporate, because the intention is manifest on the documents: that they intended you should be a corporation according to the laws of Yukon? MR. HELLMUTH: Yes, my Lord.

LORD PARKER OF WADDINGTON: And that you should have the power to carry on your business. Really, in saying what they did, it is not saying that you had no power to do what you are doing, but saying they had no power to do what they did? MR. HELLMUTH: It is denying their own action.

VISCOUNT HALDANE: Our attention has been called, and I do not know how far it bears on the question, to the distribution of executive power under the Confederation Act, including, of course, the power to grant charters. The scheme of the Act was that there should be a distribution of executive power, and a *quasi* distribution of legislative power, and you find in section 12 which is one of the two sections which cover this, it says: "All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick are at the Union vested in, or exercisable by the respective Governors, or Lieutenant-Governors of those provinces, with the advice, or with the advice and consent of the respective executive councils thereof or in conjunction with those Councils, or with any number of members thereof, or by those Governors, or Lieutenant-Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exercisable by the Governor-General." That says: We have made the great Canada out of the provinces, and the Governor-General is to exercise all the different powers that could have been exercised by the previous Governors and Lieutenant-Governors so far as the

same continue in existence, and capable of being exercised after the Union in relation to the Government of Canada. Construing that with section 65, which deals with provincial matters, the words are the same: "All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union, vested in or exercisable by the respective Governors, or Lieutenant-Governors, of those provinces, with the advice, or with the advice and consent, of the respective executive councils thereof, or in conjunction with those councils, or with any number of members thereof, or by those Governors, or Lieutenant-Governors individually, shall as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in, and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively." That seems to show that the distribution of executive power, including the power to grant charters, was intended to be exercised by the Lieutenant-Governor so far as the legislative distribution of the powers of the company could be exercised. It may be that points to the character of the subject of the legislation as the guide to which we are to look as to who is to exercise the power, but on the other hand it seems to point to this: that if one person, the Lieutenant-Governor, had it, the Dominion had it also, and could supplement it. It bears on what you were saying just now. One or other could incorporate. There is no residum left which is the creature of any statute. There is complete power of incorporation in one or other or both. Therefore it may be that you are right in saying that there is something which is not the creatnre of a statute, but a corporation, the power to create, which was meant to be given with reference to these sections, and they were to be in the nature of common law corporations, and to be capable of being supplemented by a further exercise of incorporation by whoever it was, the Dominion or the Lieutenant-Governor of the province, as the case might be. MR. HELLMUTH: I submit that the case of *The Ashbury Company* v. *Riche* does not apply to such a corporation, or such a body politic as the Lieutenant-Governor of Ontario by letters patent has created here. There is a very great distinction and difference in the language used in the English Companies Act and the language used in our charter.

VISCOUNT HALDANE: It rather indicates that the true principle is not the principle of the English Companies Act, but the principle which is to be sought for within the four corners of the British North America Act under the distribution of power in sections 12 and 65. It may be, I express no opinion about it. MR. HELLMUTH: I do not think after the argument of Sir Robert Finlay I can usefully add anything more. My learned friend Mr. Moss is with me, and he desires to say a few words. MR. J. H. MOSS: May it please your Lordships. I appear with my learned friend for the plaintiff company, the petitioners. I desire to call your Lordships' attention to a point in connection with the second branch of the defence which is put up by the Crown; that is, although we have *de facto* a free miner's license, that the leases and the other recognitions we had from the Crown are of no value. This question probably seems a little minor in comparison with the larger constitutional question involvel, but it is a matter of importance to my clients. Mr. Justice Duff, in the Supreme Court, had answered the argument that our free miner's license was not good, but there is the further point which was not dealt with, which was argued before him, that is that a free miner's license was not required at all under the regulation which governed our case. We took a free miner's license, because it was required from us by the Government, and we paid the fee rather than have any question; but under the regulation governing these hydraulic concessions a license was not reqnired. The regulations your Lordships will find at page 13 of the appendix to the appellants' case. Paragraph 3 on page 14 is the paragraph which governs our case. These regulations are as to the setting apart of land for hydraulic purposes, and paragraph 3 provides that:

> "To any person who has prior to the date hereof filed an application in the Department of the Interior at Ottawa, or in the office of the Commissioner

of the Yukon Territory or in the office of the Gold Commissioner for a mining location in the Yukon Territory not provided for by the mining regulations already in force, the Minister of the Interior may issue a lease subject to the same conditions as to size and otherwise, and conferring the same rights as a lease issued under these regulations for a location acquired at public competition; provided that the Commissioner has reported that it has been proved to his satisfaction that the applicant himself, or a person acting for him, was upon and actually prospected prior to the date hereof the ground included in the location, and provided further that the Gold Commissioner has reported that the ground included in the location is not being worked and is not suitable to be worked under the regulations governing placer mining. But under this section no person shall be given a lease for more than one location."

My Lords, that provided for the case of an application which had already been filed, and your Lordships will see, on turning to the record, page 4, that Doyle's application was made on the 22nd July, 1898; and on turning to page 5 you will find that Matson's application was made on 2nd November, 1898, and these regulations to which I am referring were passed on 3rd December, 1898. The following paragraph 4, which provides for the disposal of these locations by public competition does require the free miner's license. That is all I wish to say on that point.

I should like to address a word to your Lordships in regard to the view expressed by the Chief Justice in the Supreme Court, and the Judges who agree with him in regard to the importation of the idea of ancillary powers or objects. My learned friend Mr. Newcombe in the Supreme Court shrank, apparently, from advancing the argument that provincial objects meant that a company could not carry on any objects or purposes outside the province, because of the consequences of such contention.

THE LORD CHANCELLOR. Could not they do outside the province what was necessary to carrying on the business within it. That is the real point of ancillary powers. MR. MOSS: It seems to me their Lordships have gone further, and my learned friend in the Court below, at any rate, contended for a wider meaning of "ancillary" than that.

THE LORD CHANCELLOR: It is your contention that ancillary powers are not those that are conferred by the Statute, section 92. It is to incorporate a company to act anywhere, you say? MR. MOSS: Yes. It seems to me that my learned friend is introducing this ancillary idea in order to avoid the consequences of a strictly logical construction of the section: the construction that the limitation is strictly geographical is intelligible, but not reasonable. It is logical if it is sound, but I submit with deference that the introduction of the ancillary idea is intended to palliate the mischief, but that it is logically unsound. All the objects of the company are wrapped up together, and "ancillary," I submit, means nothing more than that they are to do their part of the prescribed objects. The British North America Act certainly does not say that you must carry on your expressed objects inside the province, but you may go outside your implied objects. There was some discussion in one or two of the cases in the English Courts as to the use of that expression "ancillary" in connection with companies, which is not uninteresting. There was a case in 44 Chancery Division of *Buckle* v. *Fredericks*.

THE LORD CHANCELLOR: There are all sorts of cases. There is the ordinary case in which a company having no corporate power to hold land none the less if it is necessary for the purpose of its business to hold land is at liberty to do it. MR. MOSS: That is wrapped up in the main power.

VISCOUNT HALDANE: I have never been able to understand these ancillary powers. If the limitation is territorial how can there be any power to do anything ancillary outside it? MR. MOSS: I cannot see how there is. I venture to think that the ancillary power is a herring that my friend has drawn across the trail to avoid the consequences of the logical construction. The case of *Buckle* v. *Fredericks*, in the 44 Chancery Division, is a very good illustration of what is meant by ancillary power. It was a question arising under a contract not to go into the liquor business. A theatre had started a refreshment booth in connection with their theatre, and they argued that they were not carrying on the liquor business,

but that it was ancillary to the theatre business. That struck me as a very good illustration of what may be ancillary.

THE LORD CHANCELLOR: There we come to another question, and that is construing contracts in restraint of trade, in which you always introduce personal considerations which really find no entrance into this discussion at all. MR. MOSS: No, my Lord.

THE LORD CHANCELLOR: When two people contract, the one that he shall not carry on trade, you have to consider what it really was desired to protect, and what it was desired to restrain? MR. MOSS: Yes, my Lord. I quoted that illustration, because the idea was that the refreshment establishment was ancillary to the theatre. It would be ridiculous to say that a theatre could carry on a theatre business in Ottawa and could not carry on a theatre business across the river at Hull, but could have a refreshment booth across the river at Hull because that was ancillary.

LORD SUMNER: If the refreshment booth was on the other side of the river it would not be used by the theatre goers.

THE LORD CHANCELLOR: It would be said at once that was not ancillary to the theatre at all. MR. MOSS: Possibly so. That, at any rate, is my submission in that regard; that the point as to ancillary powers will not stand examination. MR. WALLACE NESBITT: May it please your Lordships.

THE LORD CHANCELLOR: For whom do you appear? MR. NESBITT: I appear for the intervenants, all the provinces, with my learned friend Sir Robert Finlay

VISCOUNT HALDANE: We are departing from our rule, which is to hear only two counsel: MR. NESBITT: I shall confine myself to the main reference, and your Lordships will not hear from me again on that subject. MR. NEWCOMBE: My Lords, I thought Sir Robert Finlay said that this argument was to be devoted to the Bonanza case specially, and that the part of it which affected the general question was to be considered by your Lordships as part of the argument which is to follow in the main case. If that be so perhaps my learned friend's observations would come more appropriately later on.

THE LORD CHANCELLOR: I understand the position is this: the Bonanza case gives a concrete instance of one of the series of questions that we are asked to answer with regard to the power of a province to incorporate companies? MR. NESBITT: Yes, my Lord.

THE LORD CHANCELLOR: So far as the general question deals with the point of incorporated companies, the whole of that I understood could be dealt with in the Bonanza case; there would then be other questions left in the general case, and we would consider how far they ought to be dealt with at all; but certainly I thought all the general questions relating to incorporation of companies were to be dealt with now. MR. NESBITT: That is what we understand. MR NEWCOMBE: It is quite immaterial to me.

VISCOUNT HALDANE: That is what I understood, and on no other footing should we have the pleasure of listening to Mr. Nesbitt's argument.

THE LORD CHANCELLOR: We will proceed on that footing. MR. NESBITT: The ground has been very fully covered, but there are certain observations I desire to submit to your Lordships further on the point that was under discussion, that my Lord Haldane referred to this morning. The practical view that has been taken of that legislation has been this, both in the Dominion and in the provinces, that a General Companies' Act should be framed which should vest in the Governor in Council all the powers so far as granting letters patent to trading companies and the like are concerned that are vested in the legislatures themselves. It was a piece of machinery provided to obviate the difficulty of applying in each case for a special Act of the legislature, and wherever you find a grant for objects specified in these letters patent it is as if a special Act of the legislature had been passed in reference to that. I take it that the true meaning of the language is simply that whatever the powers of the legislature were in reference to the creation of companies that power is now vested in the Lieutenant-Governor-in-Council, and is exercised by the issue of letters patent.

VISCOUNT HALDANE: In the old province of Canada before 1866 the Governor-General exercised the powers of the Crown in creating corporations. He could have created a mining corporation or I should think any other, subject to this that legislation might be required to enable them to endow that corporation with rights as distinguished from powers. Then comes Confederation and says: We conserve the dedication by the Queen of that executive power to the Governor-General, and in future he shall exercise it under section 12. It is important to contrast the words of section 12 and section 65. Section 12 says: "As far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada." What prevents them from continuing in existence? This, that there is a *quasi* distribution of Federal powers. You get in section 65 the transfer of the residuum which does not continue in existence as far as Canada is concerned—of the others to the province. When you get to section 65 you will find in contrast to the words I have just read "shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in" Quebec and Ontario. I say nothing about Nova Scotia or New Brunswick because these were left to be matters of scheme to be dealt with separately. Quebec and Ontario were two instances where there were certain legislative powers given exclusively to the province, and it was said the Lieutenant-Governor of these provinces is now to exercise the old common law power which existed before of creating corporations. The legislatures may put limits and prescribe modes. These are limitations on the prerogative. They are not the creation of any new power in the Lieutenant-Governor to create these corporations. Therefore is not the presumption that you approach the consideration of your problem not with the doctrine in *Ashbury Railway Carriage, &c. Company* v. *Riche*, the construction of the words of a Statute creating the whole of the entity, but with Mr. Justice Blackburn's view standing as true,—the view expressed in *Ashbury Railway Carriage, &c., Company* v. *Riche* in 9 Exchequer about the Sutton Hospital case. Is not the principle of construction the one he adopted? You have a corporation and you have to see whether there is anything that cuts it down. MR. WALLACE NESBITT: Yes, my Lord. That is glanced at in Mr. Justice Idington's judgment in one section where he puts it that the provinces had these powers before Confederation and you must find a negativing language cutting those powers away from them before you can assume that they are not in the exercise of the same powers, as the creation of a juristic body, as existed in them before Confederation.

VISCOUNT HALDANE: I do not say that this is my view, but I put it for your consideration and Mr. Newcombe's, if that is right there was complete power to create this corporation to mine in Yukon either in the Lieutenant-Governor in Ontario or in the High Commissioner or whoever he was in Yukon, or in the Governor-General of the Dominion. *Quasumque via* you get a full corporation and a capacity of endowing it with full powers. That seems to me to be the relevancy of it if it is a sound argument from your point of view. MR. WALLACE NESBITT: I have pressed sections 12 and 65 on one or two occasions, but I have never been able to get anyone to see that there was anything in them until your Lordship suggested it this morning, and I am very glad that you think that that argument is sound; because it seems to me to be at the very threshold of the inquiry we are embarked upon.

VISCOUNT HALDANE: I am really seeking for information. We made a somewhat searching investigation into the nature of the Constitutions in the case of the Sugar Refining Company and the Government of Australia, and there we pointed out, in both cases, but done differently, the object is to get a complete field of powers divided into two so that nothing should be omitted, and all that existed before should be there, only differently distributed. MR. WALLACE NESBITT: May I ask your Lordships in connection with that to note a case that your Lordships have been referred to, The Maritime Bank case in 1892 Appeal Cases, at page 442. Lord Watson's observations there were, paraphrasing them, that each province has as full and ample powers, as plenary powers, as the Imperial Legislature, within section 92. Does not this "purposes" and "objects," simply mean this, that the same authority that the legislature could give or the Governor

could give is vested in the Governor to give by way of provincial legislation. What is that authority? They could have given under the head of "provincial objects" the fullest authority, and therefore whatever the ambit of jurisdiction of the legislature is, whatever their powers are, those powers may be exercised by the Lieutenant-Governor-in-Council. Then if that is the scheme of both would your Lordships note the Revised Statutes of Canada, 1906, chapter 79, their Companies Act, section 5. Your Lordships will see how the name scheme is kept up in both showing at any rate what the authorities both in the Dominion and in the provinces thought, "The Secretary of State may, by letters patent under his seal of office grant a charter to any number of persons, not less than five, who apply therefor, constituting such persons, and others who have become subscribers to the memorandum of agreement hereinafter mentioned, and who thereafter become shareholders in the company thereby created, a body corporate and politic, for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends"—

VISCOUNT HALDANE: Are we looking at the Dominion Act or the Ontario Act. MR. WALLACE NESBITT: The Dominion Act.

VISCOUNT HALDANE: That is very much the same as the Ontario Act. MR. WALLACE NESBITT: They use the same language, the same is used in Quebec I believe.

VISCOUNT HALDANE: Does not that rather point to these words being introduced for the purpose of carrying out the quasi Federal Constitution under sections 12 and 65? Wherever the field is defined by reference to legislative powers you may create the corporation, but you may only do it with a purpose or object in view, of a class defined by reference to the distribution of legislative powers.

LORD PARKER: That is a more remarkable section in the Dominion Act than in the Railway Act.

THE LORD CHANCELLOR: I cannot understand. Why do they except the railway? MR. WALLACE NESBITT: They are dealing practically with a trading and manufacturing company. When you deal with loan and railway companies that require special legislation, in each case applicable to them, you have the general Railway Act, and the general Loan Companies' Act, and the general Insurance Act.

LORD PARKER: I think I understand that, but the remarkable part of the section appears to me to be this, that it seems to negate the power of the Dominion to incorporate a company for the purposes for instance of mining in Australia. MR. WALLACE NESBITT: I was going to point out, if that argument is good against us that there is territorial limitation, the same territorial limitation must be read in to any of their companies if they seek to do anything in Michigan or New York or anywhere abroad. May I state in a word what the idea has been since Confederation; on has always assumed the doctrine till the diligence of Mr. Ewart raised the question in the Canadian Pacific Railway case, where he felt there might be difficulty on the construction of the policy as to the policy covering standing timber, he raised the point to get back the premium money paid by the Canadian Pacific Railway to the insurance company that the Ottawa Insurance Act was *ultra vires*. Then this brought on this avalanche of difficulty. Prior to that the assumption has been I think throughout that the doctrine as I understand that is laid down in the John Deere Plow case, the last case, was the true doctrine, that where, if I may describe the Dominion area by reference to this building—we will say this room is the province of Ontario, that is its territorial area, the Dominion consists of a number of other rooms—where a company is to be given the right to live in every one of those rooms, that is Dominion. That was first hinted at in Parsons' case, followed in the Investment Company's case, followed in the Compagnie Hydraulic case, and affirmed in the John Deere Plow case—that that gave any trading corporation, because it related to a matter outside, the right of residence outside the province, that that was Dominion. That in the same way a provincial company, providing that instrument did not of necessity limit it territorially describing the objects, had only a right of residence in the province, but that if the other province saw fit or the state of New York, or the state of Michigan, to allow them to carry out, to exercise, their capacities there, they did it not as of right but under the doctrine of comity, and that this juris-

diction only meant this, each had a concurrent right to create companies, the one with a right to operate in each of the provinces, the other with a right to operate only in its own province so far as right could be conferred, but the power under the leave of the other provinces or other states to exercise its capacities abroad.

THE LORD CHANCELLOR: What you mean is this, that if you regard this building as representing the Dominion and each room as representing the province the province could grant to any person the right as far as the province was concerned to go into any other room and do what it pleased, it could not give them the key of the door; but the Dominion could give them a master key which would unlock every door. MR. WALLACE NESBITT: That is what I understood the John Deere Plow case decides.

VISCOUNT HALDANE: There is a status which would enable them to go into any room. MR. WALLACE NESBITT: What is the creation of a corporation? It is nothing but the provincial or Dominion law saying to one person, if it pleases two persons, three or more: We create you into a juristic body, the status of that juristic body in the case of a Dominion company being that it has a legal right of residence everywhere throughout the Dominion which cannot be denied it. Its capacity to exercise its rights may be greatly hampered by provincial general law, as for instance in the case of the law of Mortmain, an illustration given in the Parsons' case. Another instance, if it is a Dominion insurance company, it may be compelled to have its policies in each province subject to the right of that province to say what are the conditions applicable to the contract in that province, making it applicable to all companies of course.

LORD PARKER: Including every province as a foreign state for all those purposes. MR. WALLACE NESBITT: Yes, that has been established I think beyond peradventure by the decisions of this Board commencing with Parsons' case. May I give for a moment for what it may be worth one's view of the historical situation? It is referred to in the judgments and it was appealed to by the Dominion, but we appeal to it even still more strongly. You have the condition of things that the provinces each had a right, the fullest possible right to create companies prior to Confederation. Then the discussion arose immediately the parties met at Quebec, and the opposing forces were marshalled on the one side by Sir John Macdonald and on the other side by Sir Oliver Mowatt. The first article that appeared was: Generally to the provinces the incorporation of companies. That was stricken out because that would have meant that even all the Dominion companies, inter-provincial railways and everything of that kind would have had to seek incorporation from the provinces and legislation regulating their matters from the Dominion. Then they substituted next, it appears: The incorporation of companies for all objects other than those assigned exclusively to the Dominion. That would cover banks, for instance, and inter-provincial railways and the like. That was not satisfactory. Then they substituted, to get at the language: Companies with provincial objects; and apparently the notion there was, in opposition to Dominion objects. What are "Dominion objects?" I think it is quite plain what the gentlemen sitting about the Board thought they were, and what this Board has said they were. First the provincial objects were anything within the legislation of the provinces,—subject to this, that the matters that had been assigned specially to the Dominion they had no right to interfere with, inter-provincial railways, telegraph lines connecting the provinces, telephone lines—of course, they were not in existence then—banks, savings banks or companies necessary to carry out any of the enumerated heads of section 91; those are Dominion. Then there was another field, namely companies desiring a right of residence—it has been called under that name, or desiring a Dominion status, a right to be in each province; or another name, "for general Dominion purposes." Those I would say were Dominion objects. Take for instance savings banks. Everybody has conceded, my friend has argued always, that the Dominion only can incorporate savings banks. He must appeal therefore to the legislative jurisdiction there because a savings bank might be confined wholly in its operations to one province; yet no province has ever thought they had a right to create such an institution, because it was an institution the legislation in reference to which is given exclusively to

the Dominion by section 91, which would include necessarily its incorporation if our view is correct. Then if that is so what is the result as a practical matter? That both have, in the case of trading companies, so to speak concurrent rights, the one to create a company only with a right in its own province or residence, but a complete juristic body, capable and entitled to exercise its capabilities by the leave of other provinces or by the leave for instance of the state of Michigan or the state of New York. If it is a territorial limitation the Dominion has no further right under that to create a body, a bank for instance, to have, like the Bank of Montreal, its business in San Francisco and its business in New York than the province has to create a mining company which can do business by the leave of the state of Michigan or the state of New York, or a trading company—

VISCOUNT HALDANE: The scheme of the British North America Act as explained in half a dozen cases that we have had, but notably in the case where Lord Loreburn, when Lord Chancellor gave the judgment in 1902, is to give all powers except in certain military and prerogative matters to Canada, to be used either by the Dominion Government or by the Provincial Government as the case may be. There must therefore be power to create a company which can trade in Australia or here extra-territorially and that power to create such a company as distinguished from conferring on it territorial right must exist somewhere in the Canadian legislature. MR. WALLACE NESBITT: We say it exists in both.

VISCOUNT HALDANE: You point to section 5 of the Dominion Companies' Act as being in the same terms as the Provincial Companies' Act. You say if these words are to be read territorially nowhere does such a power reside, and there must be such a power, to give a corporation the requisite status. Therefore you say these words: Purposes or objects to which the legislative authority of the province of Canada extend, must be read with reference to the distribution in sections 12 and 65 for some purpose such as that, and not for territorial purposes. Is that your argument? MR. WALLACE NESBITT: Yes, my Lord, only put much better than I can put it.

LORD PARKER: If you are to contrast Dominion objects with provincial objects nobody would probably contend that the Dominion was incapable of creating a company to trade outside the Dominion. Therefore Dominion objects and provincial objects may be perfectly consistent with both parties having that power.

VISCOUNT HALDANE: Yes, that is the same view p... from another point. MR. WALLACE NESBITT: Let me add just one sentence to what your Lordships have said. I have always thought that wherever you get a Sovereign power entitled to create a corporation, this juristic body, you must find something that cuts down the ordinary attributes of that by express language before you attempt to cut it down. In other words if it creates that juristic body, puts the breath of life into it, it ought to have a right to exercise all its capacities,—its arms, its hands, its legs, and everything else (comparing it to a natural person) unless, in the instrument itself, it negatives the ordinary common law right that exists of that juristic body to go anywhere throughout the world by the leave of the authorities beyond its own creating probabilities. Where do you find that? In the language "with provincial objects," if you read it in the sense which I have put. Both have the power to create these bodies. "for provincial purposes," my friend Sir Robert Finlay referred to: the same meaning. Undoubtedly they can raise revenue not to be spent only in the province. They can raise revenue by way of direct taxation for anything that may further the interests of the province. We have our Commissioner; we have our Immigration Agency, here on the Strand, housed I think even in a better building than the Dominion Government has its representative in, in Paris, and though in Belgium, I do not know whether it has now—

VISCOUNT HALDANE: I do not think you need argue that Canada is capable of some amount of being rep.. sented all over the world; it is obvious that the Constitution meant that. MR. WALLACE NESBITT: "For provincial purposes," is that anything more than "with provincial objects"—does it go as far?

VISCOUNT HALDANE: Is not it *ad rem* that section 65 said that the Lieutenant-Governors were to have these powers "as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec

respectively"? That is to say they were to have the full powers unless they were somehow cut down. What was to cut them down was cases where they were not capable of being exercised in reference to Ontario and Quebec respectively. Then it says in the Companies' Act, in both cases, Dominion and provincial, you are to look to Dominion purposes and objects; but a Dominion purpose or object is to create a corporation—which, it is true, has no rights, because Canada cannot give rights, beyond the Canadian territory—but has the status, as to trade, all over the world. Why not the same with reference to Ontario and Quebec? MR. WALLACE NESBITT: I have never been able to see.

VISCOUNT HALDANE: They are the same words? MR. WALLACE NESBITT: Yes.

VISCOUNT HALDANE: And you have this, that the common law power is to continue except so far as it is taken away. Lord Watson said in the case you referred us to, the Lieutenant-Governor for the province represents the Crown. MR. WALLACE NESBITT: Just as much as the Governor-General. That is also in the Queen's Counsel's Patent case—I think your Lordship argued it.

VISCOUNT HALDANE: Yes, I was in that case. MR. WALLACE NESBITT: The Lieutenant-Governor was the only one entitled to give the patent to the Queen's Counsel as representing the King in the provincial Courts.

VISCOUNT HALDANE: I remember it was a very short judgment, but it was very definite, and an application of the same doctrine. MR. WALLACE NESBITT: I have given your Lordships the historical situation in 1864, of what the parties evidently had in mind when they sat down to make this contract or agreement. What has been the course pursued since? The Dominion has apparently taken that for granted, that the right was only, in the provincial company, in the province, but its capacity could be exercised if the Dominion gave its leave. You have that in the Insurance Reference which has been argued at length. Ever since 1868 that has been the view adopted by the Dominion authorities, as shown by their legislation certainly in reference to the companies. Applying that to the Bonanza case it was apparently the doctrine they gave effect to when they recognized the Bonanza Company as a company duly incorporated under the laws of Ontario by executing the documents they did. That shows for what it may be worth the view of the Dominion authority. Now if a contrary doctrine is established, may I ask your Lordships' attention to some of the phases of Mr. Justice Idington's judgment. While the judgments are long and somewhat rhetorical, I do not think your Lordships can pay too much attention to the difficulties that he points out, and to the calamitous results that will follow from the view being taken that there is a territorial limitation. I shall only given certain instances which I think are known to your Lordships; certainly well known to Mr. Newcombe. Take on the east, the Dominion Iron and Steel Company, which your Lordships all know about; that is a Nova Scotia corporation under special Act. Its great smelting works are at Sydney, Cape Breton in Nova Scotia; all its iron ore is in Newfoundland, its coal areas run well out beyond the three mile limit, I should think, under the sea. MR. NEWCOMBE: Not so far as that, but they do run under the sea pretty well. MR. WALLACE NESBITT: I thought that No. 6 even ran as far as I said.

THE LORD CHANCELLOR: Are the three miles sea limit the property of the Dominion or of the province? MR. WALLACE NESBITT: Of the province. MR. NEWCOMBE: Jurisdiction and not property.

VISCOUNT HALDANE: Are you raising the question? MR. NEWCOMBE: No.

THE LORD CHANCELLOR: Does the foreshore belong to the province or to the Crown? MR. WALLACE NESBITT: The province, except in public harboure.

VISCOUNT HALDANE: The three-mile limit question we considered carefully in the Fraser River case, and we came to the conclusion that there was no question of property there.

THE LORD CHANCELLOR: I follow your point; you are brought against the other argument, that it may be true all those powers may perfectly well be lawful, because you could not carry on the business without getting the coal and the ore. MR. WALLACE NESBITT: I am coming to that. I will give three or four startling illustrations. They gather their ores, and smelt them at Sydney. Their sales are

largely in Australia, India and South Africa. They are shipping through the Panama Canal to the Southern American countries.

LORD PARKER: Have they their own mines? MR. WALLACE NESBITT: They own their own iron mines in Newfoundland; they get the quartz and so on in Nova Scotia; the smelting is done in Nova Scotia, but the large sales are in the foreign countries. They own their own line of steamships plying between Nova Scotia and Newfoundland. If the territorial limitation is confined and the legislation is going to get that company out of the difficulties of the Birkbeck case—the Dominion cannot to it. My friend in the Supreme Court said: We will pass any legislation that is necessary. They cannot pass legislation which will affect the civil rights of creditors and stockholders among themselves in the company as to all these "illegal" transactions, the province cannot pass it because they are in reference to things which happen outside the territory, and the ancillary doctrine, which I have always contended is the most extraordinary doctrine ever promulgated in reference to a trading company, cannot help them because it cannot be said to be ancillary, the carrying on of such a functional matter as the ownership of the mines, the ores, and the working of them, and the shipment of them across from Newfoundland to Nova Scotia. Make ancillary as wide as you please, it cannot cover such a transaction.

THE LORD CHANCELLOR: I do not know that it matters, but I am not prepared to assent to that. It appears to me quite possible. MR. WALLACE NESBITT: May I discuss it a little later?

LORD PARKER: If your main business is smelting iron ore, it cannot be considered in the ordinary sense an ancillary business to mine coal. MR. WALLACE NESBITT: No, my Lord.

THE LORD CHANCELLOR: One gets always into confusion when you use uncertain language, and "ancillary" is obviously a most uncertain word. If it were said a company were incorporated within a province and had power to do anywhere, by virtue of that incorporation, any act which was reasonably necessary for the purpose of carrying on its business throughout the province, that might include acquisition of coal mines.

LORD PARKER: It is laid down in the English cases, if a company is incorporated for a particular object it may do anything that is reasonably necessary for affecting that object though it is not specified, but there are also lots of decisions, I think, that where a company's business is, say running a railway or smelting ore, though it can acquire everything that is necessary for that purpose, it cannot go and own coal mines merely because it wants coal, or mine ore because it wants it.

VISCOUNT HALDANE: I did my best to persuade the House of Lords when I was at the Bar about this, the London County Council ran tramways from Westminster Bridge to the other bridge, and there was a short space between where they ran omnibuses, that was not treated as ancillary. MR. WALLACE NESBITT: I know that case. Let me pass from Nova Scotia to my own province. Your Lordships know something of the nickel business. 85 per cent of the total nickel business of the world is within Ontario; Sir Alfred Mond's is about 15 per cent., the other is the large company I speak of. The Huronian Company is the operating company; the product of certainly half a day would supply the total uses of Canada. That nickel has to be sold and is sold, at present it is under the complete control of the Admiralty for the building of big guns on warships, for armour plate, and for a certain number of industrial purposes here and in the United States. Is it ancillary to its business that it can only bring the ore up to a certain state, say about 85 per cent. to 92 per cent., and that then, in the case of the Mond Company it has to be brought to Wales, under their process, because of the severity of our climate and because you have to have a reasonably even temperature, to continue the other 8 or 9 per cent. In the case of the great company it has to be taken to Hoboken, where it is submitted to another process, which finishes the other 9 per cent. Are all those operation *ultra vires* to the ownership of the mines? It has been a matter for some considerable time of great public clamour that the province of Ontario itself should own the mines so as not to have any ability in outside Sovereignties to have a certain control over the output of the nickel. It is all ultimately refined in the United States, and they

might have, in the case of this war, shut down those refineries, in which case the manufacture of big guns would practically have ceased for the time being. You would have to recast all the calculations about strains and so on. The province of Ontario it is said should own those. It has to sell the product all over the world. Has the province to go to the Dominion for incorporation of that company to run its own commission? Is such a thing possible? The province at the present time is largely going into the control of electricity. It does it through what is called a Commission, the Hydro-Electric Commission of three. It purchases its electricity at Niagara Falls. In order to make a success of its undertaking in the west, in other words to take care of the overhead expenses, it is said to be necessary to sell across the river in Detroit. Has it no ability to do that or must the project fail because of the territorial limitation? Take the Toronto General Trust Company; the point I think is not about investing its money, but they become executors of estates, and they carry on that business in the west; they must have millions they represent as active executors in Manitoba for instance. Are those *ultra vires?* Have they all to be made good? No legislation short of Dominion can make them good, Manitoba cannot, they cannot concurrently, I should think, as between the company and the heirs and so on, if they are *ultra vires.*

LORD SUMNER: You will make it plain in time I daresay, but I do not quite follow how these fearful results throw much light on the interpretation of the Statute. Supposing the Statute means what you contend it does not mean, and all these things happen, they happen because mankind has not been able to understand the Statute before, or because we misunderstand it now. MR. WALLACE NESBITT: All I am pressing it for is this. If the language is plain it has nothing to do with it. Your Lordships have to administer the law of course, but I do press the doctrine of inconvenience in this way. I think it was Lord Westbury who said in a case with which your Lordships will be familiar, unless the language was very plain he would hesitate long where there was at all a doubtful construction before giving effect to something which would breed such inconveniences as were referred to—it was Lord Campbell in the Marriage case. It is for that reason—if there is any possible construction, to go back again to an old case, where practically they said that the Judges would read the Statute upside down to avoid inconveniences—it is on that doctrine.

VISCOUNT HALDANE: I have always thought these very dubious doctrines belonged rather to the period of the "dispensing power." MR. WALLACE NESBITT: It is on that point that I am giving your Lordships the illustrations.

I have the official figures of the capital of the companies incorporated up to date, under the theory I have assumed, by the province of Ontario. Your Lordships will have to say what these figures mean, because there has been a dispute about it. The first figure is two billion odd.

THE LORD CHANCELLOR: Let us see what you mean by a billion? MR. WALLACE NESBITT: I mean a thousand millions.

THE LORD CHANCELLOR: Not a million millions? MR. WALLACE NESBITT: No, my Lord, 2,733,600,875.00. MR. NEWCOMBE: Do I understand my learned friend that this is a statement of the capitalization of companies incorporated by Ontario and doing business outside the limits of the province? MR. WALLACE NESBITT: No, incorporated, many of them, in Quebec. The official figures are 315 million substantially. Take the T. Eaton Company; that has an enormous business, I think next to Sears Roebuck, the largest departmental store on the continent. They have an enormous building in Winnipeg, it must have run into a million or two millions of dollars, and the whole business there. Is the whole of that *ultra vires?*

Now I come to the "ancillary" doctrine. What does "ancillary" mean? Is it that which is necessarily incidental to make the business successful. I am a manager of a company; is it ancillary because, in order to make the business successful, to save it from bankruptcy, I think I should carry on business outside the province. Take the illustration which my friend gave of cigar making. The province of Ontario or Quebec both raise large quantities of tobacco and incorporate a company to produce, to manufacture and to sell tobacco. Well now it is ancillary to that to sell the tobacco over here, if you smoke our tobacco. But why? It is only

because the business manager thinks he can make more money out of it. What right has he to sell over here an ounce of that tobacco; the functional powers are to produce, to manufacture, and to sell. If the territorial limitation is read in the moment you get to the the edge of the province all your rights cease. How can you say a greater right exists in reference to something that is implied than can be given by the creating authority to that which is functional—I have never been able to see the force of the ancillary doctrine applied to this.

LORD SUMNER: I suppose it is quite plain, to refer to your illustration, that the province cannot say to its company: I have no power to let you go out of this room, but if you do go outside the room but not far I shall not say anything against it? MR. WALLACE NESBITT: That is, it will be *intra vires?*

LORD SUMNER: It will be ancillary. That will not do. On the other hand it will not do for a company to use the word "ancillary" to cover anything it wants to do and to make dollars out of doing it. That will not do. MR. WALLACE NESBITT: That is the point which I am making.

LORD SUMNER: So "ancillary" has to be supported; therefore you have to select which among the different objects of the company is the top one and which is not, which may be a very difficult thing; I quite appreciate all the difficulties of it. MR. WALLACE NESBITT: Is a construction going to be given which will give you the simple test; is it to be within the legislative jurisdiction; or is it to be the double test, legislative jurisdiction plus a question of fact of whether it is ancillary to something within the legislative jurisdiction. Is ancillary to mean one thing in one case, if I form my company to manufacture tobacco it is ancillary to sell it, if I form it to manufacture and sell it is not ancillary because that is functional, that is power, therefore I cannot do it.

LORD SUMNER: I am not so sure about it.[1] Mr. Hellmuth I think put the illustration that if you incorporate yourself to do only one thing, most other things may be ancillary, but if you incorporate yourself to do several things you limit your ancillary opportunities. MR. WALLACE NESBITT: That is our submission; I say no construction will be given to a section which leads to such curious results. Whenever you deal with the Act in any other phase it is a question of legislative jurisdiction.

LORD SUMNER: If a corporation cannot contract except under seal; why is it that it can engage a charwoman by word of mouth. The reason is, the Courts say, really a lame answer, that you cannot engage a charwoman under seal and you must have a charwoman. MR. WALLACE NESBITT: Our Courts have practically abandoned that doctrine.

LORD SUMNER: It is not enough is it that it is an illogical expedient which the Courts have adopted. The Courts do adopt illogical expedients. MR. WALLACE NESBITT: The less they adopt them in connection with a great compact of this kind the better I submit. If you come to any other question under the Act you look for the legislative ambit and there is an end of it. Here you look for the legislative ambit plus these uncertainties of questions of law which will lead to eternal litigation and all sorts of *inter se* contests between stockholders and investors. Surely if you find that all parties to this contract, all authorities, have concurred up to date in a certain treatment you will not disturb that settled practice of 40 or 50 years unless the language admits of no other possible construction, and I do not think that it can very well be urged that that is the case here. That is the point I make as to that, my Lords.

In conclusion my submission is that the words "provincial object" can be read giving to "Dominion object" a reasonable construction, you give to both the ample and full right of the creation of a corporation with that which is ordinarily inherent in that corporation, namely the recognition of it as a juristic body in foreign parts; that there is nothing in the language of this Statute to cut down that which is the *prima facie* rule in connection with all corporations created by a Sovereign authority, that the fullest and amplest powers, still remain under section 65 to the Provincial Parliaments to create these juristic bodies, as full powers as they had before; that that is only cut down by section 12, which gives the right to the Dominion similarly to create juristic bodies in matters which are assigned specifically to the Dominion Legislature and not otherwise. That includes all

such matters as are enumerated and under the general clause, the power to create corporations with a right of residence in each of the provinces which right could not be given by the provinces, and that the only difference in the status of these corporations is, in the one case the right to do business subject to local laws, in the other case it may be denied at any moment by the provincial authorities to each other: that the same powers exist in reference to the creation of these corporations in giving them rights to receive the recognition of Michigan or New York or Ohio, to both Dominion and Ontario corporations.

I ask your Lordships to therefore say that the practice which prevailed shall continue and that these enormous interests shall not be jeopardized and thrown into such a state of confusion and uncertainty as would follow from a judgment by your Lordships of a territorial limitation. MR. NEWCOMBE: For the present part of my argument, my Lords, I shall endeavour to confine what I have to say to what is strictly pertinent to the Bonanza case, which is the concrete or specific case.

THE LORD CHANCELLOR: Yes, but you will deal with the other before you conclude? MR. NEWCOMBE: I shall, my Lord.

THE LORD CHANCELLOR: You will begin by dealing with the concrete matter. MR. NEWCOMBE: Yes, my Lord, the particular case of the Bonanza Company.

Now, my Lords, this is a petition of right, a proceeding instituted under the Petition of Right Act of the Dominion which provides the ordinary procedure for actions against the Crown, and it is, as has been observed, of course fiated by the Governor-General, as appears on page 4. The Governor-General's fiat, I submit, merely operates to entitle the parties to proceed against the Crown, but it does not waive of affect any right of defence which the Crown has.

THE LORD CHANCELLOR: No. MR. NEWCOMBE: I merely made that remark, my Lords, in view of an observation which has been made; all defences are open.

Now, my Lords, the petition is a long pleading beginning on page 4 of the case, and there is an answer pleaded, setting up grounds of fact and grounds of law in answer, and there is also a reply.

THE LORD CHANCELLOR: I have been through them both. I was anxious to know, and that is why I asked Mr. Hellmuth, whether there was any defence on the part of the Crown that they had made these grants in ignorance. Obviously there is not. The rest is a mere denial that there was the power. That is the only relevant matter, is not it? MR. NEWCOMBE: Yes, my Lord. I suppose the only relevant matter to this discussion is the issue.

THE LORD CHANCELLOR: It is 1 and 2. The respondent denies that the suppliant ever had the power under the letters patent "to carry on the business of mining in the district of the Yukon or to acquire any mines, mining claims or mining locations therein or any estate or interest by way of lease or otherwise in any such mines, mining claims or locations. Should a free miner's certificate have been issued to the suppliant the respondent claims that the same is and always has been invalid." That is the real issue. MR. NEWCOMBE: Yes, my Lord; that is submitted by the Judge's order which is on page 55 of the record: "the questions of law set up by the respondent in paragraphs 1 and 2 of the answer," etc.

THE LORD CHANCELLOR: Yes, I noticed that. I think we are all familiar with the preliminary stages of this dispute. MR. NEWCOMBE: Those two preliminary points are raised under the statement of defence or the answer, and there was an order to have these heard and determined in a preliminary way, but it is not precisely a demurrer because you see that the argument proceeded not only upon the pleadings, the issues raised by paragraphs 1 and 2; but the admissions on page 53 introduce certain facts and certain documents which are to be referred to.

THE LORD CHANCELLOR: As I say, I have read all this. On page 53 is the order. It directs that the questions of law raised by the pleadings are to be argued and disposed of before the trial of the petition of right, and admissions of fact necessary or raising the question of law are to be made. MR. NEWCOMBE: It is really the order at page 55, because there are a number of issues of law here which have not been submitted.

THE LORD CHANCELLOR: I quite follow. Are there any such admissions which are of importance to us? If not, let us get to the substance of the matter. MR. NEWCOMBE: I shall get there as soon as possible, my Lord, but I want to put this in order to get the position understood, because very little has been said about it—

THE LORD CHANCELLOR: That is quite true. MR. NEWCOMBE: The nature of the case has been drowned in the general discussion of the constitutional question.

THE LORD CHANCELLOR: That is why it was that I said I had made myself familiar with what has taken place. MR. NEWCOMBE: There are six admissions here on page 53: "(1) The suppliant company obtained what purport to be free miners' certificates from the date of its incorporation down to a period at which such certificates ceased to be required. (2) The suppliant company has done no business in the province of Ontario beyond having its head office and the holding of certain meetings there." That, we think, is an important fact. "(3) The suppliant paid to the Secretary of the Yukon Territorial Council a fee of $500 and a license under the Yukon Ordinance (chapter 53 C. Ordinances of Yukon Territory, 1902), to carry on business in the Yukon was therenpon assumed to be granted to the suppliant company."

THE LORD CHANCELLOR: That is a thing that I wanted to ask you about when you began to address us. That payment is referred to at page 51. The receipt is given there, and it is said to be a receipt for incorporation of the company. MR. NEWCOMBE: That is a mistake of Mr. Burns, the Territorial Secretary; it was not an incorporation fee at all. It is a license fee.

THE LORD CHANCELLOR: It is the fee under this admission (3), a license under the Yukon Ordinance Act to carry on business. MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: It is put here: "was thereupon assumed to be granted." Was not it granted in fact? SIR ROBERT FINLAY: I think that merely intends to reserve the question of capacity; it was granted.

THE LORD CHANCELLOR: It was thereupon granted. MR. NEWCOMBE: On page 6 of the joint appendix, which is the last print of all in the book, there is "The Foreign Companies Ordinance," of the Yukon.

THE LORD CHANCELLOR: Sir Robert called attention to that. MR. NEWCOMBE: That authorises the issue of a license to certain companies.

THE LORD CHANCELLOR: Yes. MR. NEWCOMBE: This is only an abstract. Section 5 of that is not printed, but section 5 if it had been bronght in here would have shown that a fee is chargeable on the issue of a license proportional to the capital of the company, and according to the capital of this company, the fee was $500. That is a taxing license, and when they say here "incorporation fee" they mean the license fee.

Then "(4) The free miners' certificates under paragraph 1 hereof are in the following form." That appears on page 50. (5) The Yukon license purporting to be granted under paragraph 3 hereof was in the following form.". That appears on page 52. "(6) No license under section 1 of 61 Victoria, chapter 49 Can., was never granted by the Secretary of State to the suppliant company." And then the regulations are referred to, and in addition to that, certain exhibits were put in evidence which are printed in the record. First, the letters patent of incorporation of the company at pages 30 to 32; then exhibit No. 2 three leases and two collateral agreements, pages 33 to 45; then exhibit No. 3, the lease of reverted claims, page 46; exhibit No. 4, free miner's certificate; exhibit No. 5, the cash return to which we have referred, and exhibit No. 6, the Yukon license. The claims here are for damages for breaches of two agreements on pages 39 and 44. I think I should refer to those.

THE LORD CHANCELLOR: We have seen these. Sir Robert called our attention to them. MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: There may be matters on them to which you desire to call our attention, but you know, really, Mr. Newcombe, what is in our mind in this: We want to see whether or no there was power to grant these documents, not what the documents contain, because there is no real dispute about

that. They are mining leases. MR. NEWCOMBE: They are agreements to make grants.

THE LORD CHANCELLOR: Certainly. MR. NEWCOMBE: These people, Matson and Doyle, obtained leases from the Crown.

THE LORD CHANCELLOR: And assigned them to the company. MR. NEWCOMBE: The leases which they obtained were—

THE LORD CHANCELLOR: Assigned to the company. MR. NEWCOMBE: They are alleged to have been assigned to the company.

THE LORD CHANCELLOR: They are accepted as assigned to the company subject to all these questions of powers. I gather there is no doubt that the leases which were granted by Matson and Doyle are vested in the company. MR. NEWCOMBE: Yes.

THE LORD CHANCELLOR: Nothing turns on that: the whole question is whether there was power in the company to hold them. Is not that the point? MR. NEWCOMBE: I think not, if I may put my point.

THE LORD CHANCELLOR: Certainly. MR. NEWCOMBE: It is this: that the leases were granted to Matson and Doyle and assigned to the company. The leases were of large areas which they say they wanted to work in a hydraulic fashiou by bringing water from a distance and washing down the sides of the banks and getting out the gold in that way. Then within these, and excepted from the leases which were made to Matson and Doyle, were certain placer areas which had been granted out by the Crown to placer miners. They are small areas intended to be worked by hand with pick and shovel and a pan; they could not very well wash down the whole area there without affecting these, and these areas being outstanding it was desirable to get in those areas, and so they approached the Crown.

THE LORD CHANCELLOR: And got them in. MR. NEWCOMBE: And got these agreements for breach of which they are not claiming damages.

THE LORD CHANCELLOR: Yes. MR. NEWCOMBE: May I now read the covenant at the foot of page 39, it is the same in both cases—there are two of these agreements? "Now this agreement witnesseth that the Minister for himself and his successors in consideration of the premises and of the sum of one dollar now paid to the Minister by the parties of the second part doth promise and agree with them the parties of the second part their executors, administrators and assigns that in every case where any land comprised within any of the claims hereinbefore mentioned or referred to"—those are the leased premises, any lands comprised within those "becomes revested in the Crown"—those are the placer areas—"the Minister will execute or cause to be executed in favour of the parties of the second part their executors, administrators or assigns a lease of such land in the same form as the two indentures of lease hereinbefore referred to." That is, that when these placer areas fell in, were abandoned or lapsed, for any cause became revested in the Crown, then a lease of those should be made to Matson and Doyle, the lessees of the large areas, in the same terms.

THE LORD CHANCELLOR: Is not that exactly what occurred? MR. HELLMUTH: A certain portion.

THE LORD CHANCELLOR: All we are concerned with. MR. NEWCOMBE: I may misunderstand this question, but I should like to have an opportunity to put it in the way in which I do understand it.

THE LORD CHANCELLOR: That is quite true, Mr. Newcombe, and it is very important that you should; but we are very anxious to see whether there is any question that arises on the character of these grants or the subject-matter of the grants or any question excepting the simple question as to whether this company was in a position to accept the grant from the Crown: does that depend upon its contents? MR. NEWCOMBE: It is not a question of accepting a grant from the Crown. There is no question in this action as to the title to property, as to who is the owner of these mining areas in Yukon: the question is as to the right which is alleged on behalf of the Bonanza Company to recover damages for breach of these agreements collateral to the leases and set out here as collateral, made between the Crown and Matson and Doyle?

THE LORD CHANCELLOR: The first answer to the petition is that they never had the power to acquire by way of lease any interest in any of these mines. Is that in dispute or no? MR. HELLMUTH: That is what has been decided—

THE LORD CHANCELLOR: It may be that Mr. Newcombe no longer disputes it. The answer is at page 18. MR. NEWCOMBE: We set out that they had no power to acquire no doubt, but the question is not as to where the property is, but as to whether or not they can recover damages under these agreements.

THE LORD CHANCELLOR: Surely, it is the questions of law arising on these paragraphs—those are the questions referred: "That the questions of law set up by the respondent in paragraphs 1 and 2 of the answer . . . be raised, heard and determined." MR. NEWCOMBE: "The respondent denies that the suppliant has now or ever has had the power either under letters patent, license, free miner's certificate, or otherwise, to carry on the business of mining in the district of the Yukon, or to acquire any mines, mining claims"—

THE LORD CHANCELLOR: "To carry on the business of mining" in Yukon is entirely independent of whether he has any property or not; it is a general question. MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: The next is that he had no power to acquire any mines; that is a specific matter. MR. NEWCOMBE: "Or to acquire any mines, mining claims or mining locations."

THE LORD CHANCELLOR: "By way of lease." MR. NEWCOMBE: "Or any estate or interest by way of lease or otherwise in any such mines, mining claims or locations."

THE LORD CHANCELLOR: Did he purport to acquire an interest by way of lease? I understood it was disputed that there was any right. MR. NEWCOMBE: What they acquired by way of assignment was these claims in respect of mining, which were alleged by Matson and Doyle, for breach of these covenants to assign. It is in respect of that that the damages are claimed.

THE LORD CHANCELLOR: We are not concerned with the damages, but with the question of law arising on paragraphs 1 and 2.

VISCOUNT HALDANE: And that is all, and nothing else. MR. NEWCOMBE: Very well, my Lords.

Then to make my position clear, it is at all events in respect of these two collateral agreements and in respect of one of the other exhibits printed here that the claim arises, and a lease of reverted claims at page 46, in respect of which no claim arises, is put in there, as I understand, as a piece of evidence by the other side on account of the second recital, which says: "And whereas the said hydraulic leases and all the interests therein of the said John Joseph Doyle and others and the said Charles A. Matson and others have become vested in the lessees."

THE LORD CHANCELLOR: I think it is put in for this reason, in order that they may give a definite concrete piece of evidence with regard to a lease which has been granted to them which it is said by you in paragraph 1 they have no right or power whatever to hold. You deny in general language that they have any such right and they give a specific instance of such a right which they say was good. SIR ROBERT FINLAY: That is a lease of certain of these claims; there are others.

THE LORD CHANCELLOR: It would make no difference about the others, Sir Robert, of course; it is an instance. SIR ROBERT FINLAY: Yes.

(Adjourned for a short time.)

MR. NEWCOMBE: My Lords, what I meant by the observations I was making when your Lordships adjourned is not more than this: we are faced here with a claim for damages. It is not a claim under the leases. We submit that that claim, inasmuch as the plaintiffs had no authority to engage in the business of mining in Yukon, does not raise any question as to the present title to these premises but the question is as to whether they are entitled, in view of the circumstances, in view of the defect of their powers, to maintain the claim which is asserted here to recover damages for breach of the agreements made independently of the leases by the Crown with Matson & Doyle to assign certain areas to them, and which were later on assigned to the Bonanza Company.

The letters patent of this company are on page 30.

THE LORD CHANCELLOR: What point are you on now? MR. NEWCOMBE: In the first place I am going to show, independently of the question of the capacity of the company, that they were not qualified to carry on the business of mining in the Yukon because they had not complied with the statutory requirements in that behalf.

THE LORD CHANCELLOR: You mean in the Yukon? MR. NEWCOMBE: Yes, my Lord. Supposing everything that my learned friend says as to the interpretation of "provincial objects" be true, still I submit that this company did not comply with the local laws, and therefore was incapable of mining.

THE LORD CHANCELLOR: In what respect? MR. NEWCOMBE: In respect of not being a free miner within the territory.

THE LORD CHANCELLOR: That is a small detail. We are here to decide a great constitutional question. MR. NEWCOMBE: Yes, my Lord, but we are here to resist a claim of 17,000,000 dollars.

THE LORD CHANCELLOR: You are also here to argue the questions that have been raised before the Supreme Court. We are hearing these cases very much together. We are in your hands, of course, but our minds are very much on the question that has been argued this morning. Would it not be convenient to follow up that point? MR. NEWCOMBE: Certainly if your Lordships prefer it. I was endeavouring to deal with the case in the order in which my learned friend dealt with it

THE LORD CHANCELLOR: It is a mere question of the order, which the Board would desire to leave in your hands. The question as to whether, or not, the company was a free miner must be raised at some time in the course of your argument. MR. NEWCOMBE: I will take it now or later on. I will deal with it in the order most convenient to your Lordships.

THE LORD CHANCELLOR: It is plain it must be dealt with at some time. What Lord Haldane thought, and what the Board thought, was that it was involved in the general question. MR. NEWCOMBE: It may be involved in the general question, and I thought that perhaps the general argument would follow more naturally and logically upon a statement of the actual position of this company. That was the order in which my learned friend dealt with it.

VISCOUNT HALDANE: Take it in your own way. MR. NEWCOMBE: If your Lordship please. The letters patent are at page 30. The company is incorporated pursuant to a Statute of Ontario authorizing the Governor-in-Council to "create and constitute bodies corporate and politic for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends. And whereas by their petition in that behalf the persons therein mentioned have prayed for a charter constituting them a body corporate and politic for the due carrying out of the undertaking hereinafter set forth." Then at the foot of the page the corporation has "for the purposes and objects following, that is to say (a) To carry on, either as principal, agent, contractor, trustee, or otherwise, and either alone, or jointly with others, the businesses of mining and exploring in all their branches, and (b) To apply for, purchase, lease, or otherwise acquire patents and patent rights, trade marks, improvements, inventions, and processes, and to exercise, develop, and grant licenses with respect thereto, and for the said purposes." Those words qualify the two main purposes of the company which are in (a) and (b): for the said purposes to do what is enumerated in the following paragraphs: "(1) To construct, maintain, and operate, buildings machinery, engines, cars, docks, bridges, elevators, canals and other waterways, and other works. (2) To acquire by purchase, lease, or otherwise, and upon such terms and conditions as may be agreed upon, real and personal property, and estates and interests therein, including mines, mining claims, mining locations," and so on. Then in paragraph 8 it says: "To acquire and carry on all or any part of the works, property, franchises, and to undertake any liabilities of any person, firm, association, or company engaged in or pursuing any one or more of the kinds of business, purposes, objects or operations above indicated, or possessed of property suitable for the business purposes of the company hereby incorporated, and as the consideration of the same to pay cash, or to issue any shares, stock, deben-

tures, bonds, or obligations of the company hereby incorporated. (9) To sell, transfer, and convey to any person, or corporations having power to acquire the same, and on such terms and conditions, and for such considerations as may be agreed on all from time to time any of the works, undertakings, real and personal properties, rights, powers, concessions, and privileges of the company." Those are the powers granted; and at present I direct your Lordships' attention to the fact that it is described as an undertaking, and they have to do with the construction of works, canals, waterways, and physical structures upon the ground; and which therefore, as I shall submit later on, are granted in pursuance of the provincial power enumerated in paragraph 10, section 92, with regard to local works and undertakings. The lease, which is at pages 33 and 34, provides for hydraulic and other mining processes. The placer mines, as I have said, are excepted in the grant made by the two leases Nos. 2 and 9. The free miner's certificate is at pages 49 and 50, and it was obtained the day after the incorporation of the Company. It confers in terms, as your Lordships will perceive, all the rights of a free miner under any mining regulations. We say that the Bonanza Company were not entitled to a free miner's certificate, in the first place for incapacity as a company incorporated for provincial objects. That part of the case I will come to presently, but assuming for the moment capacity I submit the company was not entitled to a free miner's certificate, because it was not entitled by the regulations to be a free miner. The regulations are at pages 10 and 11 of the joint appendix. These are regulations Nos. 9 and 10. I think we may refer to No. 10, line 29: "'Joint stock company' shall mean any company incorporated for mining purposes under a Canadian charter, or licensed by the Government of Canada." This company, we submit, was not incorporated under a Canadian charter within the meaning of that definition. So far as judicial authority upon this point is concerned the Exchequer Court I think did not pass upon it. The Chief Justice upheld our contention; Mr. Justice Davies deciding solely upon the other ground made no observations upon it, and the other Judges were against us. What has been said by the other side in support of the contention that it is a Canadian charter is by reference to the judgment of Mr. Justice Duff at page 79 of the record. As showing that this is not a Canadian charter may I refer to the section of the Dominion Lands Act at the foot of page 9, with this explanation, that in the North-West Territories, which include the Yukon, the whole area of Canada, other than the four original provinces, and British Columbia, and Prince Edward Island, which were afterwards added, was included what was formerly known as the North-West Territory, and Rupert's Land, and after the cession of their rights by the Hudson's Bay Company, and the constitution of the province of Manitoba, which was carved out of the Territory of the Hudson's Bay Company, which, as I say, included the North-West Territories and Rupert's Land, the remaining portion of Canada was organized under the North-West Territories Act, which covered the whole unorganized area, the whole area of Canada not included within any province. Then there was a legislature constituted at Regina, with limited powers, corresponding very much to those which the provinces had under section 92; and afterwards, upon the discovery of gold in the Yukon, the Yukon Territory was set up, separated from the North-West Territory, and given local powers of legislation which are described here in the statute to which my learned friend referred. In all that area the public lands, including the mines, have always been vested in the Dominion as representing the Crown. It is different, as your Lordships know, in the older provinces, where the Crown lands belong to the provinces, but in the North-West Territory, and in the Yukon Territory, the public lands, including the mines, belong to the Dominion, as the Crown, and not to the local authorities.

THE LORD CHANCELLOR: They belong to the Crown in right of the Dominion? MR. NEWCOMBE: Yes. The distinction was preserved when the province of Manitoba was constituted, and when later on the provinces of Saskatchewan and Alberta were constituted.

VISCOUNT HALDANE: I remember a case with regard to the Indian Reserves. I forgot what was decided there? MR. NEWCOMBE: It was decided that when the Indian title was surrendered, the title which was recognized as belonging to the

Indians under the Proclamation of 1763, the surrender accrued, although brought about by the Dominion, for the benefit of the province, and not for the benefit of the Dominion, because the beneficial ownership, subject to the Indian interest in the province of Ontario, was in the province. It would be the other way about, I submit, where the surrender is in one of the new provinces.

The local authorities have no legislative jurisdiction over the public property of Canada.

VISCOUNT HALDANE: No. They have legislative jurisdiction over the whole territory, and they have some power to make laws there, but they cannot legislate with regard to the title. MR. NEWCOMBE: No, they cannot legislate affecting the right of the Crown in right of the Dominion in its public lands.

VISCOUNT HALDANE: It may be that they can legislate about people who come there. MR. NEWCOMBE: No doubt.

VISCOUNT HALDANE: Your difficulty is this. This is what troubles me about it. This is a Yukon Ordinance we are dealing with. MR. NEWCOMBE: That is a regulation. It is the regulation of the Governor-in-Council.

VISCOUNT HALDANE: They apply to Yukon. MR. NEWCOMBE: Yes.

VISCOUNT HALDANE: And to Yukon only. MR. NEWCOMBE: Yes.

VISCOUNT HALDANE: It does seem to me to be extraordinary if a joint stock company which may receive money in Yukon Territory excludes a company incorporated by Yukon law. MR. NEWCOMBE: I am coming to that in a moment. I want to complete the statement which I was making by reference to this section 47 of the Dominion Lands Act. The lands in the North-West Territories, and that which was formerly the North-West Territories, is governed by the Dominion Lands Act which provided by section 47: "Lands containing coal or other minerals, including lands in the Rocky Mountain Park, shall not be subject to the provisions of this Act respecting sale or homestead entry, but the Governor-General in Council may, from time to time, make regulations for the working and development of mines on such lands, and for the sale, leasing, licensing or other disposal thereof." Under that authority these regulations were made and the intention according to my submission was that the local authorities should have no power to legislate with respect to dealing in these lands or the minerals contained in them.

VISCOUNT HALDANE: That is really not quite the point. The only question is whether this company is a company within the meaning of the definition in the regulations which regulate the Yukon Territory. The expression in the regulations is that the company must either be a Canadian company or a company licensed by the Governor of Canada. One would naturally imagine that the first class of company that came within it would be a company incorporated under Yukon law. MR. NEWCOMBE: I submit not, because I submit they never intended that the local assembly should have any authority to incorporate companies to deal in Dominion lands and mines.

VISCOUNT HALDANE: Mines might be private property. MR. NEWCOMBE: They might, but the whole country was undeveloped and in the hands of the Crown.

LORD PARKER OF WADDINGTON: In the Consolidated Ordinance it is distinctly contemplated that there will be companies incorporated under the authority of the ordinance of the territory. MR. NEWCOMBE: Yes, I think they have power to incorporate.

LORD PARKER OF WADDINGTON: They are excepted from the power to grant licenses, the reason being that the licenses only relate to foreign companies, and there is no need to get a license for companies incorporated by the law of the territory.

VISCOUNT HALDANE: It may be that this means that any company that is Canadian is to be capable of being the recipient of a grant or certificate without more, but if it is a foreign company then it must be licensed by the Governor of Canada before it can come in.

THE LORD CHANCELLOR: Supposing you were asked whether this company was a Canadian company, would not your answer be: Yes. If it is not a Canadian

company, what company is it? MR. NEWCOMBE: It is a provincial company, my Lord.

THE LORD CHANCELLOR: If it is a Canadian company what other geographical description could you give it? MR. NEWCOMBE: An Ontario company.

THE LORD CHANCELLOR: Is not that a Canadian company? MR. NEWCOMBE: Looking at it from this distance your Lordships would think it was an apt description of such a company to call it a Canadian company, but I submit that nothing could be more inapt or inaccurate than to describe, for instance, such a company as Mr. Justice Duff says would come within it, that is a company incorporated by British Columbia previous to the Union, as a Canadian company.

VISCOUNT HALDANE: That was not a Canadian company. British Columbia was a Crown colony in those days, and was not part of Canada. It has been brought into Canada now, and I should have thought any company incorporated in British Columbia to-day was a Canadian company. MR. NEWCOMBE: There is a clear distinction according to what I submit is the general understanding; you speak of Canadian as distinguished from provincial.

THE LORD CHANCELLOR: That is quite possible. It is quite true that you may if you find something that suggests that there is a distinction to be drawn between the words "Canadian" and "provincial." Here you find nothing of the sort.

LORD SUMNER: The Government of Canada means the Government of the Dominion, the adjective therefore must be the adjective of that Canada of which the Government is mentioned immediately after. MR. NEWCOMBE: That is the observation I was going to make.

THE LORD CHANCELLOR: You say it is an Ontario charter granted by the Dominion of Canada. That is how you seek to put it. MR. NEWCOMBE: Yes, a Canadian charter.

LORD PARKER OF WADDINGTON: That construction might exclude a company incorporated according to the ordinance in the territory of Yukon from having a free miner's certificate, together. MR. NEWCOMBE: I do not think it was ever intended to authorize such a company; I do not think such a company ever did get a free miner's certificate.

VISCOUNT HALDANE: If we are against you you could alter the statute. MR. NEWCOMBE: That is my submission. It is in a very narrow compass. The collocation of words is such as to indicate that it was a company in respect of which the local authority had no capacity, and to evidence a policy on the part of the Dominion, so far as companies incorporated within Canada were concerned, to provide that only those incorporated by the central authority should have the right to mine there.

The Yukon license so called is at page 52. It is signed by Mr. McInnes, the Commissioner, and Mr. Burns, Territorial Secretary; it says: "I, William Wallace Burns McInnes, Commissioner of the Yukon Territory, by and with the advice and consent of the council of said territory, do hereby authorize and license the Bonanza Creek Gold Mining Company, Limited, to use, exercise and enjoy within the Yukon Territory, all such powers, privileges and rights set out in that memorandum of association as are within the power of the Commissioner of the Yukon Territory in council authorize and license, and to carry on within the Yukon Territory all such objects of their incorporation." That license is authorized, if at all, to be issued to this company under section 2 of the Foreign Companies Ordinance of Yukon printed at page 6 of the Joint Appendix, which provides that "Any company, institution or corporation incorporated otherwise than by or under the authority of an ordinance of the territory or an Act of the Parliament of Canada desiring to carry on any of its business within the territory may (through the Territorial Secretary) petition the Commissioner for a license so to do and the Commissioner may thereupon authorize such company, institution or corporation to use, exercise or enjoy any powers, privileges and rights set forth in the said license." My Lords, I submit that this is not a company within the application of that clause to whom the officials of the Yukon Government had any authority to issue a license. My contention will be that it is a company locally limited as to its mining powers to the province of Ontario. I ask your Lordships for the purpose of considering this to suppose that the

words "within the province of Ontario" are embodied in the charter or letters patent which were issued to this company. It is a company provincially authorized to carry on the business of mining in Ontario. It applies to the Commissioner of Yukon for a license under section 2. Its business is to carry on mining in Ontario. Those words "its business" mean as I submit its appropriate chartered business, the business which it is empowered to carry on, and if it be limited, as according to my contention it is, to carry on business in Ontario it can no more qualify under this ordinance for a license than a company permitted by its charter only to mine could come into the foreign jurisdiction and get a license to carry on insurance business.

VISCOUNT HALDANE: This brings us at once to the main point. MR. NEWCOMBE: I think we are touching very closely upon that now. I just want to clear away this before I go to the general question. The words are "desiring to carry on any of its business," you cannot read that as applicable to a company that is authorized to mine only in Ontario. You would read it then: Desiring to carry on the business of mining in Ontario.

THE LORD CHANCELLOR: There is no doubt that the business of this company as defined by its charter does include carrying on mining operations in Yukon, because there is no limitation in the charter. MR. NEWCOMBE: Except the limitation which the British North America Act necessarily puts on it.

THE LORD CHANCELLOR: You may say that the British North America Act has prevented the charter hampering the operation of its plain language or you may say the right in connection with the British North America Act of mining must mean mining in Ontario, but supposing you take the plain words of the certificate which is all we have for the moment, then plainly this company did desire to carry on its business, which is mining, in the Yukon district. Until you have displaced the other I should suggest to you that there is no possible means of escaping from the fact that its business was mining. You can then say: But properly read its business was not mining; it was mining in the province of Ontario, but until that is established it becomes impossible.

VISCOUNT HALDANE: It is the main point.

THE LORD CHANCELLOR: Once you have got your first proposition established then this follows as a matter of logical sequence. MR. NEWCOMBE: I will pass to the main question, and I will come back to this.

THE LORD CHANCELLOR: If you are right on the main question you will have very little to say on this. MR. NEWCOMBE: There was the point that my learned friend argued, that any company could come and get a license, and when the company got that license it had a license from the Crown which would make it a corporation within Yukon independent of anything else. I think that question comes in more conveniently later on.

Then, my Lords, we have to consider the general scope and intent of sections 91 and 92 of the British North America Act with particular reference to the definition of local powers for the incorporation of companies with provincial objects under Item 11 of section 92. The first observation I wish to make with regard to that is as to the generality of all Dominion powers; all general powers affecting the country, general matters of common interest, are as Lord Watson explained in the Maritime Bank case committed to the Dominion, and local powers to the province. That is the general scope of the two sections, and it has been firmly established by the decisions of this Board that the Parliament of Canada alone can constitute a company with power to carry on its business throughout the Dominion. Of course there are two kinds of companies constituted by the Dominion.

LORD PARKER OF WADDINGTON: At the date of the Union, or the date of the British Columbia Act, the province had some power of exercising the prerogative of the Crown to deal with a corporation by the executive Act of the Governor-in-Council had they not? MR. NEWCOMBE: I am not sure that they had.

VISCOUNT HALDANE: The province of Canada was constituted with the same sweeping words, and there was a Governor-General. There is no doubt he would exercise the power of the Crown just as in Australia nobody doubts that before the Commonwealth Act that was done. MR. NEWCOMBE: That may be so.

I am not aware of that power ever having been exercised, and I have never had occasion to consider it.

VISCOUNT HALDANE: The Lieutenant-Governor or the Governor-General always granted the letters patent. SIR ROBERT FINLAY: I think in the Dobie case the original charter was granted by the old Parliament of Canada by statute.

LORD PARKER OF WADDINGTON: I was not thinking so much of the Parliament as the executive powers.

VISCOUNT HALDANE: It all depends upon the Lieutenant-Governor or the Governor-General. If the Commissioner delegates the power of the Crown in very large terms he has to exercise the prerogative for all local matters. Where is the Queen's Counsel case reported? The relevance of that is that it was a direct case of letters patent being granted by the Governor-General, and the question was who had the right to grant it. MR. NEWCOMBE: It is in 1898 Appeal cases at page 247. It is the *Attorney-General for Canada* v. *The Attorney-General for Ontario.*

VISCOUNT HALDANE: I remember the Judicial Committee made very short shrift of it. MR. NEWCOMBE: The question was as to the power of the legislature of Ontario to confer powers upon the Lieutenant-Governor to issue letters patent to Queen's Counsel giving them precedence in the provincial Courts.

VISCOUNT HALDANE: The contention of the Dominion there was that the Lieutenant-Governor of Ontario does not represent the Crown in respect of the prerogative rights of the Crown, and particularly in respect of the prerogative right or power of the Crown to grant letters patent to Queen's Counsel, giving them precedence. I think this is the relevant part of Lord Watson's judgment at page 253: "Assuming it to have been within the competency of the Provincial Legislature to vest that power in some authority other than the Sovereign, the Lieutenant-Governor appears to have been very properly selected as its depositary, seeing that, by section 65 of the British North America Act, he is entrusted with the whole executive powers, authorities, and functions which before the Union had been vested in or were exercisable by the Governor or Lieutenant-Governor of the province of Canada, in so far as these powers, authorities, and functions which before the Union had been vested in or were exercisable by the Governor or Lieutenant-Governor of the province of Canada, in so far as these powers, authorities and functions may be necessary for the government and administration of the new province of Ontario." MR. WEGENAST: Might I volunteer this statement, that this very Act, which was passed in 1852, and in identical language practically, has been perpetuated both in the Dominion and in the provinces.

VISCOUNT HALDANE: This King's Counsel Act. MR. WEGENAST: No, the Companies Act, giving the powers to grant letters patent in the provinces. They were altered I think in 1897. As a matter of fact a dispute arose at Confederation as to it, and I think the Ontario Legislature ventured in 1868 to amend the General Act, and after some correspondence the Ontario Legislature passed an Act in identical terms with the Dominion Act of 1869.

VISCOUNT HALDANE: So that the words in question came originally from even earlier than a Dominion source, the old province of Canada. MR. WEGENAST: From the original Act of 1864, which applied to both Upper and Lower Canada.

VISCOUNT HALDANE: What was its object and purpose? MR. WEGENAST: I can find it in a few moments.

VISCOUNT HALDANE: It would be interesting to see it. MR. NEWCOMBE: With regard to this question of the prerogative of the local Crown to grant incorporation by letters patent that has been suggested for the first time by your Lordships, as is pointed out in the judgment below, it has never been doubted that the doctrine of *The Ashbury Co.* v. *Riche* and other cases following it under the British Act have full application in Canada to companies incorporated either by special Act of Parliament, or by letters patent pursuant to the delegated powers which are conferred in each of the provinces, and in the Dominion also, upon the Lieutenant-Governors or the Governor-General to incorporate. And that is pointed out in the judgment which my learned friend read to your Lordships yesterday of Mr. Justice Duff, where he discusses both cases.

LORD PARKER OF WADDINGTON: What was in my mind was this: The words of the Act are "Legislate as to the incorporation of companies with provincial objects." MR. NEWCOMBE: In relation to that as coming within the classes of subjects next hereinafter enumerated.

VISCOUNT HALDANE: They may legislate with respect to the incorporation of companies with provincial objects. MR. NEWCOMBE: In relation to matters coming within that.

LORD PARKER OF WADDINGTON: Had the Crown, as represented by the Governor in Council, at the date of this Act, any power, and if so, was it taken away?

VISCOUNT HALDANE: I have no doubt we can find that out at once by referring to that very learned book on the Colonial Constitution written by Mr. Todd, which contains more information about these things than anything else. Perhaps somebody would look, to make sure. I think Todd is the most likely book. MR. NEWCOME: It has not been the subject of discussion before, and your Lordships suggestion was just as new to me as it was to counsel upon the other side. By section 9 of the British North America Act, the Executive Government—

VISCOUNT HALDANE: My impression is you will find there is a delegation of the right to use the prerogative in all local matters. MR. NEWCOMBE: That would be specially provided for in the Governor's instructions.

VISCOUNT HALDANE: We must have somewhere the Governo. s instructions. MR. NEWCOMBE: Yes, they were amended in 1878. Your Lordships should get the instructions after 1878. With regard to the observation on the British North America Act, it stands in this way under section 9. "The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen." Then section 12 and it is the same correspondingly under section 65 for the provinces, deals with the Dominion.

LORD PARKER OF WADDINGTON: It is not quite the same. MR. NEWCOMBE: On this point it is. "All powers, authorities and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant-Governors of those provinces"—That is limited to the statutory prerogatives to the powers which were vested in the Governor under any Act.

LORD PARKER OF WADDINGTON: You are reading what section? MR. NEWCOMBE: Section 12. Section 65, subject to your Lordship's remark, I think is the same: "All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada or Canada, were or are before or at the Union vested in or exerciseable by the respective Governors or Lieutenant-Governors of those provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those councils, or of any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively." That does not distribute in terms any prerogative power, any common law prerogative.

LORD PARKER OF WADDINGTON: The statute might have said that all the prerogatives of the Crown may be exercised by the Governor-in-Council of these particular provinces. MR. NEWCOMBE: They might have said so.

VISCOUNT HALDANE: The words are the same. They are enough to cancel the exercise of the prerogative. MR. NEWCOMBE: It is not under any Act of any of these legislatures that the Crown has the right to incorporate a company by letters patent. Therefore as I submit the prerogative remains under section 9 vested in the Queen, and is not distributed.

LORD PARKER OF WADDINGTON: Under what authority did the provinces prior to the Union create corporations? MR. NEWCOMBE: By statute. MR.

WEGENAST: I have the Act now. MR. NEWCOMBE: The special Act is earlier. My friend says that the Companies Act came 3 years before.

VISCOUNT HALDANE: Do you say there is no power to create a common law corporation in Canada? MR. NEWCOMBE: Yes, my Lord, I submit that off-hand. SIR ROBERT FINLAY: Before that the Imperial Act of 3 and 4 Victoria, chapter 35 of 1840 for reuniting the provinces of Upper and Lower Canada I think gave power to the legislature by section 3 to make laws for the peace, order and good government of the province of Canada. MR. NEWCOMBE: It is the Act of Union.

VISCOUNT HALDANE: Let us clear this up. I do not remember any section which in terms delegates the prerogative, except the sections you have referred to. First of all the Executive Government and authority is declared to continue in the Crown. That is section 9. Then section 12: "All powers, authorities and functions which under any Act of Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant-Governors of those provinces, with the advice, or with the advice and consent of the respective Executive Councils thereof, or in conjunction with those councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence"—one to the Governor-General, and the other to the Lieutenant-Governor. MR. NEWCOMBE: Yes. Those are statutory powers.

VISCOUNT HALDANE: All they did was to set up the constitution. They created a constitution. The difference between a Crown Colony and a Colony, was that it had a legislative constitution. There was always a legislature of the provinces. I have Mr. Todd's book here which says: "In every British Colony of adequate extent and importance the personal authority of the Crown is represented," etc., etc. (reading to the words) "the Secretary of State." Then it says: "The instructions are directly referred to in the British North America Act, section 55," etc., etc. (Reading to the words) "guidance of the Governor." MR. NEWCOMBE: Yes.

VISCOUNT HALDANE: "Where a bill, passed through the Houses of Parliament is presented to the Governor," etc., etc. (Reading to the words): "local Governor." I think that is all we can get until we look at the instructions. Does anybody here know what the instructions of the Lieutenant-Governor are in Canada? MR. LA FLEUR: I am looking for that,

VISCOUNT HALDANE: I think we ought to be able to find the instructions to the Governor-General quite easily. SIR ROBERT FINLAY: I find in the 45th section of this Act of 1840 a reference back to the powers conferred by the statute of the 31st year of King George III. that the Governor shall have all such powers as were conferred by that statute of George III.

VISCOUNT HALDANE: We had better see what this is. The dominating document is the commission and instructions; they sometimes limit what might otherwise pass. MR. WEGENAST: I speak with hesitation, my Lord; I have not looked into it lately, but I think there are no instances of a grant of letters patent of incorporation by any of the Governors of the American colonies.

THE LORD CHANCELLOR: That may be. These were Crown colonies in the first instance at any rate; afterwards they got Constitutions, but in the first instance these were simple Crown colonies.

LORD PARKER: The old Companies Act commences in this way: "The Governor-in-Council" (this is of the province of Canada) "may by letters patent under the Great Seal of the province grant a charter;" that is to say, it is empowering the Governor to exercise the prerogative of the Crown. He may grant a charter, and the purposes for which he may grant a charter are defined. They are not defined in most cases with reference to any territorial area at all; in one or two they are defined.

VISCOUNT HALDANE: There you have a legislative devolution of the prerogative.

LORD PARKER: It says: "carrying on any kind of manufacturing, ship building, mechanical or chemical business," mining for gold or silver, washing,

dressing and smelting ores, erection of dams "opening and working quarries of marble, slate or other economic minerals . . . boring for, opening and using petroleum," and there are a number of other things, among them are: "Carrying on of any fishery or fisheries in this province or the waters thereto adjacent, or in the Gulf of St. Lawrence, and the building and equipping of any vessels for such fishery or fisheries." SIR ROBERT FINLAY: May I ask what your Lordship is reading from?

LORD PARKER: The Act of 1864, the Companies Act of the province of Canada prior to the Union. This would fit in sections 12 and 65, because there is an Act of Parliament devolving the prerogative of the Crown on the Governor, so that these powers here are kept alive by section 65, and the only question then is whether they have been limited by the power to exercise jurisdiction with regard to incorporation of companies under section 92. If they had not been limited, they still exist. You have nothing about provincial objects at all. Then the question is whether the Provincial Legislature, not has conferred power, but has limited the power. The question is whether they could pass a Statute to limit the powers; they may do it as far as provincial objects are concerned, but not for any other purpose. MR. WEGENAST: The Dominion was finally concluded to have fallen heir to that Act.

LORD PARKER: Why more than the other? MR. WEGENAST: It was arranged between Sir John A. Macdonald and Mr. John Sandfield Macdonald in correspondence.

VISCOUNT HALDANE: Prior to Confederation? MR. WEGENAST: After Confederation.

LORD PARKER: It would do so under section 12. MR. NEWCOMBE: Under section 129.

LORD PARKER: All the powers there referred to are transferred for the purposes of the Dominion to the Dominion Executive. MR. NEWCOMBE: Under section 129 the law is to remain in force subject to being altered by the appropriate legislature. This was a Statute authorising the Governor of the old province of Canada, which comprised two of the present provinces, to incorporate companies for that area, and therefore it was a Dominion object.

LORD PARKER: It was not for that area; it was a general pow -- It was not confined to area at all. MR. NEWCOMBE: It authorized them t. ncorporate companies for the whole province.

LORD PARKER: No, there is nothing about the province. It authorized the Governor simpliciter to incorporate companies for certain purposes, which is really transferring part of the prerogative of the Crown to the Governor. Then comes section 12 which says that power is to be kept alive for the purposes of the Dominion, but there is also section 65 which says that it is also to be kept alive for the purposes of the provinces. Then you have the two co-ordinate jurisdictions created by this Act to create corporations for certain purposes. MR. NEWCOMBE: Yes.

LORD PARKER: The question is, has any province under its powers limited that?

VISCOUNT HALDANE: I think that is the real question. MR. NEWCOMBE: What I submit upon that Statute is this. As I said, that was a Statute for the old province of Canada, and it entitled the Governor to incorporate companies having powers throughout that province. In so far as that power was to be exercised by the Dominion it must be exercised by the Governor-General. Very likely you could also incorporate a company under that for the area which is now, we will say, the province of Ontario.

VISCOUNT HALDANE: Why do you say it was to be exercised by the Governor-General, having regard to section 65? MR. NEWCOMBE: It was a Statute conferring a power which could not be exercised by the local Governor.

VISCOUNT HALDANE: Why not? MR. NEWCOMBE: Because it was for the incorporation of a company with power to do business in Ontario and in Quebec. My learned friend says they cannot grant those powers. He says there is capacity, but as to grant of powers, they cannot do it. Therefore that was a power which could not be executed by the Lieutenant-Governor of Ontario.

VISCOUNT HALDANE: In the particular case; but what are you speaking of when you say that? MR. NEWCOMBE: I am speaking of the 1864 Act, to which Lord Parker is referring, the pre-Confederation Statute.

VISCOUNT HALDANE: Yes, but when you cut up the territory into provinces—which was not the case before—and when you give these provinces Constitutions and when you appoint a Lieutenant-Governor in the province to represent the Crown, does not the distribution of powers flow automatically? Is not this power which you say was exercised by the Governor-General for the benefit of the entire old province of Canada distributed between Dominion and Provinces under these two sections? MR. NEWCOMBE: I should think so; if it were competent under that Statute, which I have not examined, to the Governor of the old province of Canada to incorporate a company for that part of it which is now Ontario, separate companies as to that part, that would be a power, I suppose, which he could continue to exercise until the law was changed, but that Statute has been repealed, and what we have to consider now is the present Statute.

VISCOUNT HALDANE: That is not quite what is said. It is a power to create a corporation. It is only to be exercised for provincial objects. If that is the theory— MR. NEWCOMBE: No, I would rather put it this way: to incorporate a company with provincial objects, as the Act says, that is, having provincial objects.

LORD PARKER: These considerations seem to me of the utmost importance in construing what was done afterwards, because your subsequent Companies' Act which you read to us was to incorporate companies for the purposes for which the legislation of the province had power to legislate. MR. NEWCOMBE: Yes, my Lord.

LORD PARKER: That is what it looks like, and that very seriously limited the thing. There are many things here they have no power to legislate on, for instance mining in Yukon, yet that is within the direct words of the earlier Statute, in 1864 they were given powers to incorporate companies for the purpose of carrying on business in Yukon, under the general mining power, it is not confined at all. The only question is whether the subsequent Act limits that power. MR. NEWCOMBE: In so far as they were given that power, that power descended to the Dominion in 1867.

LORD PARKER: It descended to both according to the words of the Statute. MR. NEWCOMBE: Not, in my submission, to do anything beyond the limits of the province.

LORD PARKER: There are no words of territorial limitation in 1864. MR. NEWCOMBE: That was a pre-Confederation Statute, and you have to apply section 129 of the British North America Act to it. When they came to deal with the laws after Confederation it was a question what to do with that Act of 1864; was it a Dominion Act or was it a provincial Act? What would the revisers when they came to revise the laws do with it? It may be that part of it went to the Dominion and part to the province. Certainly, I submit, the whole of it went to the Dominion in so far as it authorized the constitution of companies with powers common to the two provinces of Ontario and Quebec. If there were local provisions in it, if it conferred local powers, those might have remained with the provinces; and the Act would stand to be repealed perhaps by both legislatures in its different aspects or relations. But, however, that may stand, that Act is no longer in force, and the question is what was the legislature doing when it passed the Act under which this company is incorporated?

LORD PARKER: That is what I want to find out. MR. NEWCOMBE: This is a new question, because we have always supposed that this was a statutory corporation, and could do nothing except what the Statute authorized it to do. That has been common ground in the case all through. I think that it is still, when you come to consider it deliberately, nothing but a statutory corporation. Whether or not the Lieutenant-Governor has power, if he were advised to exercise it, to create a corporation by force of his own letters patent is a question; I am disposed to submit that he could not do that. At all events, it would be a most astonishing thing I should think if he would undertake or be advised to exercise the power. I mean to say, the incorporation of such companies as formerly were incorporated, under

the common law powers of the Crown, with monopolies of trade and that sort of thing, is not consistent with the ideas of Government which prevail in the country, and would not be tolerated. What I humbly submit is that, in enacting this Statute, the Companies' Act of Ontario, which appears in the Revised Statutes of 1897, chapter 191, the legislature was dealing merely with the project of a statutory corporation and providing a convenient means of incorporation by force of legislative act only, delegating the statutory power for the sake of convenience. It happens that the power is delegated to the Lieutenant-Governor; it might have been given to another official. It might have been given, as it is now in the Dominion, to the Secretary of State.

LORD PARKER: I think it would simplify matters if you would fix your attention on the moment of time which took place immediately on the passing of the Dominion Act, when the provinces and the legislatures of the provinces and the Dominion were complete. Suppose at that particular date, before any legislation either by the Dominion or the provinces, any single province or the Dominion had intended to create a company, how would they have done it? The Dominion would have found that under section 12 they had succeeded to, amongst other things, powers vested in the Governor of Canada under the Act of 1864, and they could, proceeding under that Act, have created any company for "mining gold, silver, copper or other metals or ores; or for coal, plumbago or other minerals." MR. NEWCOMBE: Generally?

LORD PARKER: Generally. Similarly, with regard to the provinces, if the provinces wanted to do so they could have referred to section 65, and section 65 would have given them the same power.

VISCOUNT HALDANE: Were you reading from the 1864 Act?

LORD PARKER: Yes.

VISCOUNT HALDANE: It comes to this, they could under that Act have created a company.

LORD PARKER: Each of them could have created any company.

VISCOUNT HALDANE: That is to say, the province of Canada.

LORD PARKER: The constituent parts of the province of Canada. It is for the purpose of mining among others. There is no reference to territorial limits. The moment the Union takes place, under section 65 that power is kept alive, and is to be exercised by the Governor-in-Council of any particular province. It is one of the Acts of Parliament referred to.

VISCOUNT HALDANE: Canada was split up into two provinces. There were two others, New Brunswick and Nova Scotia which were not provided for, they were to be dealt with by scheme.

LORD PARKER: Section 65 distinctly says that it is to be exercised "after the Union in relation to the Government of Ontario and Quebec respectively" by the Governors and Councils of those provinces. The Ontario Governor and Legislative Council could have created a company immediately for mining in Yukon. MR. NEWCOMBE: No, I humbly submit.

LORD PARKER: I am just putting the point to you. I want to see how you get out of it. Similarly in regard to the Dominion; under section 12 the Governor and Council of the Dominion could have created a company for precisely similar purposes.

VISCOUNT HALDANE: For mining at Ballarat for instance.

LORD PARKER: Yes. If take section 92, Ontario can legislate for "the incorporation of companies," or in matters relating to the incorporation of companies, "with provincial objects." Where do you say that Ontario has legislated so as to cut down this power in the executive? MR. NEWCOMBE: I deny that the power exists in the Executive.

LORD PARKER: How do you get over section 65 then? MR. NEWCOMBE: Might I put it this way? Suppose that the first thing that they wanted to do after the Union was to repeal that Act, and suppose the Dominion had repealed it. what would be left? The right to use it for the purpose of the incorporation of companies with provincial objects by the two local legislatures.

LORD PARKER: I should not be disposed to dispute the fact that the Dominion might have repealed it, but only so far as related to the Dominion. MR.

NEWCOMBE: Suppose the province of Ontario could repeal it, they could repeal it only in so far as it relates to the incorporation of companies for the provincial objects of Ontario; the rest would be left.

LORD PARKER: I do not think you are quite accurate; if they repealed it at all they would repeal it and say: The Governor-General and Council of this particular province shall notwithstanding section 65 have no such power, or have limited powers.

VISCOUNT HALDANE: Yes. You see, Mr. Newcombe, it is obvious what the scheme was. Two new provinces were created in place of the old province of Canada, divided into two. The powers of the whole province of Canada were *prima facie* transferred to, not the Dominion of Canada, but to the Lieutenant-Governors of the provinces under section 65. The words are different, and it is by way of exception that things are reserved which are appropriate only for the Governor-General of the new Confederation. The province is the territorial place which corresponds either to Upper or to Lower Canada, but which is akin to the old united province of Canada. When you bring in territorial limitation, it is only that the Lieutenant-Governor of that province, in exercising the power which is now transferred, is to have regard to provincial objects. It might be a very good provincial object to create an Ontario company to transact business in London. So far as the status of the company is concerned, he has powers akin to those that the old Governor-General of the united province of Canada had before Confederation.

LORD PARKER: You can test it in this way. Supposing the province of Ontario immediately after the Union had said, there shall be no incorporation of companies for provincial objects, the Governor's power of creating corporations for provincial objects would have gone, would not it, and the only power of incorporation which he had left would be the power of incorporating under the Act of 1864, companies for objects which could not be called provincial objects? MR. NEWCOMBE: That would revolutionize the whole understanding of the Act.

VISCOUNT HALDANE: Non-provincial objects, much in the same sense that the old ones would have been. MR. NEWCOMBE: I submit no statutory power descended to the provinces which could not have been enacted by the provinces after the Union.

VISCOUNT HALDANE: I am not at all sure of that.

THE LORD CHANCELLOR: What is the meaning of section 65 then? MR. NEWCOMBE: In so far as they are capable of being exercised in relation to the Government of the province—you have to go I submit in order to find that out to the distribution of legislative powers under section 91 and section 92.

VISCOUNT HALDANE: Is there any light thrown on it by a decision in a case which we have not yet been referred to, but which was a very important decision? I think it was *The Attorney-General of Ontario* v. *Mercer*. MR. NEWCOMBE: Escheat.

VISCOUNT HALDANE: A case in which the question arose whether the Dominion or the province took royal rights in the soil of the province. There there was considered the distribution of the functions of the Crown. There may be nothing in it. It is rather for negative than positive purposes that I want to know. I remember there was some discussion in Mercer's case. The question was who took regalia found in a province, was it the Crown as represented by the Lieutenant-Governor or was it the Crown as represented by the Dominion? MR. NEWCOMBE: It was held that, inasmuch as by section 109 the lands, mines and minerals and royalties connected therewith were attributed to the provinces, this, being a right arising out of lands, went to the provinces.

VISCOUNT HALDANE: By your observation you have disposed of the relevancy of the case. I think I do remember it was decided under section 109, but the question was whether there were not some general observations upon the position. I think Lord Selborne gave the judgment, I am not sure.

LORD PARKER: Is there any clause in this Dominion Act relating to the executive powers of the Governors and Councils in New Brunswick or Nova Scotia? MR. NEWCOMBE: Yes, there is in the British North America Act—it is section 88, perhaps.

VISCOUNT HALDANE: Mercer's case does not touch it.

LORD PARKER: What I meant was that section 12 keeps alive all executive powers exercisable by any Provincial Government, or colonial Government if you like, to your the expression, prior to the Act in favour of the Dominion as a whole. Section 65 appears not to extend beyond Ontario and Quebec. It leaves out the question of executive power in Nova Scotia and New Brunswick and other provinces. MR. NEWCOMBE: I do not think there is any special provision for Nova Scotia and New Brunswick, except section 88, and, perhaps, section 89. In construing those sections in my submission you have also to have regard to section 129 which provides: "except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective province, according to the authority of the Parliament or of that legislature under this Act." Now, my Lords, after the Union in respect of these general Acts passed by the provinces which covered both Dominion and local purposes, I submit that the Lieutenant-Governors could exercise no power except such as could be provided by their own legislatures after the Union. If a power existed by pre-Union legislation, and if that power could have been conferred after the Union by the local legislature, then the Governor of a province could exercise the power. If it were a power that could not be conferred after the Union by the local legislature, it was a power that fell to the Dominion in the distribution as effected by the general clauses of the Act.

THE LORD CHANCELLOR: Will you tell me how you get that from section 65, it begins "All powers, authorities, and functions which under any Act . . . . were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those provinces," &c., &c., shall "be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively," and then it goes on "subject nevertheless" . . . "to be abolished or altered by the respective Legislatures of Ontario and Quebec." Suppose they were not, how can you say the "powers, authorities and functions," which they possessed became inherited by the Dominion? MR. NEWCOMBE: "As fas as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec."

THE LORD CHANCELLOR: Certainly. MR. NEWCOMBE: How are you going to find out what the functions which may be exercised by the Government of Ontario and of Quebec are except by reference to the distribution of legislative powers in sections 91 and 92, and perhaps one or two other clauses which distribute them? For instance, could they appoint Judges until a Statute was passed by the Dominion?

VISCOUNT HALDANE: That is dealt with by another section. MR. NEWCOMBE: That is dealt with by another section, yes, but that is excluded from the Government of the province.

LORD PARKER: *Prima facie* they remain alive; the point is to show how they have been taken away. You may find it in the Dominion Act, you may find the power of appointing Judges is vested in some other body. MR. NEWCOMBE: That is just it, if you find the intention of this Act to be that certain powers shall after the Union be exercised and carried out on behalf of the Dominion Government, then I say those powers can no longer be exercised by the local Government.

VISCOUNT HALDANE: Where do you find they are only to be exercised by the Dominion? I, on the contrary, find in the Act the new provinces are likened to the old united province of Canada, except so far as things are taken out, and the Confederation constituted. I am quite aware that the residuary powers are in the Confederation, but, for the rest,—it is a true Confederation—it is only the things which are taken out as belonging to the Confederation from its nature that operate restrictively. MR. NEWCOMBE: Those things which your Lordship describes as

relating to the Confederation strictly are attributed to the Governor-General, and executive powers in relation to those cannot be exercised by the Lieutenant-Governor.

VISCOUNT HALDANE: I get this from the difference in wording between section 65 and section 12. In section 65 there is a transfer of the powers to the Lieutenant-Governor of the provinces "as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively." That is except so far as they are incapable of being exercised they pass to them. When I turn to section 12 I get the contrast of words "shall as far as the same," that is to say the powers of the Governor or province, "continue in existence and capable of being exercised after the Union in relation to the Government of Canada be vested in" the Governor-General. You proceed there by way of exception, whereas in section 65 you proceed by general transfer.

LORD PARKER: You will have an opportunity of thinking this over before you address us again. Supposing that the effect of the 65th section is immediately after the Union to leave the Governor and Council of Ontario with power to create a company to mine in Yukon, in order to get that right which exists at that moment removed, you must say that mining in Yukon is "a provincial object." The moment you can do that you are right; then you can restrict it; but unless you can make mining in Yukon a "provincial object in Ontario" you could not modify it at all, because it would not come within section 92. What is in my mind is, in construing section 92, having regard to the state of circumstances which existed at the time, it is impossible, is not it, to give the words "provincial objects" a territorial signification?

VISCOUNT HALDANE: It is so inapposite to the state of things at the time of Confederation. MR. NEWCOMBE: Well, my Lords, I do not know that I can do any more than submit, as I have, that the Dominion has the general powers and the province the local powers.

THE LORD CHANCELLOR: The point that has been raised I expect is new to you. MR. NEWCOMBE: It is new to everybody.

THE LORD CHANCELLOR: It is obvious that it is right you should have time to consider it before you continue your argument. You can deal with it to-morrow morning if you prefer to, instead of now. MR. NEWCOMBE: Very well. Then I was going to say next however the question may stand under the Act of 1864 and under the powers which descended under that, the legislation which governs this case is found in chapter 191 of the Revised Statutes of Ontario for 1897. The Statute was repealed in the execution of the powers of section 129 of the British North America Act, and it has disappeared. Now we have this, which, I submit, is a mere delegation of statutory power to create a corporation, as it happens, to the Lieutenant-Governor, not in aid of any prerogative power which he may have, but as an independent matter altogether. As I said it might have been committed to the Secretary of State to issue the instrument of incorporation. By a few clauses of the Act I think that is made clear. First section 4 provides: "The incorporation of every company hereafter by letters patent shall be governed by this Act, and all the provisions of this Act shall apply to every such company." By section 15: "Notice of the granting of the letters patent shall be given forthwith by the Provincial Secretary in The Gazette, and from the date of the letters patent the petitioners and the persons who signed the memorandum of agreement and their successors, respectively, shall be a corporation by the name mentioned in the letters patent and shall be invested with all the powers, privileges and immnities which are incident to such corporation, or are expressed, or included in the letters patent and The Interpretation Act, and which are necessary to carry into effect the intention and objects of the letters patent and such of the provisions of this Act as are applicable to the company." I ask what is that but a statutory provision defining by force of legislative power what the effect of this incorporation is? It necessarily, I submit, excludes any power which may be thought to have been granted independently by the Lieutenant-Governor.

LORD PARKER: That is the point where the question arises. You say it repeals the Act of 1864. If it repeals the Act of 1864 it could only do so because the Act of 1864 in its subject-matter is a matter connected with the incorporation

of companies with provincial objects, and you can only get rid of the Act of 1864 at all under that section; it is otherwise kept alive.

VISCOUNT HALDANE: You are quoting the Ontario Act? MR. NEWCOMBE: Yes, my Lord.

LORD PARKER: There is a repeal of this Act. Under what power do you repeal the Act of 1864? You can only do it under the Act relating to the incorporation of companies. MR. NEWCOMBE: Yes, my Lord.

LORD PARKER: You can only do it because the purport of the Act of 1864 was a company with local objects.

VISCOUNT HALDANE: It may be the Ontario Companies' Act is *ultra vires*, but it is a new point.

LORD PARKER: Once you say it is repealed, you must admit that mining in Yukon is a provincial object in Ontario; otherwise you could not repeal it. Their is a dilemma. MR. NEWCOMBE: The Act of 1864, if I may say so, ought to be read for present purposes as if it itself enumerated the Dominion powers and the local powers. If you read it that way, there is one section in it which says companies may be incorporated for provincial objects in Ontario and companies may be incorporated for provincial objects in Quebec. That was a legislative power, we will suppose, conferred by the old Statute upon the Governor of the old province. Then it goes on to say that other companies may be incorporated for the whole province. If that is to be or has been repealed by a province, it can only be repealed as to that part of it which says companies may be incorporated for provincial objects of Ontario. Ontario can repeal that part of it. Quebec can repeal that part of it which says "provincial objects of Quebec."

LORD PARKER: I agree, but they could not repeal a part which gives the Governor-General under section 65 the power, to use the words of the Act, to incorporate a company for mining in Yukon.

THE LORD CHANCELLOR: Let me just if I understand what your argument upon it is, for the moment. I think you say section 65 in point of fact only preserves those powers that are capable of being exercised in relation to the Government of Ontario. Then you say that, under the British North America Act, 1867, the only powers that are capable of being exercised in relation to the Government of Ontario in regard to the incorporation of companies are the incorporation of companies with provincial objects. Is that your contention? MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: Therefore there is nothing that is kept alive by section 65 excepting the exercise of powers which could subsequently be properly exercised by the legislative authority of the province of Ontario. Then, again, when you proceed, by virtue of that, to repeal the Companies' Act of 1864, you repeal it only so far as it could have affected, that is so far as it affected, companies with provincial objects. That I understand to be your argument? MR. NEWCOMBE: I think that is right—that is my submission.

THE LORD CHANCELLOR: I am not saying for the moment that I approve of it. MR. NEWCOMBE: No, my Lord, that is what I have submitted so far.

(Adjourned till to-morrow at 10.30.)

MR. NEWCOMBE: My Lords, I was referring to the Revised Statutes of Ontario of 1897, chapter 191.

VISCOUNT HALDANE: What is that Act? MR. NEWCOMBE: It is the Statute under which the company was constituted.

VISCOUNT HALDANE: It might be a converient thing to get a reference to the various Statutes. You are now going to give a reference to the Companies Act under which it is constituted. MR. NEWCOMBE: Revised Statutes of Ontario 1897, chapter 191.

VISCOUNT HALDANE: Now will you give me the reference to the Dominion Act? I think I have it, but I should like to have them all. MR. NEWCOMBE: Chapter 79, Revised Statutes of Canada, 1906.

VISCOUNT HALDANE: Was not that after the company was constituted? MR NEWCOMBE: That is the revision of 1906.

VISCOUNT HALDANE: The terms are the same? MR. NEWCOMBE: Yes, my Lord, and in the revision, of course, the sections may be traced by the foot-notes. There is a foot-note to each section, showing when it was enacted.

VISCOUNT HALDANE: Now I want to ask you for ..o other Acts, the old Companies Act of the province of Ontario, 1864? SIR ROBERT FINLAY: 27 and 28 Victoria, chapter 23.

VISCOUNT HALDANE: Is that in the Statutes of Canada? SIR ROBERT FINLAY: In the Statutes of the old province of Canada.

VISCOUNT HALDANE: There is an older Canadian Act which that may refer to, I am not sure, about 1843, I think. MR. NEWCOMBE: The Act of Union of 1840 my learned friend referred to.

VISCOUNT HALDANE: Was not there an older Companies Act referred to? SIR ROBERT FINLAY: I think not.

LORD PARKER: Is that the Act of Union of the provinces? MR. NEWCOMBE: Of Upper and Lower Canada. SIR ROBERT FINLAY: 3 and 4 Victoria, chapter 35.

VISCOUNT HALDANE: Is that the Act passed after the report? SIR ROBERT FINLAY: Yes, my Lord.

LORD PARKER: I suppose that contains the words giving power to the legislature for the peace, order and good government of the province? SIR ROBERT FINLAY: In the third section.

LORD PARKER: The Act of 1864 was passed under that power? SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: Has anybody seen the instructions to the old Governor-General? SIR ROBERT FINLAY: My friend Mr. Lafleur has looked, but we have been quite unable to find them.

VISCOUNT HALDANE: You will get it at the Colonial Office; it is not here. The commission of a Colonial Governor is always important because it shows to what extent the prerogative has been dedicated. SIR ROBERT FINLAY: We have looked at Sir Henry Jenkyns' book "British Rule and Jurisdiction beyond the Seas." It gives the recent form, not the old ones. The general type of instructions in 1878, for instance, to the Governor-General are printed at page 217 of Sir Henry Jenkyns' book. The commission is at page 213.

VISCOUNT HALDANE: This is the form of Governor's commission; what date? SIR ROBERT FINLAY: 1878, I think.

VISCOUNT HALDANE: That will be the ruling one at present as regards the Dominion. MR. NEWCOMBE: I should think so. Of course, the instructions issued by the Governor-General to the Lieutenant-Governors I did not bring with me. This is a new aspect of the case which was not debated, and I could not find the document last night, but if there is any difficulty in getting a copy, I shall be very glad to make copies available to your Lordships as soon as I get home.

VISCOUNT HALDANE: How are the instructions to the Lieutenant-Governors made out? They are appointed by the Governor-General? MR. NEWCOMBE: Yes my Lord.

VISCOUNT HALDANE: Are they given a commission? MR. NEWCOMBE: They are given a commission with instructions issued by the State Department.

VISCOUNT HALDANE: Have we a form of that commission? The Statute is all very well, but the Statute does not constitute the executive power; it only regulates it: you have to see the commission before you can tell what the Statute really means. MR. NEWCOMBE: Now, my Lords, just to complete the references which I was giving to your Lordships to the Ontario Companies Act yesterday when the Board adjourned, I have referred to section 15, which provides for the notice of the granting of the letters patent.

THE LORD CHANCELLOR: Will you tell me what it is you say this Statute provides in your favour? MR. NEWCOMBE: It provides for the constitution of a purely statutory company.

THE LORD CHANCELLOR: To which the doctrine of *Ashbury Railway Carriage, etc., Company* v. *Riche* applies? MR. NEWCOMBE: Yes, as well as other cases to whi.. I propose to refer. It is a delegation by the legislature of its power to incorporate for provincial objects to the Lieutenant-Governor, as it happens to be in this case, to constitute corporations by letters patent, and there is a procedure by way

of petition and so on; and preliminaries having been complied with, . . . ers patent are issued. Then by section 15: "Notice of the granting of the letters patent shall be given forthwith by the Provincial Secretary in The Gazette and from the date of the letters patent the petitioners and the persons who signed the memorandum of agreement and their successors, respectively, shall be a corporation by the name mentioned in the letters patent and shall be invested with all the powers, privileges and immunities which are incidental to such corporation or are expressed or included in the letters patent and The Interpretation Act, and which are necessary to carry into effect the intention and objects of the letters patent and such of the provisions of this Act as are applicable to the company." That is a statutory grant and sanction of powers. Then by section 25 it is provided that "The company shall, in addition to its other powers, possess power" to do a number of things which are specified there.

THE LORD CHANCELLOR: Yes, but they are not specified by any reference to territorial limits. MR. NEWCOMBE: I know, my Lord; that is so, but you have to read this Act with the British North America Act, by the authority of which it is passed.

THE LORD CHANCELLOR: I quite agree with that. All I mean is that this Act does not help you. MR. NEWCOMBE: I agree, it does not help me in that respect. It shows, if I am right, that this is a statutory corporation purely, that this is merely a statutory corporation which I am dealing with as distinguished from anything having the attributes of a common law corporation.

THE LORD CHANCELLOR: It does not necessarily show that, does it? MR. NEWCOMBE: That is my argument, my Lord.

THE LORD CHANCELLOR: Tell me why it shows that? MR. NEWCOMBE: It defines the scope of the grant. It authorizes the issue of the letters; it provides what they shall contain.

THE LORD CHANCELLOR: If this Statute had power to take away the previously existing executive authority, then it could only do it because it was at liberty to legislate outside provincial limits, and if it is at liberty to legislate outside provincial limits, the powers which it has conferred upon the company are powers to hold land and licenses anywhere in the world. MR. NEWCOMBE: This Statute does not take away previously existing powers. I am coming back to that in a moment.

THE LORD CHANCELLOR: If it confers powers, the powers it confers are unlimited by geography. They are in general language. MR. NEWCOMBE: So far as any expression in this Act is concerned, I admit; but I am only discussing for the moment the question as to whether we are dealing with a statutory corporation or a common law corporation.

LORD PARKER: It is immaterial if you are wrong in your construction of the words "with provincial objects." You do not want it at all; it is unnecessary to consider it. MR. NEWCOMBE: Perhaps that is so. I am coming to that point now, but may I complete these references? It will save going back to this volume again. I propose to refer to sections 25 and 102 and 105 of this Act as descriptive of the powers which such a corporation has.

THE LORD CHANCELLOR: I understand that, and it seems to me they do describe the powers. What I want to see is how they help you in saying that these powers are limited to the area of the province. That is the point we have to settle.

VISCOUNT HALDANE: Before you answer that, will you tell me this: Has every province got a Great Seal? MR. NEWCOMBE: Yes.

VISCOUNT HALDANE: The Lieutenant-Governor, in affixing that Great Seal, is exercising the prerogative of the Crown, as Lord Watson said in the case cited yesterday. He therefore *prima facie* in constituting a corporation is exercising an executive power—a common law power. Does not this statute merely put restrictions on the exercise of the common law powers—as distinguished from conferring on him the power to affix the seal and create the corporation. MR. NEWCOMBE: I would submit not. I would submit that it is intended to confer a new power rather than to amplify or restrict, or deal with in anywise, an existing power. SIR ROBERT FINLAY: My friend Mr. Nesbitt has handed to me

a volume of the Revised Statutes of Ontario for 1877, which has an appendix with regard to Acts repealed, and opposite the Act of 27 and 28 Victoria, the 1864 Act, I find this: "Repealed as to future incorporations 37 V. chapter 35, section 59 (Ontario)." "32 and 33 V. chapter 13, section 56 (Dominion)."

THE LORD CHANCELLOR: They purported to repeal it. SIR ROBERT FINLAY: Yes. I have not been able to get that statute.

THE LORD CHANCELLOR: The material thing is that they could only repeal it if the power under the section enabled them to deal with a company whose object permitted them to go outside their territorial limits; that is the only way they could repeal it.

LORD PARKER: They could only repeal it because "provincial objects" is not to be construed narrowly.

THE LORD CHANCELLOR: That appears conclusive, at any rate. Would it be inconvenient to you just to give us the heads and the line of your argument before you proceed in order that we may see the road along which you propose to travel? MR. NEWCOMBE: I proposed to complete my references to this legislation of Ontario constituting the company.

THE LORD CHANCELLOR: I do not want references to statutes that incorporate companies unless I see to what point the references are directed. MR. NEWCOMBE: To show that this company is a purely statutory company.

Then we come to the question as to what power the legislature had which enacted that statute, because the statute itself must be circumscribed by all the limits which attach to the legislature under the British North America Act. That brings us to the question of the consideration of the incorporation of companies with provincial objects.

Now then, I propose to show your Lordships, if I can, that that is a strictly limited power, a power to legislate for the locality of the province and to confer objects or powers upon the companies to be exercised within that locality, and, in reference to the pre-union legislation, the Act of 1864, and the sections of the British North America Act which have been referred to, to show that the executive power, whatever it may be derivable from by the Lieutenant-Governors, is not more extensive than the legislative authority conferred upon the local legislatures; so that, as to any power the Lieutenant-Governor may have had derivable from the state of things which existed at the Union, the utmost he could do would be to incorporate a company for provincial objects. When I say: "provincial objects," there, I use the expression in the same sense, whatever it may be, that is properly attributable to it in section 92.

Now, my Lords, may I, on the point which I began with, refer again to section 4 which says: "The incorporation of every company hereafter by letters patent shall be governed by this Act." That, I say, is a comprehensive provision as to what the nature and effect of the incorporation shall be. Then by section 9 a body corporate and politic may be created for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends. So that by the very terms of it the Governor could not constitute a corporation larger than the legislature could constitute. That Act which confers these powers of incorporation upon the Lieutenant-Governor takes the place of an earlier Act passed in 1850 which provided for the incorporation of companies by the signing of a memorandum and filing it with the Registrar. The Act is to be found now in the Consolidated Statutes of Canada, 1859, on page 719, chapter 63, and it provided for the formation of companies. By the first section of the Act, "Any five or more persons who desire to form a company for carrying on any kind of manufacturing, ship building, mining, mechanical or chemical business or for the erection of any building or buildings to be used . . . may make and sign a statement or declaration in writing in which shall be set forth: the corporate name of the company, the object for which the same is formed, the amount of capital stock of the company . . . The persons making the statement or declaration shall acknowledge the same in duplicate before the Registrar . . . one of the duplicates of the statement or declaration shall be filed . . ." and then "When the formalities prescribed in the foregoing sections have been complied with, the persons who signed the said statement or declaration, and their

successors, shall be a body corporate by the name mentioned therein." That provided for the constitution of a corporation without coming direct to the legislature and without the use of the letters patent of the Governor. What I submit is that when in 1864 they substituted another, a new procedure, it was a mere matter of procedure for the purpose of giving effect to the same object, namely, constituting a company under the authority of the legislature, and not under or by means of any common law power.

Now, my Lords, reference has been made to the power of the Lieutenant-Governor under section 65 of the British North America Act. Section 12 defines the powers of the Governor-General; sections 64 and 65 those of the Lieutenant-Governors; and No. 12 and No. 65 are precisely in the same terms, the one applicable to the Governor-General and the other to the Lieutenant-Governors.

LORD PARKER: I do not think they are quite in the same terms. MR. NEWCOMBE: Except, my Lord, No. 12 introduces the words about the middle of the section "shall as far as the same continue in existence."

LORD PARKER: And are applicable to the Government of the Dominion. MR. NEWCOMBE: "And capable of being exercised after the Union in relation to the Government of" the Dominion; the other one says: "as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively," subject to be abolished or altered by the respective Legislatures of Ontario and Quebec, or, under No. 12, by the Parliament of Canada.

THE LORD CHANCELLOR: Section 65 is the one we are on. MR. NEWCOMBE: Yes, my Lord; they have to be considered together. Now the only reason why it was necessary to put in section 65 was because they were dealing with a joint province. There were three provinces previously to the Union, Canada, Nova Scotia, and New Brunswick. At the Union there were four provinces; the old province of Canada was divided, Upper Canada and Lower Canada, called here in the British North America Act, Ontario and Quebec. Nova Scotia remains the same, its geographical limits remain the same: so also New Brunswick. After the Union there was no need for any special legislation with regard to them, but inasmuch as Ontario and Quebec were united under the old province of Canada, having a joint revenue and assets, and all that sort of thing, it became necessary to introduce special provisions to provide for the division of that province into the new provinces constituted by this Act, and as to how the authorities and assets should be distributed, and so section 65 was introduced. Otherwise if Ontario and Quebec had existed as separate provinces before the Union, they would have been governed by section 64, and we would have had no section 65. Generally speaking, the office of these two sections is the same, namely, to preserve the constitution of the province after the Union as it was before, except and in so far as it was altered or affected by the British North America Act, subject, of course, to future legislation which might be passed by the Dominion or by the provinces according to the jurisdiction within which the legislative authority was to be found.

VISCOUNT HALDANE: Is that so, Mr. Newcombe? The principle of the British North America Act was to make a quasi federal distribution of legislative and executive power, and the result, surely, was that it was essential that section 65 should be there and section 64 was only a temporary provision pending a scheme. MR. NEWCOMBE: May I refer to the language? "The Constitution of the executive authority in each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act."

VISCOUNT HALDANE: Which is the section which gives authority to alter? MR. NEWCOMBE: Section 91 and section 92, my Lord.

VISCOUNT HALDANE: Surely, there are other sections. MR. NEWCOMBE: There may be other sections, but the main sections are sections 91 and 92.

VISCOUNT HALDANE: Where is the alteration of the Constitution in section 91? MR. NEWCOMBE: Section 92 (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." The office of Lieutenant-Governor

is excepted. Therefore so far as the office of Lieutenant-Governor is concerned, the Dominion may legislate for that under the 29th enumeration of section 91. SIR ROBERT FINLAY: Is not the reference your Lordship asked for section 129? VISCOUNT HALDANE: That is the one I was thinking of. MR. NEWCOMBE: That is the one I cited yesterday. It is to continue to exist until altered under the authority of this Act. Section 129 provides for the laws to continue until altered under the authority of this Act. When you go to find the authority of this Act under which it is done, I submit it is section 91 and section 92.

VISCOUNT HALDANE: There is a group of sections beginning with section 134. MR. NEWCOMBE: I am going to refer to those. Those were made necessary for the same reason. They provide for the distribution of offices. I was going to call your Lordships' attention to section 135, a kindred sort of section to this: "Until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities, or authorities at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General" and so on—it mentions different functionaries and ministers—"by any law, statute, or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act,"—that is an expression equivalent to "subject to the provisions of this Act" in section 94—"and not repugnant to this Act," it is expressed in different words—"shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and functions of the office of Minister of Agriculture at the passing of this Act imposed by the law of the province of Canada, as well as those of the Commissioner of Public Works." Now when section 64 says that the constitution of the executive authority in Nova Scotia and New Brunswick shall subject to the provisions of this Act continue as it existed at the Union until altered under the authority of this Act, it means, I submit, by "subject to the provisions of this Act" that in so far as executive powers after the Union relate to those subjects which in the distribution fell to the provinces they shall be exercised locally by the Lieutenant-Governors; in so far as they relate to the larger subjects which relate to Dominion Government they shall under section 12 be executed by the Governor-General so far as they relate to his Government of the Dominion. Then section 65 is introduced for the reason which I have explained on account of the Union of the two provinces which existed and "all powers, authorities and functions which under any" Act of Parliament, and so on—and I remind your Lordships again that this is limited to statutory powers—"were or are before or at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those provinces, with the advice" and so on, "shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario . . . be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario . . . with the advice" and so on, subject nevertheless (except as to Acts of Imperial authority) "to be abolished or altered by the respective Legislatures of Ontario and Quebec."

THE LORD CHANCELLOR: You say powers to be exercised under section 92? MR. NEWCOMBE: Yes, my Lord. This clause does not give the power to abolish those. It is implied there; it was not necessary to put it there. Those powers could be abolished or altered by the respective legislatures under section 92, and they cannot be abolished or altered any further by reason of section 65 than they could be under section 92. And while the Legislature may abolish those powers they may only abolish such powers as they have authority to reinstate. They use the word "abolish," it is equivalent in a sense to repeal. "Repeal" would not have been a technical or apt word, because they were dealing with legislation deriving its force from a legislature different from that which is to act in doing away with the legislation, but it is the same sort of thing. The power may be abolished, the power may be repealed, the power may be restored, and only in so far as authorized by section 92.

Now then the application of this as suggested against me is that you have in 1864 a statute of the old province of Canada, which provided for the incorporation of companies by the Governor of the old province, and they could incorporate

companies there for general purposes, among others the purpose of mining. It is not necessary I think for this case to say what would be the effect of a charter or letters patent issued by the Governor of the old province of Canada to mine without any words of limitation; but let it be supposed, if under that Act of 1864 before the Union a company had been incorporated with power to mine, that it could mine not only in the old province of Canada, but anywhere in the world where the local mining laws permitted it to do so; then, my Lords, at the Union the Act was there, and it was an Act which authorised, if I interpret it correctly, the creation of a company in the terms such as I have described and equally authorised the creation of a company to mine within any given area within the province. A company might have been incorporated to mine in what is now the province of Ontario, or still more locally at Cobourg in Ontario. Any sort of local mining authority within the area of the province certainly could have been granted out under that Act, and perhaps capacity to mine in a local area outside, but certainly the executive authority if it was capable of being exercised under that Act after the Union fell to be exercised in part by the Governor-General and in part by the Lieutenant-Governors of Ontario and Quebec.

Now, my Lords, I must be right in that, there was a division of authority. What was the limit, what was the division of authority? Where are you going to find out what sort of companies could be incorporated after the Union under that Act, by the Dominion, by Ontario and by Quebec? My Lords, the key and the only key to that riddle is sections 91 and 92. In so far as a company was concerned to mine throughout the old province of Canada that company would have to be created by the Governor-General. If to mine within the new province of Ontario, the company would be created by the Lieutenant-Governor of Ontario because he has the authority, or the Legislature of Ontario has, to incorporate companies with provincial objects. Equally so Quebec. Look at it the other way about. Immediately after the Union the project presents itself to incorporate a company to mine locally within the province of Ontario. Is it possible to suppose that the Governor-General of the Dominion can incorporate that company; is the power to incorporate this local mining company in Ontario granted to the Governor-General under section 12 as a power in relation to the executive Government of the Dominion capable of being exercised in relation to the executive Government of the Dominion—

VISCOUNT HALDANE: Not power to mine in Ontario, but power to create a company which if it was authorised, if there was any authority in Ontario, could mine. MR. NEWCOMBE: I mean a company limited in its local operations to Ontario, a company which can mine there and nowhere else if you like, that sort of company has to be incorporated immediately after the Union, is it possible that any authority in Canada other than the Governor of Ontario can incorporate that company?

LORD PARKER: You have to consider this, the Act of 1864 was passed under a section of an earlier Act which enabled the province of Canada to legislate for the "peace, order, and good government" of the province. Therefore the creation of a company to carry on business outside or in any particular division inside the territorial limits of a province could be legislated upon by the legislature of the province. MR. NEWCOMBE: Yes, my Lord, certainly as to the latter.

LORD PARKER: Section 12 transfers all those powers for Dominion purposes to the Dominion of Canada. MR. NEWCOMBE: Yes, my Lord.

LORD PARKER: The executive of the Dominion therefore could immediately after the Act have done exactly what the province of Ontario could have done, but they do it now, not for the province of Ontario, but for the Dominion. Therefore they could have created a company with extra-territorial objects just as well as anybody else. Then when you come to the two provinces of Ontario and Quebec it is exactly the same, is not it? Each province now is separated. They have a statute book of their own. Each divided province commences its new statute book with the old statutes. If they want to alter them and repeal them they have to alter them and repeal them under the powers conferred by the Union Act. MR. NEWCOMBE: Certainly.

LORD PARKER: Then you get into a dilemma at once; if they are to repeal this Act which gives the executive power of creating extra-territorial companies they can only repeal it as far as I can see legislating on matters concerning the incorporation of companies with provincial objects. If they can it can only be because provincial objects includes extra-territorial companies. There is no power given to them to repeal unless you imply it from section 65 or the other section. MR. NEWCOMBE: When they repeal it they repeal it merely to the extent of their powers.

LORD PARKER: Then it is not altogether gone? MR. NEWCOMBE: No, it is not altogether gone.

LORD PARKER: The Governor may exercise his powers. MR. NEWCOMBE: If I am right they repeal it so far as it confers powers or right or capacity in the Lieutenant-Governor to incorporate companies for provincial objects. The rest of it is left there. We will suppose that the province passed that sort of a repeal. What is left? A power in a Governor, to incorporate a company for other than provincial objects. Who is to execute that power? Surely the Governor-General under section 12. That is the way it was dealt with. When we were arguing the Insurance case the other day I pointed out that after the Union the provinces of Ontario and Quebec had disposed of the insurance clause which provided that no company should do business in the province without a license from the Minister of Finance by a note in their Consolidated Statutes that that legislation was within the exclusive legislative authority of the Dominion. In the same schedule they dealt with this Act. If this Act had been confined in its operation previous to the Union to incorporation of companies with an area of operations necessarily extending over both provinces, over the whole of the old province of Canada, we should have found that Act dealt with in precisely the same way, we should have had the word "Dom" opposite it, meaning the exclusive legislative authority of the Dominion, according to the legend at the top of the schedule, but what happened was they took the view which I am endeavouring to present and which I submit is the only possible view that can be reconciled with the situation. They took the view that this Act for the incorporation of companies was an Act which fell partly to the Dominion—that is I submit in so far as it related to or authorized the incorporation of companies for other than provincial objects, and that so far as it authorized companies for provincial objects it fell to them. The Dominion repealed it to the extent of its powers and the provinces to the extent of their powers, so you find at page 2317, volume 2, of the Revised Statutes of Ontario of 1877, chapter 23.

THE LORD CHANCELLOR: In what section and for what purpose? What is the statute that you refer to? MR. NEWCOMBE: The statute of 1864.

THE LORD CHANCELLOR: What is the statute in which you say this statute is cited; is it a repealing Act? MR. NEWCOMBE: It merely shows what disposition was made in the first revision of the Statutes of Ontario after the Union, and I have no doubt it is the same in the first revision of the Statutes of Quebec. I have not looked at it but I have no doubt it is the same.

LORD PARKER: We are asked to decide the construction of a particular section of the Dominion Act. That may have been muddled up by every province in all sorts of ways. We have not the material, nor do I think probably would the Board consent to go into all the legislation of all the provinces on a reference of this sort. MR. NEWCOMBE: I did not introduce this question, my Lord. I am only endeavouring to remove a difficulty which has been supposed to be in my way here. It never occurred to me before the beginning of my argument that there was any question arising out of pre-Union legislation.

THE LORD CHANCELLOR: I do not know what the purpose of the statute is to which you refer. You refer me to a page 2317. I see there 27 and 28 Victoria, the Act of 1864 and certain Acts referred to, but in what connection are they referred to? What is the document to which you are referring me? MR. NEWCOMBE: It shows the disposition which was made of the old statute by the legislature.

THE LORD CHANCELLOR: That is, disposition by an Act of Parliament? MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: Where is that? MR. NEWCOMBE: They are cited in the margin opposite No. 23.

THE LORD CHANCELLOR: Am I looking at a page of an Act of Parliament—page 2317? MR. NEWCOMBE: At the schedule showing the disposition of the statutes before the Union, made by the legislatures and the Parliament after the Union.

THE LORD CHANCELLOR: There is an Act of Parliament that schedules them; where is that?

LORD PARKER: Was this disposition carried out by Act of the Union or act of the Union and the provinces both. MR. NEWCOMBE: If you will just allow me to answer the question, what it amounts to in this, that it shows that this Act which has been referred to—that is the Act of 1864 for the incorporation of companies by the old province of Canada was repealed as to future incorporations by 37 V. chapter 35, section 59 (Ontario), and by 32 & 33 V. chapter 13, section 56 (Dominion).

THE LORD CHANCELLOR: What I understand you have referred me to is an appendix. It does not appear to have any statutory authority at all. It is an appendix to the Revised Statutes of Ontario, but it has no statutory authority. SIR ROBERT FINLAY: It is the reference which I interposed some time ago, my Lord.

THE LORD CHANCELLOR: Is it anything but a mere chronological digest, or something of that sort? SIR ROBERT FINLAY: That is all—a mere guide. It is stated to be an appendix.

VISCOUNT HALDANE: I cannot see how it bears on the point. The point is this, that there is an Act of 1864, and a Confederation Act of three years later was passed with that Act of 1864 existing, and we have to construe the words of the Act of 1867, the Confederation Act. How can what was done by either a Dominion Act of a provincial Act affect the construction of the words of the Act of 1867? MR. NEWCOMBE: I do not say that they do affect it except as I was told the other day, that if it is a doubtful question then it is not inappropriate to refer to the view which was taken by the Parliament of Canada and by the legislatures at the time.

VISCOUNT HALDANE: If that was a general proposition you were told wrong. I said so at the time. I protest against your going into Ontario and Dominion Statutes on the construction of these words of section 92 of the Act. MR. NEWCOMBE: I do not want to press it, but I have the authority of your Lordships' Board that such references are not inappropriate.

VISCOUNT HALDANE: You have not got it from me anyhow. MR. NEWCOMBE: No, my Lord. but it is in the cases.

LORD PARKER: If on the one hand it is relevant to consider what Ontario did, it is equally relevant to consider what Nova Scotia did—we shall have to go into the whole of the Provinces.

VISCOUNT HALDANE: And British Columbia. MR. NEWCOMBE: We are dealing with a statute which nobody had anything to do with except the Dominion, Ontario and Quebec. I am arguing as to what they should have done, as to what the situation was, and I venture to submit that the action taken was in conformity with that view.

THE LORD CHANCELLOR: What I understand it amounts to is this, you say that the Act of 1864 has in fact been repealed in part as to Ontario, and in part as to the Dominion. It has been repealed as to the part affecting Ontario by 37 V. chapter 35, section 59, and as to the Dominion by 32-33 V. chapter 13, section 56. MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: I think it would have been more convenient to have told me that than to refer to the most troublesome appendix which I did not understand. Have we before us the 37 V. chapter 35, which you say repealed it as far as Ontario was concerned?

VISCOUNT HALDANE: But what possible bearing can this have?

LORD PARKER: It is begging the whole point because if it is repealed it can only be under those words.

VISCOUNT HALDANE: Because the provision is wide enough. MR. NEWCOMBE: This Statute of 1864 confers powers to incorporate companies for objects which would not be within provincial powers after the Union, fisheries and navigation. It is said that the Lieutenant-Governor of Ontario or Quebec could exercise a power after the Union to incorporate a company say for navigation purposes; for objects (I am not speaking of the question of area where it is to be exercised) of a character or of a kind which are within section 91 rather than within section 92. Surely that power must be exercised by the Governor-General. Then take the case of a company to be incorporated, as my learned friend says, with capacity to mine in Quebec. Take the desire after the Union to constitute such a company as that with simply those powers and no others described in the charter. What authority is to constitute that? If the argument suggested be right it seems to me necessarily to follow that the Legislature of Ontario may do it, because the executive power which existed under the Statute of 1864 descends to the Lieutenant-Governors, and anything which could be done previous to the Union under the Act of 1864 can be done afterwards and done by the Lieutenant-Governors. Surely Ontario after the Union, under the Act of 1864, could not have incorporated a company to mine in Quebec; Quebec could not have incorporated a company to mine in Ontario. Neither one of them could incorporate a company to mine throughout both Ontario and Quebec. Neither one of them could have incorporated a company to mine beyond the limits of the province itself. That authority I submit was reserved, in the distribution, solely to the Governor-General under section 12.

Another result of the view suggested would be that the statute instead of bringing about uniformity of executive power among the provinces would create diversity of power—whereas the Lieutenant-Governor of Nova Scotia could not create a corporation except for provincial purposes, the Lieutenant-Governor of Ontario could create a corporation for extra-provincial purposes.

LORD PARKER: It depends entirely how you construe the words "with provincial objects." If you give a large meaning to the words you bring the provinces into exactly the same position with regard to their powers, if you give them a narrow meaning you may not. MR. NEWCOMBE: I submit that they should have that interpretation which will give uniform powers to the legislatures, and the suggestion that in Ontario and Quebec by virtue of a reference to ante-Union legislation you get a power to incorporate for purposes outside the province seems to lead to the result that they have a power broader than the other provinces.

VISCOUNT HALDANE: You see the whole point of this is whether it is not a fallacy to talk of companies with "powers." It is companies with status. These are companies incorporated under a charter which is granted pursuant to a statute, and the question is whether the statute does not permit the incorporation of a company with general powers which an ordinary corporation usually has. Have you looked at the cases upon *Ashbury Railway Carriage, &c., Company* v. *Riche*? Two cases in particular have come into my mind now—*The Attorney-General* v. *The Great Eastern Railway Company*, and *The Attorney-General* v. *The London County Council*. MR. NEWCOMBE: Yes.

VISCOUNT HALDANE: I think the London County Council is not incorporated under the Municipal Corporations Act—I think it is not incorporated by charter at all; is not it the creature of Statute? SIR ROBERT FINLAY: The creature of Statute.

VISCOUNT HALDANE: Those decisions extended the doctrine of *Ashbury Railway Carriage, &c., Company* v. *Riche* to companies incorporated by special Statute—is there anything new there which affects what we are discussing? MR. NEWCOMBE: Only this, that I was going to refer to those cases as showing that the doctrine laid down in *Ashbury Railway Carriage, &c., Company* v. *Riche* did not depend upon a consideration of the special provisions of the English Companies' Act.

VISCOUNT HALDANE: It might arise under any Act of Parliament. MR. NEWCOMBE: Any Act of Parliament.

THE LORD CHANCELLOR: You get away to a new point at once; you leave the question of "provincial objects;" you presume that is decided in your favour, and you see what the position is outside. MR. NEWCOMBE: Yes, I was coming to that in another order.

THE LORD CHANCELLOR: I only wanted to see where we were. MR. NEWCOMBE: Now, I think I have said all that I can to make my position clear with regard to the effect of that Statute of 1864, and of sections 12 and 64 and 65 of the British North America Act, and I submit that none of the considerations urged having anything to do with this case. The question would have to be decided precisely the same if there had never been an Act of 1864, and if sections 12 and 64 and 65 were not here. The question is, what is the meaning of "provincial objects," and this discussion in my submission affords no light as to what that expression means as used in section 92 of the British North America Act. But there are considerations which may arise in arriving at an interpretation of "provincial objects." I have said that the intention of section 92 is generally speaking to confer local powers. The 11th enumeration is: "The incorporation of companies with provincial objects." If you can imagine that that enumeration stood alone in section 92, and that that were the only purpose of provincial power, it could have no meaning except with regard to the territorial limits of the province; there would be nothing else to refer it to, and it would mean I submit the incorporation of companies within the province to carry on business limited locally to the province, but when you find this enumeration occurring with others you can look to the other enumerations, the other subject matters of legislation which are enumerated and described there, for the purpose of ascertaining what are the provincial objects which may be conferred upon these companies of local creation. Now there is another clause here which is somewhat kindred, it has to do with the creation of corporations, No. 8 "Municipal institutions in the province." Those institutions as a whole work in the operation of corporate powers, and that item was considered by Lord Watson in the Prohibition case of 1896, at page 363. His Lordship said: "The authority of the Legislature of Ontario to enact section 18 of 53 Vict. chapter 56, was asserted by the appellant on various grounds. The first of these, which was very strongly insisted on, was to the effect that the power given to each province by No. 8 of section 92 to create municipal institutions in the province necessarily implies the right to endow these institutions with all the administrative functions which had been ordinarily possessed and exercised by them before the time of the Union. Their Lordships can find nothing to support that contention in the language of section 92, No. 8, which, according to its natural meaning, simply gives Provincial Legislatures the right to create a legal body for the management of municipal affairs. Until Confederation, the legislature of each province as then constituted could, if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the Parliament of Canada. Since its date a Provincial Legislature cannot delegate any power which it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of section 92 other than No. 8."

VISCOUNT HALDANE: Is not that a very obvious proposition, MR. NEWCOMBE: Obvious, my Lord, and I submit applicable to this argument.

VISCOUNT HALDANE: We are dealing with the construction of words in section 92. MR. NEWCOMBE: The question which Lord Watson was considering there was as to the interpretation of "municipal institutions." It had been said that that enumeration conferred large legislative powers upon the provinces. He says it does nothing except to enable the province to create a municipal institution and any power that institution is to exercise must be derived from the other enumerations of section 92.

VISCOUNT HALDANE: Lord Watson said with reference to conferring certain powers you have to see whether you have capacity to do it under section 92. As there were no other legislative powers than those conferred in section 92 Lord Watson made the very obvious observation that you could not enlarge the ambit if you had in order to do so to proceed outside section 92. MR. NEWCOMBE: He says the section simply gives Provincial Legislatures the right to create a legal

body for the management of municipal affairs. That is to create the corporation, the powers which that corporation is to exercise it derives not through the enumeration of "municipal institutions in the province," but through the other enumerations which stand alongside of it in section 92, and just so I submit the power to incorporate companies with provincial objects empowers a province to create a corporation, but the powers that are to be conferred upon that corporation must be sought for in the other enumerations of section 92, and then you examine those enumerations to see what powers may be conferred upon these corporations which the province is given authority to constitute.

LORD PARKER: I am afraid you will get very little in your company then, because none of these things are capable of, or most of them are incapable of, being exercised by a company. MR. NEWCOMBE: A number of them are not—the earlier ones. I suppose practically you may pass down to No. 10 because you come to a description of powers which practically would be conferred upon companies: "Local works and undertakings other than such as are of the following classes." There is a provision rather awkwardly expressed the effect of which is to confer upon the province the power to legislate for strictly local works and undertakings, local limits, excluding any which connect two provinces or extend beyond the limits of the province. I wonder if when the Governor of Ontario incorporated the Bonanza Creek Gold Mining Company, with power to build canals and sluiceways and to erect dams and that sort of thing, viewing the charter in its application to the Yukon. he was within the limits of this clause; was he providing for a local work and undertaking of Ontario? Surely he was conferring powers which are referable to nothing especially except section 10, and those are local works and undertakings which may be executed within the incorporating province, but not beyond it. Now then you come to "property and civil rights in the province." Under that very large powers, of course, may be conferred, practically all powers are conferred, upon corporations, but they must be within the province—you can confer "property and civil rights in the province." Is the capacity which may learned friend says is to be exercised beyond the limits of the province "property and civil rights in the province?" I submit it is excluded by this limitation, and it is only under this limitation that the grant is made. Then there is finally "generally all matters of a merely local or private nature in the province." Those are the enumerations under which the powers are defined and granted to these local companies. There are many other enumerations in the section relating to constitution, government. taxation and that sort of thing; those are all equally limited to the province and all go to show as I submit the local character of the powers which are committed to the legislatures. Lord Watson said, with regard to these powers: "It appears to their Lordships that the language of the exception in section 91 was meant to include, and correctly describes, all the matters enumerated in the 16 heads of section 92, as being, from a provincial point of view, of a local or private nature." That is the description which is applied by Lord Watson to every enumeration in section 92, and I ask whether the incorporation of Companies with provincial objects does not mean companies of a local or private nature, companies locally limited to the provinces? Could Ontario incorporate a company, as my friend says, with powers to mine in Ontario and capacity to mine in Quebec? Suppose we leave out the power to mine in Ontario, could Ontario incorporate a company with capacity to mine in Quebec and nowhere else? Would that be legislation referrable to property and civil rights in Ontario? It deals with nothing but property and civil rights. Unless the legislation be property and civil rights in Ontario then it would be *ultra vires* of Ontario.

LORD PARKER OF WADDINGTON: Could they legislate with regard to the civil rights of a company incorporated in Ontario when they got into Quebec? You could say in Ontario they shall have such rights, but you cannot say in Quebec they shall have such rights.

THE LORD CHANCELLOR: Provincial objects might make it convenient? MR. NEWCOMBE: It is foreign to any conception of provincial objects to suppose that they are objects to be executed entirely outside the province. Reading this clause for the purpose of this case, because we are dealing with Ontario, you could very well read item No. 11, "The Incorporation of Companies, with Ontario objects."

That is what it means. You can substitute the name of the province there, and that means being interpreted "private and local objects in Ontario," because the whole group of powers here is really introduced under the denomination "private and local." It is nothing but "private and local." Now, my Lords, if these be "private and local powers" this Bonanza Creek Company, which was really a Yukon company when it went abroad, could not be recognized in any place in Canada, at all events, as having any power in excess of that which is limited by its constitution. The British North America Act governs both the Dominion and the provinces, and when it confers exclusive powers on the provinces and on the Dominion, those powers are exclusive as between the Dominion and the provinces, and they are also exclusive as between the provinces themselves: that is to say, a matter which is property and civil rights in one province may not, because it is provincial, be the subject of legislation in another province; and, while that local company may by comity be recognized, it can only be recognized in foreign countries, or in other provinces, to the extent of those powers. A corporation is nothing but a bundle of powers anyway. It can only be recognized to the extent of those powers,. and behind all that is the British North America Act. As to the recognition of such a company I should like to read a passage from the decision of the Chief Justice of the United States in the case of the *Canada Southern Railroad Company* v. *Gebhard*, in 109 Supreme Court of the United States Reports at page 527: "A corporation must dwell in the place of its creation, and cannot migrate to another Sovereignty, though it may do business in all places where its charter allows, and the local laws do not forbid. But wherever it goes for business it carries its charter, as that is the law of its existence, and the charter is the same abroad as it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country, but if admitted it must in the absence of legislation equivalent to making it a corporation of the latter country be taken both by the Government and those who deal with it as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation." Is that sort of legislation, legislation as to property and civil rights in Ontario when it takes away the capacity which the company has assumed to have in another province? If this company goes out and acquires mines, and undertakes to mine, in the Yukon, by virtue of the capacity which my learned friend says is granted to it by Ontario, that capacity could be taken away from it by Ontario.

VISCOUNT HALDANE: It gets its right to mine in Yukon from the Yukon Government. MR. NEWCOMBE: Of course, it is very plain what the object was. This was a company which was never intended to do any business in Ontario at all. It never has done any business in Ontario. It is the Bonanza Creek Gold Mining Company, which is the name of a very rich creek in the Yukon. The moment it is incorporated it takes out a free miner's certificate, and goes to the Yukon to engage in mining. Is it not exercising property and civil rights in the Yukon when it does that?

VISCOUNT HALDANE: With the permission of the Yukon Government. MR. NEWCOMBE: There is nothing in the Yukon Government to prevent a company that has capacity to do so going there and carrying on any legitimate business; but I humbly submit that a creature of that sort going outside of the area of its incorporation is one which in Canada can be created only by the Dominion. That was my learned friend's view quite recently. We have referred pretty generously to notes of argument, and perhaps I might refer to the argument in the John Deere Plow case.

VISCOUNT HALDANE: Do you mean the argument of counsel? MR. NEWCOMBE: And what your Lordship said.

VISCOUNT HALDANE: What I said in the course of the discussion is only for the purpose of keeping my mind open until the end of the argument when I make it up. That is why I am listening so patiently. MR. NEWCOMBE: I hope I am not unduly detaining your Lordships.

LORD PARKER OF WADDINGTON: What one says in the course of the argument

is not one's opinion. It is merely questions to counsel. MR. NEWCOMBE: If your Lordship please.

LORD PARKER OF WADDINGTON: Supposing the Lieutenant-Governor had granted a charter without any reference to any other party, and had constituted a common law corporation, supposing the Crown could have done it here, and supposing it had been directly done by charter here, that they had incorporated a company, and that company had gone to Yukon, or Ontario, is there any reason why recognition should not have been given to it, or any reason why it should not be endowed with civil rights? MR. NEWCOMBE: There must be a difference I submit between the grant of powers by the Imperial Legislature—

LORD PARKER OF WADDINGTON: I am talking of the executive. MR. NEWCOMBE: Of course there is no limitation upon the power of the Crown, but there is a limit upon the power of the Crown as represented by the province of Ontario.

LORD PARKER OF WADDINGTON: That is the point in this case. MR. NEWCOMBE: The remission of the death penalty is a prerogative right of the Crown not dependent upon any Statute. It could have been exercised in the old province of Canada by the Governor, and no doubt it was, but the moment the Union came about it could only be exercised by the Governor-General.

VISCOUNT HALDANE: Who exercises it now? MR. NEWCOMBE: The prerogative of mercy is exercised altogether by the Governor-General, except that the province claim to exercise it with regard to offences committed against the local laws. The power is limited, and you have to find out what the power is. If the Governor has power to make a grant within what limits has he power to make that grant, and it comes back to the same question again? What I say is that he cannot make any bigger grant than legislature can, and the legislature can only grant for provincial objects. I say the moment you depart from what I submit to be a very simple and workable rule that provincial objects, like all other objects which are provided for in section 91, are to be worked out locally, within local limits, private and local matters, you get into great difficulties, and such refinements, as to create what I submit would be a grotesque situation. There is no doubt that the Dominion incorporates, under the enumerated words, any sort of company that came within those. My learned friend concedes that; also that the Dominion incorporates any sort of company, with any sort of powers, if they are to carry on business throughout the Dominion. My learned friend agrees to territorial limitations in section 92 for provincial objects. He agrees to that in his argument, I say, because he agrees that the province can confer no power to be exercised except within the limits of the province. Therefore there is a territorial limitation.

LORD PARKER OF WADDINGTON: Of a right? MR. NEWCOMBE: Yes, my Lord, right or ability.

VISCOUNT HALDANE: It is precisely the same with regard to Imperial companies, companies by charter, and companies by Statute; it makes no difference. Neither the Crown nor Parliament can confer any right outside their own territorial limits. Then can only confer powers. I understood the argument to be that they could confer powers, that is to say capacity. They cannot confer rights. MR. NEWCOMBE: I was using the words "power" and "capacity" as distinguished.

THE LORD CHANCELLOR: The argument against you is that there is a limitation. As you point out the only question is whether there is enough. MR. NEWCOMBE: There is a territorial limitation to the extent to which I have gone for the moment in this statement.

THE LORD CHANCELLOR: That is conceded. MR. NEWCOMBE: That is to say that the province incorporating a company can confer no right or ability save in the province. Let me use the word "power" in the sense of ability or right to carry out the power, and "capacity" in the other sense. Therefore if it incorporates a company to mine in the province it legislates to the extent of its powers.

LORD PARKER OF WADDINGTON: It confers both powers and rights. If the province incorporates a company to mine inside the province it confers capacity and rights.

THE LORD CHANCELLOR: It is conceded that there is some limitation by the use of the words "provincial objects." The question is what is the limitation?

MR. NEWCOMBE: I was going to lead up to a case of this kind. Supposing you have company (A) incorporated by Ontario to mine in Ontario, and company (B) incorporated to mine, in either case the legislature has conferred powers within the full ambit of its jurisdiction. Can the one company go to the Yukon and not the other? Is it a provincial object to add in either case the capacity to mine outside of Ontario, capacity to mine in Quebec? I submit that is a provincial object in Quebec; it is a civil right there. Does it become a provincial object of Ontario if it be conferred on a company empowered to mine in Ontario? Surely, my Lords, I am not wrong in saying that capacity to mine in Quebec is a civil right in Quebec, and if that is to be subject to the legislative jurisdiction of Ontario, surely you are giving the Ontario legislation overlapping powers to legislate with regard to property and civil rights, not in Ontario, but in Quebec.

LORD PARKER OF WADDINGTON: The question is whether the words are intended to introduce a limitation with regard to the capacity which the legislature can confer, or whether they are only intended to introduce a limitation into the rights which it can confer. MR. NEWCOMBE: Yes, I submit both.

VISCOUNT HALDANE: The purposes for which the company exists. I doubt very much whether you could create a company to mine in Quebec, for instance, in Ontario.

LORD PARKER OF WADDINGTON: The whole confusion comes from the ambiguous use of the word "power." MR. NEWCOMBE: I am going to quote from the case of *Colquhoun* v. *Heddon*, in 24 Queen's Bench Division, at page 497, where Baron Pollock says: "In the first place the word 'company' in itself denotes—not a mere firm of persons which in a mercantile sense might be the same in whatever part of the world it was established—but an entity and a legal entity the validity and effect of which must depend upon the laws of the country within which that company is established."

THE LORD CHANCELLOR: That is right: that is so. The rights of all the shareholders *inter se*, all the debentureholders, and all the people connected with this company, are limited by the laws of Ontario? MR. NEWCOMBE: Yes, and its capacity is defined. What does an enacting authority do when it incorporates a company, except to confer capacity? After all is there any difference between power and capacity? They confer capacity.

THE LORD CHANCELLOR: I think you get into a strange confusion when you begin to tie yourself up in a tangle of words. I do not know that there is much difference. The whole thing can be illustrated in the way in which Mr. Nesbitt illustrated it. If you consider the whole of this building as representing the Dominion the Dominion is the only body that could give power for you to enter into every room, but the province could give you the power to enter the room which represented the province, and the right to go into the next room, if you could get in. MR. NEWCOMBE: What is the difference between that company and the company which the Dominion alone incorporates?

THE LORD CHANCELLOR: A most important difference. The Dominion company can enter as of right; the other company can only enter as of grace. MR. NEWCOMBE: I submit when the Dominion incorporates a company, and the province incorporates a company, they do the same thing; they give an entity to certain persons, and confer upon that entity a certain capacity. When they go abroad clothed with that capacity they may exercise it whenever the local laws permit.

THE LORD CHANCELLOR: The Dominion company within the Dominion of Canada can exercise it anywhere. MR. NEWCOMBE: It can only exercise it if the local laws permit. Take this instance. Supposing we incorporate a company to administer trusts, what we call a trust company, for the Dominion, and supposing they go to the province of Quebec where they find a Statute which says: In this province no corporation shall execute a trust? That corporation could not carry on any business in Quebec, because the general law of the country would exclude it.

THE LORD CHANCELLOR: That may be. MR. NEWCOMBE: A company, whatever capacity it has, is up against the local laws.

LORD PARKER OF WADDINGTON: I thought that the whole point in the John Deere Plow case was that the Dominion Parliament had the power to say: You shall have the right to trade in the province? MR. NEWCOMBE: You shall have the right to trade in the province as against any local legislation against your status, or capacity; but it does not determine that you have a right to trade as against any law such as I have described, saying that no corporation shall exercise those powers.

LORD PARKER OF WADDINGTON: We are not called upon to decide that. The whole point of the John Deere Plow case was, did the Dominion give the company which it had incorporated power to go to the provinces? When they got there they might have to observe certain local regulations. Similarly the province can give the key of its own room to a company which it incorporated, but it cannot give the bunch of keys. MR. NEWCOMBE: When the company goes there and opens the door and goes into the room, is it exercising property and civil rights in that province or in the province in which it was created.

THE LORD CHANCELLOR: That is not the question. MR. NEWCOMBE: Perhaps it is not.

THE LORD CHANCELLOR: The question is whether it has been incorporated with a provincial object. If it has it can go and do it, but the regulation as to civil rights regulates it directly it comes back into its own province. MR. NEWCOMBE: My observation is that the provinces together cannot really do what the Dominion alone can do. If you want to have a company incorporated to mine all over the Dominion a very simple way would be to go to the Dominion and get letters patent of incorporation for that, and then there would be no doubt about its capacity and its power, but supposing you do not want to do that, there is another way according to my learned friend's submission in which that could be done. You could go to any one of the provinces and get a company incorporated and then go into each of the other provinces and get legislation conferring upon that company the power to mine there, and then you would have a company which could mine all over the Dominion precisely the same as a Dominion company can. I submit a project of that kind cannot be effected indifferently by the Dominion or the provinces by joint action. There is no provision in the Act for joint action by the provinces. They act separately.

LORD PARKER OF WADDINGTON: It is the same with regard to an English company. It really for all practical purposes is a matter of complete indifference by whom a company is incorporated if it is to have the same rights.

THE LORD CHANCELLOR: We are all familiar with the process of going round to get at our result instead of going straight. In this case we seem to be doing it over and over again. To say that in the end you would get the same powers if you went to the Dominion does not appear to help the matter in the least. MR. NEWCOMBE: Let me put it in this way. The Bonanza Company is claiming damages here because it has not been given properties to mine, and because it has not been permitted to construct works for bringing down the water and continuing its hydraulic operations. Of course there are dams, canals and waterways.

THE LORD CHANCELLOR: The question we have to decide is not that. The question we have to decide is whether or no those grants were good or bad; that is the whole question. MR. NEWCOMBE: Yes, but have not your Lordships to decide what powers this company had. What we have to settle so far as this case is concerned is whether Ontario granted to this company powers with provincial objects?

THE LORD CHANCELLOR: That is absolutely right; that is the whole thing. MR. NEWCOMBE: Then what I say is, are they incorporating a company with provincial objects when they incorporate a company with a capacity to construct works in the Yukon, local works or undertakings in the Yukon? Those powers in my submission are granted under enumeration 10 of section 92, "local works and undertakings," and I submit that for instance if you want to complete a railway from Toronto to Montreal, those being cities in two different provinces, Ontario by incorporating the company with authority to construct in Ontario and capacity in Quebec could not, no matter how much recognition there was of it in Quebec, construct a lawful work. Here you have the case bound up with works. Damages are sought in respect of these works. What is the position? I suppose for this canal

and waterway which it was proposed to construct to bring the water from a long distance they must make dams, reservoirs and that sort of thing. That might very largely compete in irrigation schemes in the country, and it might be necessary to take that over. I suppose the Dominion could declare the works for the general advantage of Canada under one of the items of section 92. It seems to me that you are putting the British North America Act out of sight altogether if it is going to be held that any legislation in the province of Ontario is effective for the purpose of constructing works in the Yukon territory which is not even a province. There is no object connected with any province in that case at all, nothing could be further removed from it. These works were intended to execute any provincial object. The case of *Dobie* v. *The Temporalities Board*, reported in 7 Appeal Cases, at page 151, shows that the provinces cannot effect any legislative object which belongs to the Dominion by joint legislation, and what I submit is that a provincially incorporated company cannot stand upon any higher ground than a company incorporated by the Parliament of the United Kingdom to do business [illegible]. If Parliament incorporates a company to manufacture goods in Birmingham, even it cannot manufacture in London; it cannot carry on its business in London. Neither can this company which is incorporated in Ontario for mining maintain that it is incorporated by Ontario to mine anywhere else. It is a matter of perfect indifference in the construction of the Act whether the Act says "to mine in Ontario" or "to mine." In either case by reason of the local limitations upon the power of the legislature it cannot extend its legislative authority beyond the limits of its province, and therefore the company can mine only in Ontario. What it can do outside we are not concerned with, except to say that it cannot go and carry out the specific purposes of its incorporation in an outside jurisdiction. With regard to what is incident and ancillary we are not concerned with that. This is not a question of anything ancillary or incidental; it is a question as to whether depending upon the Ontario legislation and nothing else this company is entitled to go and execute these works and carry on this business in a part of the Dominion not Ontario and not a province. It is a local company. Of course, I need not state authority for the proposition that a company incorporated to carry on a particular business in one country exceeds its power if it carries on a similar business out of that country. This is the situation in which I submit this company is. May I refer your Lordship to the case of the *London County Council* v. *The Attorney-General*, reported in 1902 Appeal Cases, at page 165.

THE LORD CHANCELLOR: What proposition do you cite that for? MR. NEWCOMBE: For the proposition that a corporation created by a Statute can do nothing except that which its Statute authorizes.

THE LORD CHANCELLOR: There were peculiar circumstances there. That case decided that the London County Council was purely a statutory body. MR. NEWCOMBE: Yes.

THE LORD CHANCELLOR: And consequently its powers were limited? MR. NEWCOMBE: Yes; we are dealing here with a purely statutory body in my submission. Then, my Lords, there is the case of the *Attorney-General* v. *Great Eastern Railway Co.*, reported in 5 Appeal Cases, at page 481. That is Lord Blackburn's judgment where he says, referring to the *Ashbury Railway Carriage and Iron Company* v. *Riche*: "That case appears to me to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and, consequently, that the Great Eastern Company, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose. My Lords, I quite agree with what Lord Justice James has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited." Those cases in my submission establish the full application of the doctrine of the *Ashbury Railway Carriage and Iron Company* v. *Riche* to this case. One of my learned friends, perhaps more than one of them, argued that the question depended upon capitalization, and the business

carried on by the company in Canada. I do not agree with what my learned friends said about that at all. It is useless to say that this is a new question. It is new to the Court very likely, because it happens to have been considered only recently, but in the consideration of legislation as between the provinces and the Dominion the question is as old as Confederation, and I think I may say, with perhaps a possible exception by way of oversight of which I do not want to exclude the possibility, that there is not a case of legislation permitted to stand of a company incorporated on the face of the statute to carry on business outside the limits of the province, to carry on business within Ontario or elsewhere. That sort of thing has not been permitted by the Government of Canada in the administration of the powers of disallowance. With regard to the case of the *Canadian Pacific Railway Co.* v. *The Ottawa Fire Insurance Co.*, my learned friend read Mr. Justice Maclennan's judgment, which, as I read it is in my favour, and I do not refer to it; but I want to refer to the judgment of the Chief Justice which is at page 412 of volume 39 of the Supreme Court of Canada Reports. I call your Lordships' attention to that simply as referring to the reports of the Minister of Justice with regard to the question of provincial power of incorporation. There was a notable example so long ago as when the late Mr. Blake was Minister of Justice a few years after Confederation, where companies were incorporated by Nova Scotia to carry on insurance business, and there was no limitation apparent upon the face of the Act as to the areas within which business was to be carried on. The dispatches show that for the reasons stated by Mr. Blake, which correspond with those or some of them which I have been endeavouring to present to your Lordships, the Government of Nova Scotia was informed that that Act was manifestly beyond its power and would not be allowed to stand, unless they introduced the words "within the province"; so those words were introduced; and it has been an understanding in all the provinces, that they have not the power to incorporate, except for business within the province. What the Bonanza Company has done I do not know, and I do not suppose that that is going to affect the constructions of the British North America Act. I can understand how acquiescence or admission as between the parties, who are concerned in the administration of the Act, might be of some consequence in construction, but I do not understand the argument addressed to your Lordships that because every company would be involved these are *ultra vires* proceedings. My learned friends spoke about capitalisation. What is the use of introducing here a question of capitalisation if all the companies that Ontario has incorporated are doing *ultra* vires business? I do not say they are, but my learned friend has spoken of two or three which may be. These companies are presumably not engaged in *ultra vires* business, but occasionally a company may be. That fact is demonstrated by the circumstance that this question has not come before your Lordships before.

THE LORD CHANCELLOR: I do not think any of us thought that we should get much assistance from Mr. Nesbitt's illustration about the companies. It does not help us to construe the statute. MR. NEWCOMBE: I do not want to be prejudiced by any statement of that sort.

THE LORD CHANCELLOR: I do not suppose you could dispute that fact. MR. NEWCOMBE: I do dispute the fact. As to the extent of the *ultra vires* transactions nobody can say.

VISCOUNT HALDANE: As far as I am concerned you are not prejudiced. MR. NEWCOMBE: I think I have said what I can with regard to the definition of provincial objects. It was said that the license in the record at page 52 constitutes the company a corporation and I referred in my opening to the statute at page 6. If upon its proper construction it excludes the right to license any company whose business does not extend to the Yukon this company is not within the description of the statute as a company which may be licensed, and there is no evidence that section 2 of the foreign companies Ordinance ever contemplated a license to provincial companies. Moreover I say that it is plain that it did not, and that they could not license provincial companies, because of chapter 49 of the statute of 61 Victoria, which is at page 1 of the Joint Appendix. This is the Dominion statute: "Any joint stock company or corporation duly incorporated under the laws of the Parliament of the United Kingdom, or under

the laws of any foreign country for the purpose of carrying on mining operations may, on receiving a license from the Secretary of State of Canada, carry on mining operations in the Yukon District and North-West Territories, and shall be entitled to the privileges of a free miner, subject to the regulations governing and affecting free miners." I submit that that is a comprehensive measure regulating the comity of the Yukon district with regard to the projects of outside companies coming there to mine. Your Lordships will see there is no division of legislative powers as between the Dominion and the local Assembly of the Yukon, because that local Assembly is not a fixture. It derives no legislative status from the British North America Act. It is simply a district created by a Dominion statute, and a local Assembly given certain powers in the nature of delegated power, and therefore the Act itself says that their legislation is subject of course to the Dominion legislation, and also to the ordinances or orders in council or regulations of the Governor in Council. Here is a statute which is passed by the Dominion, not merely a general statute, but a statute passed for this very district, the Yukon district, as to companies carrying on mines, and it provides that certain corporations may be licensed to carry on the mining business there. I deny that this company in face of that had any right to come in and mine, and I deny that the Yukon Legislature had any authority to empower it to do so by license. This is a comprehensive Act governing the whole subject, and there is no question about the legislative power to enact it. The Yukon statute under which the license is issued, which is on page 6, is not confined at all to mining companies. It does not mention mining companies and in my submission it is not intended to extend to mining companies. At all events it cannot extend to what was intended to be regulated by section 1 of the Statute of 61 Victoria, chapter 49. This Act of the Yukon Territory, No. 4 on page 6, is not an Act for the granting of powers or constituting *quasi* corporations or anything of that sort. It is nothing but a taxing Act. It is not a regulating Act. It is not an empowering Act. It is a taxing Act, and unfortunately a section is left out here which shows that, but section 5 as I said, brings in a provision that the license fee shall be in proportion to the capital of the company, and on that calculation this fee came to 500 dollars. They were merely enacting this statute for territorial purposes. It could not be enacted according to the John Deere Plow case against a Dominion company. Then it is said that the Government is estopped from denying the validity of the agreements, because of the facts alleged in paragraph 15 at page 16; they say since the inception of the suppliants' enterprise, the applicants and their predecessors in title have expended in development and improvement of the territory a sum of money exceeding 315,000 dollars. That gives rise to no estoppel. They got an assignment of certain agreements and expended some money. We have no agreement with them which is in issue in this case at all. The question is as to whether they can recover upon a claim for damages.

THE LORD CHANCELLOR: You have no agreement with them. That is an issue in these proceedings. MR. NEWCOMBE: That is so, my Lord.

THE LORD CHANCELLOR: I thought that the lease of the 16th March, 1907, was one of the leases of which you disputed the validity. MR. NEWCOMBE: There is nothing founded upon that.

THE LORD CHANCELLOR: Everything is founded upon it it seems to me. I have been listening for a week under a total misapprehension. I thought the validity of this lease was one of the issues we had to settle and now you tell me that we have not got to settle the validity of anything between the Crown and the Bonanza Creek Company. MR. NEWCOMBE: The effect of the decision as to whether they can recover damages for the breach—

THE LORD CHANCELLOR: That is not what is before the Board. What is before the Board are questions 1 and 2. When you tell us we have not got to settle here the question of the validity of the document between the Crown and the Bonanza Creek Company I am aghast, because for nearly a week that is the very thing we have been considering. MR. NEWCOMBE: The agreement, in the consideration of this question I am submitting to your Lordship. There is a recital upon which the company relies.

THE LORD CHANCELLOR: Do you or do you not dispute the validity of the lease of the 16th March? MR. NEWCOMBE: I dispute the validity of all these agreements.

THE LORD CHANCELLOR: Let us take this one. Do you or do you not dispute the validity of the agreement of the 16th March, 1907. MR. NEWCOMBE: Yes, my Lord. I say they were incapable of taking that lease.

THE LORD CHANCELLOR: You say it is bad. MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: Then why discuss the matter upon the hypothesis that we have not got to consider the validity of the document as between the Crown and the company, because the lease is between the Crown and the company. MR. NEWCOMBE: What I mean to say is that they are not suing us upon that lease.

THE LORD CHANCELLOR: Never mind that. MR. NEWCOMBE: Perhaps I have not made myself clear.

THE LORD CHANCELLOR: I quite understand what you mean. You say the action has been brought upon some other document, but that is not the point we have to consider. MR. NEWCOMBE: The point is pleaded in that way as a defence to this claim for damages. I can say no more about the matter.

THE LORD CHANCELLOR: The reference made is on questions 1 and 2 in the petition of right. MR. NEWCOMBE: Yes, my Lord.

THE LORD CHANCELLOR: And that refers to the right of the company to carry on the business of mining, to acquire mining claims or mining locations by way of lease or otherwise, and whether a free miner's certificate has been issued, and whether they have the right to hold it. MR. NEWCOMBE: I think I have made it clear that the cause of action here is upon agreements made with Matson and Doyle and the claim that they have been assigned to the petitioners.

THE LORD CHANCELLOR: That may be a reason for referring another matter to us. MR. NEWCOMBE: They say the Crown is estopped from denying the validity of the agreements because of the issue of the free miner's certificate. We have referred to that, and that actually, like the Yukon Ordinance, is a taxation provision. Your Lordships will see that there is no power to withhold a free miner's certificate from anyone, within the description of a qualified person who applies for it, and the provision is not there, but if you had the regulations before you it would appear that there is a fee of $10 payable. They give a certificate as a matter of course to people over 18 years of age or joint stock companies. I submit nothing can happen in the way of constituting a company with any different power or capacity because they pay a tax and we accept it. It does not affect the powers of the company. It is a condition of the exercise of the powers which the company possesses, and the question is whether the company possesses the power or not. It is suggested that the condition of taking it out would be antecedent to taking out the license. This is for the purpose of taxation only. There is no discretion to refuse it in proper cases as appears by the regulations at page 11, and Mr. Cory, who happened to sign the license had no authority to empower the company to mine. Then it is said that Mr. Burns collected the incorporation fee. I explained that yesterday. Then there is a lease of reverted claims to which your Lordships have been referred in the record at page 46, and a recital to the effect that these leases become vested in the Bonanza Company, but my Lords, the Crown cannot be bound as a matter of estoppel. This is an instrument not executed with any great solemnity—I think it is issued by Mr. Cory, the Deputy Minister of the Interior, the same official who signed the lease and the free miner's certificate—and cannot operate in any sense to estop the Crown. It is said that the Crown has a power of incorporation, but everything done here is, I submit, statutory, and the question is whether the statutes have provided for and authorized these proceedings. There are no letters patent from the Dominion Crown providing as to this company of any sort, and nothing done under the Great Seal and it would be necessary at least to do that in order to give it any sort of status as a Dominion company. I submit there is nothing in the way of a license issued by any responsible officer on behalf of the Dominion Government. I argued yesterday that this was not a Canadian company. If your Lordships are going to consider that point it will be necessary for me to make some further observations with regard to the question suggested by the other side that the

company is not bound by the Placer Mining Regulations, and that they come under other regulations. I think I can show your Lordships that the Placer Mining Regulations are the regulations which govern this company, and, I submit with more confidence, perhaps, than the reception of my observations by your Lordships justifies, that this was not a Canadian company. If that point is under consideration, I want to show that the regulations governing this company are the regulations to which we have referred, and no others. On page 13 is the order-in-council. "The regulations for the disposal of mining locations to be worked by the hydraulic process printed in the appendix to the Statutes of Canada 62-63 Victoria at page lxiii. follow." The sections specially referred to on the argument are 3, 4 and 14. These regulations were made on the 3rd December, 1898, and previous to that time (of course the country had only been opened up very recently then) the mining had been done by the placer method; then, as it became more largely prospected, some adventurers thought that they could work profitably in large areas and applications were put in for hydraulic mining, but there were no regulations to provide for that and so this regulation was passed, which was the first one. There were applications pending by certain persons. Your Lordships will notice the word "person" is used there and in the next section it speaks of "person or corporation." The fact is that there were persons who had made these applications and this first regulation was for the benefit of persons and not corporations. "To any person who has prior to the date hereof filed an application in the Department of the Interior at Ottawa, or in the office of the Commissioner of the Yukon Territory or in the office of the Gold Commissioner for a mining location in the Yukon Territory not provided for by the mining regulations already in force, the Minister of the Interior may issue a lease subject to the same conditions as to size and otherwise, and conferring the same rights as a lease issued under these regulations for a location acquired at public competition." Such a person, I submit, should have had a free miner's certificate because of the regulations on page 11, which say that no person may acquire any interest in a claim without a certificate; but, however that may be, this was a provision for the benefit of those who had put in applications. Then section 4 provides that "the unreserved locations not disposed of under the next preceding section shall be offered at public competition, and awarded to the highest bidder after being advertised in such manner and at such time as the Minister of the Interior may direct; and to the person or corporation to whom any such location may be awarded at such competition the Minister of the Interior may, after such person or corporation has obtained a free miner's certificate as provided in the regulations governing placer mining, and filed in the Department of the Interior at Ottawa, within a period to be fixed by the Minister, a Dominion land surveyor's plan of the location, issue a lease." These concessions that we are concerned with in this case were obtained by Matson and Doyle under the provisions of section 3. They were persons who had made applications before the regulations were made, so that they were entitled to get the leases which they did get. I say that it was a condition of their right to get those leases that they should take out free miner's certificates. Certainly they were bound to do so one way or the other. If they were required by reason of the then existing regulations to have a free miner's certificate in order to qualify for the grant under section 3, then I suppose it must follow, as a matter of course, that any person or company to whom they were to assign must also have a free miner's certificate. If, however, it be considered that they were entitled, which would be a very unusual thing, by reason of this exceptional provision to get the leases of these reserved areas without a free miner's certificate, then there is no express proviso for the case of the assignment of the grant. They made their application and got the grant under section 3 and then they assigned it to the Bonanza Creek Gold Mining Company. There was no provision as to whether the Bonanza Creek Mining Company, as assignee, under those circumstances, should have a free miner's certificate. Section 14 governs the case. "If any case arises for which no provision is made in these regulations the provisions of the regulations governing the disposal of mineral lands other than coal lands, approved by His Excellency the Governor-in-Council on the 21st March, 1898, and of the placer mining regula-

tions approved on the 18th January, 1898, or such other regulations as may be substituted therefor, shall apply."

THE LORD CHANCELLOR: Do I understand it means that the assignment to them was, according to you, invalid because they had not got a free miner's certificate? MR. NEWCOMBE: No, my Lord.

THE LORD CHANCELLOR: What is the point? MR. NEWCOMBE: I thought I had explained that. My point was that this joint stock company, the Bonanza Company, is not a company incorporated for mining purposes under a Canadian charter. The Ordinance I say applies. My learned friends say it does not apply; that they are under some other regulation which does not require that a free miner's license should be given out at all, and what I am endeavouring to do is to follow up the discussion at the opening in answer to my learned friends to show that it is these regulations which are printed here, known as the Placer Mining Regulations, and no others that govern.

THE LORD CHANCELLOR: Matson and Doyle had not got a free miner's certificate and they ought to have taken it out before they assigned. What is the point of Matson and Doyle's position? MR. NEWCOMBE: The point is this, that you have section 3 here which governs Matson and Doyle as people who had made application for hydraulic areas, when there was no regulation to provide for the granting of them. Then by section 14 Matson and Doyle should have a free miner's certificate, seeing that the only regulations then in force were the Placer Mining Regulations, which provide in very broad terms, in No. 7 at the foot of page 11, that everybody must have a free miner's certificate. Undoubtedly they did have it as a matter of fact. Then they get a grant, and then they assign it to the Bonanza Company. The point is that the Bonanza Company required to have a free miner's certificate in order to take that grant, and this I submit for two reasons. In the first place I say, if it was necessary that Matson and Doyle should have a free miner's certificate in order to acquire the grant, it was necessary that the Bonanza Company should too.

THE LORD CHANCELLOR: The question is not whether they could get an assignment from Matson and Doyle, because they had not got a free miner's certificate. The questions that are raised are, first of all, whether they ever had power, under a free miner's certificate or otherwise, to carry on the business. That is the first question. The next question is: If a free miner's certificate has been issued, then it was invalid. Those are the only questions we have to answer. If it has been issued it is invalid. I cannot see what this has got to do with it. The question we have to decide is very important and intricate.

VISCOUNT HALDANE: This is demurrer. MR. NEWCOMBE: Yes, my Lord, it is demurrer, but, as I explained in my opening, with certain facts introduced into the case.

THE LORD CHANCELLOR: Only for the purpose of raising questions 1 and 2. It is a little hard on us, when we have to decide an extremely difficult and important matter, that our attention should be diverted to points that we have not got to decide. MR. NEWCOMBE: This point goes to this, that if the company is capacitated by the Ontario legislation it has still got to comply with the local Ordinances in order to get a grant.

LORD PARKER OF WADDINGTON: The case will go back to trial on the other points when we have decided this.

THE LORD CHANCELLOR: If they had a free miner's certificate you say they had no power to take it. MR. NEWCOMBE: That is so, my Lord.

LORD PARKER OF WADDINGTON: We have only to decide the question of law on the reference. It is not the question whether they have got a free miner's certificate, but it is the question whether, if they have one, it is valid.

THE LORD CHANCELLOR: That is the real point. MR. NEWCOMBE: Whether it is valid or not depends upon the regulations, and all I was endeavouring to show was that the regulations to which I have referred are undoubtedly the applicable regulations, because of the provision of section 14, and then so far as the water rights are concerned they are put under the Placer Mining Regulations by No. 11 at the foot of page 12. I submit, therefore, that this company was not a qualified company to mine by reason of the defect in its constitutional power

and by reason of the fact that it never complied with the local ordinances. Those are the two points, either one of which will carry me home, but I hope, for the good name of the British North America Act that it will be the former.

(Adjourned for a short time.)

MR. NEWCOMBE: Might I say, my Lords, that my friend Mr. Mason is with me representing the Dominion, and Mr. Wegenast represents the manufacturers here as an intervening party. With your Lordships' permission my friend Mr. Mason would make a few observations, and Mr. Wegenast wishes to address the Board with regard to the question of provincial objects which is common to this case and to the Companies' case.

VISCOUNT HALDANE: Mr. Wegenast is for the companies? MR. NEWCOMBE: Yes, my Lord, he is representing the Manufacturers Association of Canada, the companies generally, as an intervening party.

VISCOUNT HALDANE: He is not an intervener? MR. NEWCOMBE: In the Companies' case, my Lord?

VISCOUNT HALDANE: No. In this case is he an intervener? MR. NEWCOMBE: No.

THE LORD CHANCELLOR: Of course counsel have come over here from Canada and they are anxious that we should hear what they have to say, but I am quite sure that they will not attempt to repeat arguments which have been already used, because that is an unprofitable occupation. MR. NEWCOMBE: Quite so, my Lord; I can speak for Mr. Mason. SIR ROBERT FINLAY: I am very glad that your Lordships will hear my friends, partly for this reason, that I am not at all certain for the time being, of course, on the view your Lordships take whether there may be very much argument upon the Companies' case.

THE LORD CHANCELLOR: At any rate it would be desirable that we should hear both. MR. MASON: My Lords, I shall be very brief indeed. The first observation that I wish to make is that the statement made on the other side, that the course that has been adopted ever since Confederation is the course for which the provinces now contend is not quite accurate, inasmuch as in Ontario, and I shall speak only for Ontario up to the year 1897—and here I hope my learned friends will correct me if I am wrong. I will not say it was the universal practice, but the general practice of the province of Ontario in granting charters generally to restrict the exercise of those objects within the province of Ontario— MR. HELLMUTH: I am afraid I cannot concede that it was the universal practice. MR. MASON: I did not say the universal practice, but the general practice. My friend has a number of charters which could be referred to for the purpose.

VISCOUNT HALDANE: A general practice of what? MR. MASON: To include in the charter a limitation of the objects of the company to their exercise within the province of Ontario using the express words, and the Companies' Act in terms I understand required it. Perhaps I had better let my friend deal with that.

VISCOUNT HALDANE: What does it matter what they did, we have to deal with the question of construction.

THE LORD CHANCELLOR: It is to deal with the suggestion that the course had been universally in favour of the argument for the provinces. MR. MASON: Yes. The appellant company was incorporated not only under the Ontario Companies Act but under the Revised Statutes for Ontario, 1897, chapter 197. May I read section 3? Section 3 was amended subsequently and I shall have to read the amendment also. Section 2 is:

> "All mining companies whether heretofore or hereafter incorporated under any general Act in force in Ontario shall be subject to the provisions of this Act."

(3) "The Lieutenant-Governor-in-Council may, by letters patent under the Great Seal, grant a charter under the Ontario Companies Act"— the charter has to be issued under that Act

> "to any number of persons, not less than five, who petition therefor, constituting such persons, and others who become shareholders in the company thereby created: a body corporate and politic, for the purpose of carrying on within the province of Ontario, or any one or more counties and districts therein,

the business and operations of a mining, milling, reducton and development company, or such business and operations as may be set forth in the letters patent."

I merely mention that to show that that was the practice up to 1903. In that year the 3 Edward VII., by the Statutes of Ontario, chapter 7, section 36, an amendment was made. THE LORD CHANCELLOR: When that power has been exercised and you have appointed the people under that charter under section 3 they get the powers that are conferred under the general statute, chapter 197? MR. MASON: Subject to this, that the mining company is only incorporated for the purpose of carrying on within the province this mining and millng business.

THE LORD CHANCELLOR: Having been appointed they get powers conferred by the Companies Act, chapter 197, which enables them to hold land anywhere. MR. MASON: I think the limitation in section 3 must govern the general powers in the charter. However that may be I am pointing it out now as matter of historical fact this limitation was imposed until 1903 when by section 36 of chapter 7 we have the following:

"Section 3 of the Ontario Mining Companies Incorporation Act is amended by striking out the words 'within the province of Ontario or any of the counties and districts therein' occurring in the 7th and 8th lines of the said section."

So that having in view that this company was incorporated only in 1904, no argument can be raised that the practice was of very old standing. I submit that the same applies to the general trading companies although my learned friend challenges the extent to which I go. Then I shall have to ask your Lordships' indulgence for a moment in referring to a matter which your Lordships, I may say, have been unwilling to hear, because I think you have not quite understood the way in which we refer to it, or the object for which we refer to it. This petition of right was dismissed by the trial Judge, Mr. Justice Cassels, and as the action now stands it is dismissed by reason of the judgment of the Supreme Court. Now the way the matter arose was this. I may say briefly that if your Lordships find against us on the general ground what I have to say has no application, but should you find against us on the question of some sort of recognition or estoppel, or something of that sort, this matter will become of importance, and I do not want to be embarrassed in any subsequent trial by any decision of the Board. After the company was incorporated in 1904 it took over, in July, 1905, by assignment certain claims from Matson and Doyle. They claimed that by reason of their having collateral agreements which are set out in the record—agreements collateral to the leases—that they should have had given to them, when they fell in, certain claims that the individual miners might relinquish or might abandon for one reason or another, they said they had the right by reason of the agreements to take up the claims as they fell in. All the claims in the petition arise out of these operations, under that class of claim, with the exception of certain water rights which I will mention in a moment. In 1907 the Bonanza Company having got in 1905 an assignment of these claims, went to Ottawa, and there an arrangement was entered into which is set out in what we call the supplementary agreement of 1907. There is no claim made in the petition of right arising from any branch of that supplemental agreement of 1907. All these claims, including the water rights, arise by reason of matters that had arisen much earlier than that and are not in any way affected by this agreement of 1907. Therefore if your Lordships were to find that by reason of recognition, or anything of that kind, this agreement of 1907, were binding on the Crown in right of the Dominion we might be very seriously embarrassed at a subsequent trial, because my friends on the other side would say that by reason of that recognition we were estopped or prevented from setting up later the defence which I have suggested to all these other claims. I hope I have made my point clear, there has been no recognition in any shape or form by the Crown as we contend of these claims for damages that are set up in the petition of right. We intended, if I may say, to raise that question for decision here. As a matter of fact that is one of the reasons we thought we were primarily here for. You will see why I am justified in saying that I think by turning to the pleading itself, at page 18 of the record there

is this: "The answer of Honourable Allen Bristol Aylesworth," &c. The petition consists absolutely and solely of claims for damages arising, as I have already mentioned and claims for damages arising in respect of water rights. These claims all arose prior to 1907. "In answer to the said petition"—that is in answer to the claims set up, of these damages arising before—"The respondent denies that the suppliant has now or ever has had the power either under letters patent, license, free miner's certificate or otherwise, to carry on the business of mining," &c. In other words what we wanted to have determined in the Court of Exchequer before going to the vast expense of a trial that perhaps would have to take place in the Yukon, which would be attended with great expense, was this question: Has this company a right to claim these damages in this action, owing to the fact as we say that it never had power and so on, as alleged in paragraphs 1 and 2 of the answer to the petition of right? I submit that if your Lordships can find it convenient at all, and I do not think that it will at all add to the work of your Lordships, we might have some expression of your Lordship's opinion on that, if your Lordships deal with the special question of recognition, because our whole answer to this petition of right was simply this: so far as these two paragraphs are concerned we say that you have not the right to maintain these claims for damages because you never had the capacity to acquire these interests. I hope I have made my point clear.

LORD PARKER: If we hold that there was capacity to acquire these interests it will not prejudice any other defence which you have to the action? MR. MASON: That is so, my Lord.

LORD PARKER: The best form of order would be, if we take that view, to discharge the order and declare that the company was capable, and send it back to be tried in the usual way. MR. MASON: Yes, my Lord. The only way, as I said in opening, in which it becomes of importance is if your Lordships are going to pass a judgment on recognition.

THE LORD CHANCELLOR: I understand that. It is a little difficult but I understand the position to be this: that Matson and Doyle enjoyed by virtue of their leases certain collateral rights against the Crown and that the Bonanza Company says that those collateral rights were assigned to them as representing Matson and Doyle, and that, by virtue of those rights, the Crown ought to have made further grants to them, or ought not to have impeded them in certain action which they took, but as the Crown declined to recognize them they suffered damage. Is that the position? MR. MASON: That is the position, my Lord.

THE LORD CHANCELLOR: That being the position, anything more unfortunate for the purpose of determining it than questions 1 and 2 it seems difficult to imagine. MR. MASON: It says "In answer to the said petition." If you look at the petition that is all there is in the petition. I thought your Lordships were under the impression that we were challenging expressly for the purposes of this action their right to take the leases in 1907.

THE LORD CHANCELLOR: You are challenging it, for the decision of this Board. MR. MASON: Quite so, my Lord. SIR ROBERT FINLAY: I think I can simplify this matter, no claim is based on that document, the lease of certain of the claims that have lapsed which was made in March, 1907. That was referred to as containing a recognition that the title in the other leases had vested in the company, but the claim arises on the collateral agreements which were entered into with Matson and Doyle.

THE LORD CHANCELLOR: Yes. Among other things we have to decide whether that lease is good? SIR ROBERT FINLAY: Yes, my Lord, and of course the decision on the point as to whether the company had the former leases would rather decide, necessarily, whether they had this, as regards capacity. MR. MASON: As regards capacity. SIR ROBERT FINLAY: But there is no specific claim based on any breach of the obligations.

THE LORD CHANCELLOR: Contained in the lease—I understand that. MR. MASON: If I have made myself quite clear on that, my Lord, I have undertaken that I shall be very brief, and if your Lordships will pardon me for so doing, instead of entering into any elaborate argument on what remains for me to

say, with your permission I shall briefly indicate in half a dozen propositions the only further things that I have to add.

THE LORD CHANCELLOR: That may be a very convenient way of doing it. MR. MASON: And I shall not detain your Lordships further.

First I think more attention should be directed to the meaning of the word "objects," in the expression "with provincial objects." I submit that there cannot be any great difficulty in defining what the objects are, because the word "objects" here is used in the sense in which corporation lawyers when drawing articles of association, or when preparing their application for letters patent in our provinces, use the term.

Without putting it in elegant language, I submit the meaning of "objects" is that: the things that the company is incorporated to do. Then I have this proposition: that the objects of a company are the things which the company is incorporated to do. These things must be provincial in their character and scope; otherwise they are not "provincial objects." Mining—the business of mining—is not an object limited to any part of the world. It may be carried on in any part of the world. It can be a "provincial object" only if it be carried on in a province; and thus the territorial restriction becomes an essential element.

Now the next proposition is: That "provincial" must mean provincial with respect to the incorporating province, for the simple reason that the aggregate of the areas of the provinces is the area of the Dominion.

THE LORD CHANCELLOR: I think that must be so. MR. MASON: Then, my Lord, in any case it would be beyond the competence of Yukon to enable this Ontario company to exercise its objects within the Yukon, because the Yukon lands were the property of the Dominion and within the exclusive control of the Dominion. That must be so under the first sub-section of section 91, speaking of the public property, and is recognized by all the legislation, because the Dominion Lands Act is the only source to which we can go to find out what laws govern the public lands in the Yukon.

Then another proposition, my Lords, which I submit with hesitation, because I do not think it has received much attention, and I merely mention it for what it is worth. The distinguishing feature of company business is freedom from liability beyond the amount of subscription, and the protection of the public throughout the Dominion must make the matter one for proper "regulation of trade and commerce" within the sphere of Dominion action. This would be defeated were the provincial creature allowed to roam throughout the Dominion.

Next the Provincial Companies Act and the charter profess merely to grant authority only so far as the legislative authority of the province extends. This is surely equivalent to saying that the legislature limits its grant to what it can expressly give, and the company is unable to take more abroad inasmuch as comity is merely a recognition of power already existing, and does not create new powers. I merely mention in passing that your Lordship I think referred to the certificate of incorporation. I cannot speak of all the provinces, but with regard to most of them at all events the express limitations that are upon the powers of the company are shown in the same document as creates the company, that is the letters. Then every sub-section of section 92 has language showing the restriction to the territorial area of the province; if you like, it has the local character. One observation only: Why should sub-section 11, if all the others have that character, be deemed an exception; what is there in its wording to warrant that? Why should it be regarded as exceptional when all the other sub-sections have that express limitation; what is there in the wording which can warrant us in drawing that conclusion?

LORD PARKER: If you look at No. 9 of section 92 you will see that licenses may be issued "in order to the raising of a revenue for provincial, local or municipal purposes." A thing may be a local purpose and yet a provincial purpose. If it was not provincial they could not do it at all, could they? MR. MASON: I think that remark, my Lord, may be made with regard to sub-section 9 which you have referred to, and also with regard to the word "provincial" in section 2, that the term is used there in the sense of the public object.

LORD PARKER: "Provincial" there is something other than that which is in the province; it is something which concerns the province, as distinguished from any particular local area. MR. MASON: I submit not, my Lord. MR. NEWCOMBE: I would submit what it means is "municipal," smaller than the province; "local," which may be carried out by the municipality, even smaller still, a small area, but "provincial" nevertheless is intended to describe the geographical area of the province, the biggest locality for which the province can legislate—local within the province.

LORD PARKER: "Local" and "provincial" are both provincial purposes. MR. NEWCOMBE: Yes, my Lord, but as to areas less than the whole province.

LORD PARKER: It is true, but the areas are for provincial purposes. It shows that "provincial" there is not used simply as territorial. MR. NEWCOMBE: That is the purpose for which the money is to be expended. They have to pay their debts. It is not quite apt to say that it is "territorial." In the clause which says you may raise money for provincial purposes it is to enable the province to discharge its debts and to pay its civil servants in the public service. MR. MASON: To anyone familiar with our municipal system I would submit that that does not offer any difficulty. We are too much governed we say sometimes, we have townships; a larger area, of the county, and a larger area still of the province, and then the Dominion. I would submit, to anyone looking at it from this distance, that the limitations under which we are because of our federal system are not perhaps as likely to be appreciated outside the limits of the Dominion as within; when we speak of "local" or "municipal" we mean the smaller units of local organization, as distinct from the province. For that reason, I say "provincial" means there public.

Reference has been made to the case of *Comanchi County* v. *Lewis*, in one of the United States Reports. I do not think that case will assist your Lordships for this reason. There a corporation had been partially organized, hut had not been completely organized, according to the usual laws there regarding institution of such corporations. The Sovereign Legislature passed an Act which recognized its institution, and when that Act was passed, being an Act of the Sovereign Legislature, within that jurisdiction, then that concern was not only a corporation *de facto*, as they say in the United States, we do not know the term in Canada, with regard to a corporation at all events, but became a corporation *de jure* as well. I think that is the whole effect of that case.

Then if it becomes of any importance I merely wish to say in answer to Mr. Hellmuth's statement that this company has performed all its obligations, and so the contract is executed, as far as it is concerned, we cannot subscribe to that. The company claim still that they are entitled to leases as they fall in. If your Lordships look at the supplemental lease, that would involve making further leases, and involve payment of rent, so that the contract cannot be said to be in any sense executed, but it is an executory contract, if it makes any difference.

THE LORD CHANCELLOR: Thank you, Mr. Mason. MR. WEGENAST: I appear, my Lords, for the Canadian Manufacturers Association, which includes in its membership between 2,000 and 3,000 of the companies directly interested in the results of this hearing. Most of these companies are companies operating under provincial charters. Probably 1,500 of the companies might be said to be operating under provincial charters, and the balance under Dominion charters. I ought perhaps to volunteer the statement that in Canada, unlike Great Britain, as I understand it, the bulk of the trading of the country, that is to say the wholesale trading, is done by the manufacturers themselves; the manufacturers maintain their selling organization and have commercial travellers.

THE LORD CHANCELLOR: It is the same thing in the United States, is not it? MR. WEGENAST. Yes, my Lord. So that in a very substantial measure we represent the wholesale trading of the Dominion.

Now, my Lords, I am in a somewhat equivocal position in this reference, because the ground has shifted very much from what it was in the Supreme Court. There we took a position as real intervenants between the Dominion and the provinces, contesting in a measure the position of both. I find myself now, however, because of the shifting of the ground, almost squarely behind the Domin-

ion. This is not argument, but I apprehend it will be of some importance to your Lordships if I say that in anticipation of the possibility of such a shifting I asked for specific instructions as to the position which the provincial companies desired to take with reference to the contest over "provincial objects;" and I am instructed to say to your Lordships that my clients do not favour a system of dual control over companies, of the kind that would be involved in a decision to the effect that "provincial companies" were of the same capacity practically, for practical purposes, as Dominion companies. I make that statement in view of the possible thought in your Lordships' mind that it was anomalous for me to take this position—

THE LORD CHANCELLOR: It is useful—I was a little surprised. You say the provincial companies want to be bound by the strict provincial limits? MR. WEGENAST: I have specific instructions to take that position before your Lordships.

VISCOUNT HALDANE: We have heard it, Mr. Wegenast. I do not think it can affect the question.

THE LORD CHANCELLOR: No. It is in order to justify your position here; when you state you appear for provincial as well as Dominion companies you want the Board to understand that there is really no diversity of interest as far as your clients are concerned, because they all want you to take the view— MR. WEGENAST: That is so. MR. WALLACE NESBITT: I do not know what my friend's instructions are, but I think I represent the two largest corporations, and he is certainly not expressing their view.

THE LORD CHANCELLOR: I understand, Mr. Wegenast, that you represent a group of companies? MR. WEGENAST: Practically all, 80 per cent. of the wholesale manufacturing companies of the Dominion.

THE LORD CHANCELLOR: Are they formed together by any association? MR. WEGENAST: Yes, my Lord, the Canadian Manufacturers Association, which exists for the purposes such as are served by our appearing in this reference.

THE LORD CHANCELLOR: They are members of that association? MR. WEGENAST: Yes, my Lord.

VISCOUNT HALDANE: They take that line and you are here to argue the point. It cannot make much difference what their view is. MR. WEGENAST: No.

THE LORD CHANCELLOR: No, it was simply to justify your position. MR. WEGENEST: I wanted to explain why I should find myself in a position of supporting a limitation of the powers of the provincial companies. I think it would be quite understandable to your Lordships if your Lordships could place yourselves in the position of the companies as they operate in Canada. We are more interested in the other phase of this reference, that is to say questions 6 and 7 of general companies reference, because it is an obvious solution of the difficulties in which trading companies find themselves, if, by taking a Dominion Charter, they can secure full capacities and rights throughout the Dominion.

VISCOUNT HALDANE: I think you argued the John Deere Plow case. Was that for this association? MR. WEGENAST: No, my Lord, the John Deere Plow Company. It is an obvious solution for this immensely difficult situation in which companies, both Dominion and provincial, find themselves by reason of the doubts which are here raised if these companies can all by taking Dominion charters square themselves with regard to their capacity and powers to trade throughout Canada.

Now the furthest that the provincial companies whom I represent would care to go in asserting their power to trade beyond the limits of the province is this, that they are not inherently incapable of entering into transactions incidental to the exercise of "provincial objects," interpreting the expression "provincial objects" as at least implying some territorial limitation, that is to say, given an object which is provincial it does not become non-provincial by reason of the fact that certain transactions may be entered into outside the province. If I may illustrate by the example of a municipal corporation in the province of Ontario, say the city of Ontario, it is certainly restricted in its objects to the territory of the province, and yet nobody would say that the city of Ontario had not power or capacity or right, or whatever it may be called, of buying materials outside the province, buying machinery for municipal purposes; but the real purpose of the

corporation is still a provincial purpose. In other words I desire to suggest a distinction different from that mentioned in the judgments of the Supreme Court between functional and ancillary objects. What I desire to suggest is that the distinction is not between two kinds of objects or two kinds of powers; objects may be one thing; transactions more or less incidental entered into in pursuit of those objects may be quite another thing; and the furthest we care to go in sustaining the powers of provincial companies is to submit that a provincial company is not inherently incapable of entering into transactions outside the province which are incidental to their provincial purposes within the province. Beyond that any extension of the provincial jurisdiction would, in the view of my clients, tend to create embarrassment.

THE LORD CHANCELLOR: Let me put two illustrations to you. Suppose there was a company formed in Ontario for the purpose of carrying on the business of wireless telegraphy, and put up a large installation in Ontario, could they receive messages from outside the province? MR. WEGENAST: May I say this, my Lord, first, that it may be very difficult when one comes to examine particular cases on the ground of fact to draw the line.

THE LORD CHANCELLOR: That is just what you ask us to do. MR. WEGENAST: I submit the line must be drawn somewhere; one often meets that difficulty in law that there is a distinction.

LORD PARKER: It must be drawn somewhere unless you discard once for all the territorial notion. MR. WEGENAST: I quite agree, my Lord; and what I say in answering your Lordship is subject to the difficulty that, having it put without an opportunity of fully considering it, I might put it on the wrong side of the line.

THE LORD CHANCELLOR: It will not bind you or your clients if you put it the wrong way, but I should like to know what you say. MR. WEGENAST: If the purposes of the wireless telegraph company may be described as provincial purposes—

THE LORD CHANCELLOR: It is no use starting off with a hypothesis which answers the question. I am putting it without any such hypothesis. I say a company incorporated according to the laws of Ontario for the purpose of carrying on the business of wireless telegraphy. They put up a large telephonic installation in Ottawa. Can they receive messages from outside? MR. NEWCOMBE: No.

THE LORD CHANCELLOR: I overheard an answer which you probably would not care to give. The answer I overheard was no. MR. WEGENAST: I am prepared to answer if your Lordship will bear with me for a moment. The difficulty I have is that your Lordship's statement of fact may not be sufficient to enable one to say whether the objects are provincial or not.

LORD PARKER: To put it in a slightly different way, suppose a company formed to enable the inhabitants of Ontario to receive messages from, and to send messages to, Yukon: would that be a provincial object? MR. WEGENAST: Even there I guard myself by saying I would not have enough facts. If the objects of establishing the wireless station were something connected, let us say, with municipal Government—

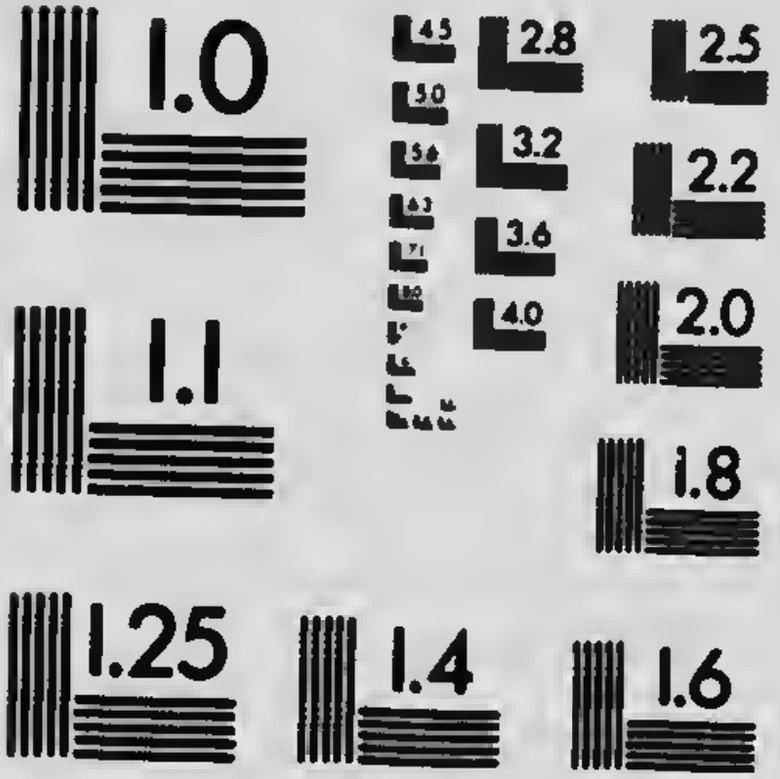
THE LORD CHANCELLOR: How can we test that? You do not say anything about the reason why you establish it. You establish it to make money. MR. WEGENAST: If making money is a provincial object I am in a difficulty at once. One must have further facts.

THE LORD CHANCELLOR: I do not think there are any further facts needed. The case I put seems to me quite simple and plain. MR. WEGENAST: I am not sure that I can suggest an answer offhand—

THE LORD CHANCELLOR: I put to you letters patent granted to five people who incorporate themselves into a company to carry on business in wireless telegraphy within the province of Ontario. MR. WEGENAST: Let me put it in this way. I should have selected an example which would not carry quite so much difficulty with it, but take a company whose object was to carry on throughout Canada the business of transmitting wireless messages, an inter-provincial wireless telegraph business, I should say that was not a provincial object, and I should say that by no process of reasoning, or of juggling in the draughtsmanship of the

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5969 - Fax

charter, could it be made a provincial object. Similarly if the object of the company were to transmit messages as a commercial undertaking between Ontario and Quebec, I should say no, that was not a provincial object, but given a wireless telegraph apparatus as serving some purpose, I cannot call to my mind a good illustration, some municipal purpose—

THE LORD CHANCELLOR: I do not want to have anything to do with municipality, but as a pure matter of private enterprise and to supply the newspapers—that is their object, to get news and sell it.

VISCOUNT HALDANE: To help the Stock Exchange in Toronto, say.

THE LORD CHANCELLOR: To acquire and sell news through the agency of wireless telegraphy. MR. WEOENAST: For a specific newspaper?

THE LORD CHANCELLOR: No, to anybody who will buy the news.

VISCOUNT HALDANE: Take the case I put. The Stock Exchange in Toronto is interested in the fluctuations of Yukon mines; may not they have a wireless telegraphy installation there to get news from Dawson City or wherever it is? MR. WEGENAST: Yes; only because your Lordship qualifies it "for the purpose of the Stock Exchange."

THE LORD CHANCELLOR: I do not want to put it that way. You have the general business of wireless telegraphy in Ontario. To that business you get subscribers, the Stock Exchange, newspapers, anybody who likes to come from anywhere and subscribe to your agency in order to get the benefit of your wireless telegraphic system. That is the business you are carrying on. MR. WEGENAST: May I ask whether it is from anywhere in Canada?

THE LORD CHANCELLOR: Anyone can come into your office in Ontario and become a subscriber to your wireless telegraphic system. MR. WEOENAST: If it is to serve the people in Canada and anyone in Canada can come and the intention is—

THE LORD CHANCELLOR: The intention is merely to carry on a business of wireless telegraphy in the province of Ontario. MR. WEGENAST: In the province of Ontario?

THE LORD CHANCELLOR: I have so stated it. MR. WEOENAST: I say unquestionably yes.

THE LORD CHANCELLOR: Then it can be done, then he could establish receiving as well as transmitting stations all over Canada, if the object of that was to supply more effectively the business in Ontario. MR. WEOENAST: I should say not.

THE LORD CHANCELLOR: Then your business has to be lame all its life because you cannot take the necessary steps to make it a profitable undertaking. MR. WEGENAST: No, my Lord, we have here a disjunctive federal system which gives the power to the federal authority, the central authority. If that is not the intention, then, my Lords, what is the intention? How, in the nature of things, could there be an adequate system of administration over, let us say, a wireless telegraph system if there were not that jurisdiction vested in the Dominion.

LORD PARKER: It would go very far. Take a publishing business, suppose you could not incorporate a company to publish and sell books without putting in the limitation "for people in Ontario." MR. WEGENAST: I do not suggest that, my Lord. Of course, your Lordships can drive me to the wall with very difficult questions.

LORD PARKER: It would be advisable if possible to come to some conclusion which would obviate all these subtle points. MR. WEOENAST: Yes, my Lord, and the conclusion that my clients submit is that in every case where business partakes, or begins to partake, of an interprovincial character the solution is a Dominion charter.

THE LORD CHANCELLOR: When your trust company, which was put as an illustration against you, carries on a business of a trust company in Ontario. They are asked to undertake something in New Brunswick and they must say no, we cannot do that. MR. WEGENAST: Well, there, questions would arise.

THE LORD CHANCELLOR: I know they are difficult questions to answer, but we have to consider them. MR. WEGENAST: I will make the best endeavour I can to consider them, because they do arise. In the case of a trust company—of

course, I cannot claim to speak for trust companies—but is there not the further consideration that this artificial person who is created is expected to assume functions which are properly included under the head of "property and civil rights," and that on that ground alone possibly the province might have jurisdiction. I am not saying that it would have, but that is where the question arises, that is to say when you come to the execution of a trust in a province, it may be that the Provincial Legislature has under its jurisdiction "property and civil rights"—

THE LORD CHANCELLOR: Is not the answer really this—that is why I put the question: According to your contention you can afford us no standard by which these cases can be measured and tested. MR. WEGENAST: That is not my answer.

LORD PARKER: Your argument is that we shall be exceedingly unwise to decide any particular rule, and that we should wait till a question arises and decide on concrete facts? MR. WEGENAST: I should agree with that.

VISCOUNT HALDANE: If you were logical, and if you pushed the "territorial" construction, and pushed it to its extreme, you could not do any of these things. MR. WEGENAST: No—I should like an opportunity of disputing that if I may. It is provincial "objects," not provincial "transactions." As I say the character of a municipal corporation is not altered by the mere fact that it may secure some material from an outside jurisdiction. I think that is the answer. The object still remains purely local and provincial. And similarly I should submit that a manufacturing company in Ontario might purchase materials in Quebec without altering the real character of its undertaking. But, my Lords, this is the illustration that I wish to place before your Lordships, and while it leaves much to be desired in the way of clearness, still I submit it does afford a basis of distinction. Suppose a manufacturing company begins in a small way in Ontario to manufacture shoes and finds that, with the extension of its business, it is desirable to send travellers, say to Manitoba and Quebec, and finds further that, with the extension of its business it is expedient to open an office in the province of Quebec and in the province of Manitoba, and then further at a later stage finds it expedient to open a manufacturing establishment, we will say, in Montreal or Winnipeg, what I say is, that, somewhere along the track of development, a line can be drawn. I do not wish to undertake to draw the line. Perhaps that had better be left, as my Lord Parker says, to be decided when the concrete cases arise, but somewhere there is a line to be drawn beyond which the undertaking of that company becomes non-provincial.

THE LORD CHANCELLOR: Do not you see the trouble is that you are asking us to draw this line. MR. WEGENAST: No, my Lord, I say not.

THE LORD CHANCELLOR: *You*, at least, must say we are to draw the line because you will not confine the contention to strictly territorial limits, you say they may go outside. MR. WEGENAST: No, my Lord, perhaps I have not put my point in proper language. What I say is that it is quite possible that, in opening a branch in the city of Montreal, the company would be transgressing the terms of its charter, that is to say, if the words "provincial objects" are to be read in the charter.

THE LORD CHANCELLOR: Take the question you have asked: "Has a company incorporated by a Provincial Legislature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province?" What is your answer? You have to come and contend for one view or another on this question. MR. WEGENAST: I have no definite answer to that, my Lord.

THE LORD CHANCELLOR: That is a little awkward; I thought you were here to argue one side. MR. WEGENAST: I should have hesitated to have put that question.

LORD PARKER: You can get all sorts of permutations of that. Assume they carry on the grinding in the province of their incorporation, the answer may be one thing; assuming they grind and buy in the province of their incorporation, the answer may be another. You get all sorts of possible complications. MR.

WEGENAST: Yes, my Lord, I am here to ask your Lordships not to say that that provincial company has capacity to do all those things outside the province.

LORD PARKER: The question may arise if they do one thing will that be enough? MR. WEGENAST: That will arise later.

LORD PARKER: Or 2 or 3.

THE LORD CHANCELLOR: You cannot answer me No. 2, I will not be too hard on you. Let us take (3): "Has a corporation constituted by a Provincial Legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts—(a) within the incorporating province insuring property outside of the province." What do you say to that? MR. WEGENAST: Well, if I were in a position to decide rather than argue—

THE LORD CHANCELLOR: No, but you have to come and argue one side of these questions, that is perfectly clear. MR. WEGENAST: I am quite willing to, my Lord.

LORD PARKER: I understand you would say that if they began by working in their province, and every now and again, took one outside, it would not matter? MR. WEGENAST: Yes, my Lord.

LORD PARKER: If they go on taking them outside and the bulk of their business is outside a time would come when they would be transgressing their charter? MR. WEGENAST: Perhaps transgressing their charter. I did not finish what I want to say on that point, I should like to complete that. There may come a time, and this I submit is the test, when a shareholder would be entitled to bring an action to restrain the company from going beyond the limits of its chartered power. Take a company incorporated for the purpose of manufacturing we will say at Toronto: can that company without any limitation, as a matter of capacity from its shareholders, as a matter of the authority given to the directors by the shareholders, have unlimited capacity to open branches in every province of the Dominion? That puts my question. I submit not, I submit there must be a place at which the character of that undertaking ceases to be provincial, and a stage at which an individual shareholder would be entitled to bring an action to restrain a company from embarking its funds in an undertaking—

LORD PARKER: Suppose you lay the boundary say between 500 and 600 transactions outside the province, so that a shareholder could come if there were 600, but could not come if there were 500, supposing the extra 100 was the thing which gave the company its profits, you would be preventing the company from carrying on business at a profit. MR. WEGENAST: I think that is not putting quite precisely my submission. It is not perhaps the volume of transactions that is the determining factor. There may be a number of factors entering into it; the geographical factor may not be the only one. My submission merely is this; and your Lordships will sympathize with me in my reluctance to decide on the specific illustration—It would be too much for your Lordships to say that a provincial company is inherently capable, acquires its capacity by virtue of its provincial incorporation, of going into every province of Canada.

LORD SUMNER: The proposition is that a company incorporated with provincial objects transcends its powers by undertaking extra-provincial activities. MR. WEGENAST: I am quite prepared to agree with that.

LORD SUMNER: You say a little does not matter, but if it has done very much it is *ultra vires* and it must be decided in each case how much. MR. WEGENAST: I should agree with that. You must see on the particular facts.

THE LORD CHANCELLOR: What you invite us to do is to say it is quite impossible to answer these questions because they are dependant upon special facts. I do not think anybody else has suggested that.

VISCOUNT HALDANE: We have to interpret section 92. MR. WEGENAST: Yes, my Lord, and the only point with which we are concerned is that there shall not be set up, by virtue of a decision of this Board, this dual system of incorporation by which a provincial company shall be considered as having the same capacity as a Dominion company. Apart from that I am simply in your Lordships' hands on this aspect of the question to assist your Lordships by answering any questions which I can. May I put what I have to say in the form of a proposition, which

may perhaps be a little more concise than what I have said. I submit that a provincial company is not inherently capable of entering into any transactions whatever outside the province. The restriction as to objects does not preclude extra-provincial transactions not inconsistent with the provincial nature of the objects, regarded as a whole. Might I call your Lordships' attention on that point to the judgment of Mr. Justice Duff in the Bonanza case, where he says that you must look at the objects of the company as a whole, and, from what you see there, decide whether it is provincial or not, and my submission is that in so deciding you may, at least, regard the territorial factor.

Now, my Lords, just one word as to the universality of the practice of incorporating companies in the colonies to trade throughout the Dominion. If I were to state my view of the facts on that basis as fully and emphatically as I believe them it would be ungracious to my learned friends who appear for the province. There was not until the close of the premiership of Sir Oliver Mowat the slightest pretence on the part of the province of Ontario to incorporate companies with objects other than provincial. MR. NESBITT: If my friend will take the trouble to look at the incorporation of the Niagara Power Company, which was incorporated directly under the eye of Sir Oliver Mowat, he will find it goes the full length.

THE LORD CHANCELLOR: I do not see myself that it matters. It cannot affect the question of construction. MR. WEGENAST: No, my Lord, but I should like to reinforce what I have stated by calling your Lordships' attention to the fact that the Companies Act of Ontario, until 1897, required the company in terms to state the place within the province of Ontario where the objects were to be carried out, and until a few years before that—I cannot remember the precise date, I think 1883—the fact that the company's objects were to be carried out within the province of Ontario was recited in the charter.

LORD PARKER: That may be because they chose to limit the powers of their Governor-General for incorporating companies. MR. WEGENAST: I quite appreciate that.

LORD PARKER: That is no reason why they should not afterwards repent of it and annul the powers. MR. WEGENAST: That is so, and in the other provinces (I have taken the trouble to examine this matter rather carefully) the rule was the same except for some occasional incorporations by memoranda of association under general Acts, which memoranda the Dominion could not disallow, but, as I understand, the Dominion regularly disallowed any attempt at legislation on the part of the province to incorporate with powers extending beyond the province. That, my Lords, is all I have to say on this branch of the case. I should like to say this, that our chief interest, as your Lordships will appreciate, is in questions 6 and 7 of the reference, which point the way to the solution of this extremely difficult, one might say intolerable situation, in which trading companies find themselves. The legislation which has already been passed since the John Deere Plow decision evinces a construction by the provinces of that decision which, on my submission, is absolutely untenable.

VISCOUNT HALDANE: In the John Deere Plow case we had questions 6 and 7 before us. MR. WEGENAST: The difficulty in which we find ourselves (I do not suggest for a moment that it is a final reason why your Lordships should go into these questions 6 and 7) is that several of the provinces have already legislated in such a way as to show that their interpretation of the John Deere Plow decision means anything than what my learned friends for the provinces now admit to start with, that is, that the Dominion has the right to go into any province and I cannot, in justice to my clients, lose the opportunity of saying that it is that feature of the reference in which they are most directly and most vitally interested.

THE LORD CHANCELLOR. Your clients who represent the Dominion companies. MR. WEGENAST: Yes, my Lord.

THE LORD CHANCELLOR: I am not sure that the others took the same view, but it does not matter. SIR ROBERT FINLAY: I have very little to say.

THE LORD CHANCELLOR: You are appearing for the intervenants. SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: You have no right to reply according to what was laid down in the John Deere Plow case. MR. HELLMUTH: I have asked my friend Sir Robert to reply for the Bonanza Company.

VISCOUNT HALDANE: In the John Deere Plow case we laid it down expressly that no intervenant had a right to reply.

THE LORD CHANCELLOR: That is in accordance with the practice too.

VISCOUNT HALDANE: But if you say you represent the Bonanza Company, that is another matter. SIR ROBERT FINLAY: I can only say that the learned counsel for the Bonanza Company have asked me to reply. I am briefed for the intervenant. I admit that I have no right to reply, but if you Lordships by comity will allow me I will be very brief. MR. HELLMUTH: I have asked my learned friend Sir Robert to reply for the Bonanza Company.

THE LORD CHANCELLOR: You are seeking to confer upon Sir Robert Finlay a right of reply which he does not possess. However, this will not be used as a precedent.

VISCOUNT HALDANE: We will shut our eyes to any defect there may be in your retainer for the Bonanza Company, Sir Robert. SIR ROBERT FINLAY: If your Lordship pleases. I shall observe the principle that my friend Mr. Wegenast observed of my reply not attaining any great dimensions. I shall be extremely short. I am not going to repeat anything that has been said, and really I have only a few observations to make with regard to what has been said on the other side. The first thing I wish to say is this. I submit that my friend Mr. Wegenast's argument was extremely instructive because he really demonstrated the impossibility of applying the territorial principle. He had to say that applying the territorial principle it was impossible to say that any rule could be laid down.

THE LORD CHANCELLOR: Impossible to answer the question which had been propounded by the Board. SIR ROBERT FINLAY: Yes, and he went so far as to ask your Lordships to retire defeated from deciding the appeal in the Bonanza case. It must be decided because it is an appeal. I have listened with the greatest interest and the greatest pleasure to my friend's argument, because I submit it very powerfully supports the appeal I make to your Lordships to discard the territorial principle altogether as incapable of application. Of course, in construing the Act one must look at the words of the Act and the surrounding circumstances in which the legislation was passed. You have got this, that by the Act of 1864, and an earlier Act the province of Canada, which comprised Ontario, had exorted to the full the power of providing for legislating for the creating of companies discarding the territorial principle altogether. What I submit to your Lordships is this: If the framers of the British North America Act had intended to put an end to that state of things, would not they have used very different language from that which they have used. All they have said is that they may legislate with regard to "the incorporation of companies with provincial objects." I submit to your Lordships that all that those words mean is, objects which are non-Dominion objects, and that that really solves the whole difficulties which have been alleged to exist with regard to this case, and that interpretation is, not only in harmony with what may be collected from the Act to have been the intention of its framers when you look at the surrounding circumstances which were within their knowledge and for which they were legislating, but it is also, as I submit, entirely in conformity with the language of the Act itself. Section 92 uses the words "for provincial purposes" with regard to the revenue. It cannot be contended that they could expend the revenue only within the province. Agents must be maintained in the mother-country. For instance the provinces have asserted on a magnificent scale, the right of making contributions for the purposes of hospitals for our soldiers and for other purposes in connection with the war.

THE LORD CHANCELLOR: And they have buildings over here for their representatives. SIR ROBERT FINLAY: Yes, my Lord, but, according to my friend's principle all that would be wholly *ultra vires*. You cannot put a different meaning on the words "provincial purposes" in head 2 from the meaning that is given to them under head 11. Then, my Lords, I submit that the key to the section is to be found in the recognition, that as long as the provinces do not trench upon the sphere of the Dominion legislation (I will not go through the heads again) as

long as they do not effect to confer the right to carry on business in any other province, they are justified in following the course which their predecessors were following at the time when the British North America Act was passed.

My Lords, I only want to say a very few words with regard to what my friend Mr. Newcombe said as to what had taken place in Yukon. I am not going to re-argue the question of whether a Canadian company would include an Ontario company. I submit that it is perfectly clear, for the reasons stated by Mr. Justice Duff, that it would and that it is not confined to Dominion companies. My friend referred to what was said by Lord Watson in the Liquor case in 1896 with regard to the creation of municipal bodies and the powers to be conferred upon them by the Provincial Legislature. All that Lord Watson said in that passage was that the conferring on the Provincial Legislatures of the power to create municipal institutions did not appear to be under the guise of legislating for municipal institutions, the right to give to those municipal institutions any faculty which could not have been exercised by the province itself. That is really all that Lord Watson says. He says: If the province could not have controlled the liquor trade, neither could they have conferred upon the municipal institutions the right of doing it. That is really all that the passage comes to, and I do not propose further to advert to my friend's observations on that head.

Then my Lords my friend quoted the case of the *Canadian Southern Railway v. Gebhard*, in 109 United States Reports, at page 537. All that is said there is that persons dealing with a company incorporated in Ontario, in a Province, must take the risk of what the powers of that company are according to Ontario law and under its charter. That is not the point. The question is the effect of the dealings of the Government of Yukon and the Government of the Dominion with this company. I do not propose to repeat the observations I made in this connection in the earlier part of the argument.

VISCOUNT HALDANE: Could you tell me this. Section 4 of the present Ontario Companies Act, in the revised Statutes of 1897, says: "The incorporation of every company hereafter by letters patent shall be governed by this Act and all the provisions of this Act shall apply to every such company, subject to the provisions of any general Act applying to the company." That limits the power to incorporate by letters patent to what is within the statute. SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Is that so in the earlier Ontario Companies Acts, say the one under which this corporation was incorporated? MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: Was this section in that too? MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: I was reading from chapter 191, The Ontario Companies Act, 1897. SIR ROBERT FINLAY: That is the statute.

VISCOUNT HALDANE: You have answered my question.

THE LORD CHANCELLOR: We must consider what course we will take now. SIR ROBERT FINLAY: May I say a word with regard to the Companies' case, which I do not press. In our view the decision of the two cases that have been argued will answer the points raised by the question in the Companies case, as far as convenient or proper to be answered.

THE LORD CHANCELLOR: Will you take the questions. Let us go through them. SIR ROBERT FINLAY: It is at page 4 of the record.

VISCOUNT HALDANE: If you do not ask for them to be answered now, Mr. Newcombe does not want them to be answered. SIR ROBERT FINLAY: These questions were framed by my friend.

VISCOUNT HALDANE: I sat here on the application for leave to appeal and Mr. Newcombe raised an objection to leave being given on the ground that they were unnecessary.

SIR ROBERT FINLAY: The questions had been framed entirely by my friend Mr. Newcombe; the provinces had no hand in framing them at all. Then they were answered in the Supreme Court your Lordships know how, and I applied for special leave to appeal. I think my friend Mr. Newcombe did not support that application, but rather intimated a desire that it should not be granted. Anyway

we thought it safe to have leave in case there was anything remaining which required clearing up.

THE LORD CHANCELLOR: Which are the questions you want answered? SIR ROBERT FINLAY: The first and second have been fully dealt with.

THE LORD CHANCELLOR: You want an answer to both those? SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: So far as the Bonanza case raises them. SIR ROBERT FINLAY: Yes, my Lord. Then the third is:

> "Has a corporation constituted by a Provincial Legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts—
>
> "'(a) within the incorporating province insuring property outside of the province;
>
> "'(b) outside of the incorporating province insuring property within the province;
>
> "'(c) Outside of the incorporating province insuring property outside of the province?
>
> "Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country?
>
> "Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province?"

THE LORD CHANCELLOR: Does not the question turn upon two things. We have already discussed in the former case whether insurance is something special which is for Dominion treatment, and, secondly, what has been said to-day about the statute of a company? SIR ROBERT FINLAY: I think the various questions under head 3 will be really answered by what your Lordships say in the other two cases.

VISCOUNT HALDANE: That question again is a question that you want answered? SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: In one case or the other. SIR ROBERT FINLAY: Yes, my Lord. Then Question 4 is:

> "If in any or all of the above-mentioned cases (a), (b), and (c), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases, on availing itself of the Insurance Act, 1910, 9 and 10 Edward VII., chapter 32, section 3, subsection 3?"

Your Lordships will recollect that that was discussed in the Insurance case, and I do not know that anything more will be wanted beyond what your Lordships may decide in that case. Then question 5:

> "Can the powers of a company incorporated by a Provincial Legislature be enlarged, and to what extent, either as to locality or objects by
>
> "(a) the Dominion Parliament?
>
> "(b) the legislature of another province?"

That will be answered in the best form, which is in a concrete case, by what your Lordships say about the Bonanza Case. The question 6 is:

> "Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a license so to do from the Government of the province, or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such licenses?"

That question was raised in the John Deere Plow case.

VISCOUNT HALDANE: In the John Deere Plow case we said, according to my recollection, that we had this question before us and did not intend to answer any further until a concrete case arose and then we would decide it. The same thing applies to the next question. SIR ROBERT FINLAY: Yes, my Lord. My friend, Mr. Wegenast, said there had been some legislation in the provinces since the John Deere Plow case and he was very anxious to discuss it. It would be

very interesting, I admit, but I suggest we had better wait until a concrete case arises.

MR. NEWCOMBE: My Lords, there is one observation which I should like to make with regard to what my learned friend has said. I intimated to your Lordships, when the application for leave to appeal was made in this case, that, considering the debate and consideration to which these questions were subjected, we did not think, on the general questions, that it was expedient to proceed further with them, because of the difficulties which had been encountered judicially in dealing with them. My learned friend has said I drafted the questions. I suppose he does not mean that I did it with my own hand. It was a deliberate transaction of the Governor-General of Canada upon the advice of his Ministers with a view to settling this very difficult question affecting business interests in the Dominion, and I think from the point of view at that time the reference has served very good purpose, although it may be inexpedient to debate it further now. There is one question here which is a specific question. No. 4 at page 82, referring to sub-section 3 of section 3 of the Insurance Act, "Is the said enactment, the Insurance Act, 1910, chapter 32, section 3, sub-section 3 *intra vires* of the Parliament of Canada"? Of course if your Lordships should unfortunately pronounce in accordance with the views of the majority of the Supreme Court that the whole Act is *ultra vires*, that goes with it, but if, as I hope I have grounds to anticipate, that the Act will be upheld, then there is the question as to whether the Dominion has the power to say of the company which is incorporated locally, that that company, upon simply complying with the provisions of the statute, may extend its business throughout the Dominion by force of the Dominion legislation. I submit that that section is a very important section in the administration of the Insurance Act, because when many companies are exerting their right to do business upon that very section it would be desirable to know whether that was an *intra vires* enactment, and I would submit, if your Lordships approve, what I have to say in support of that. It will be very brief.

THE LORD CHANCELLOR: Let us hear what you have to say with regard to it. SIR ROBERT FINLAY: This really resolves itself into what has been argued already on the capacity point.

VISCOUNT HALDANE: I think it does.

LORD PARKER OF WADDINGTON: It would only become the least bit important if it was decided that a provincial company has no liberty outside its own limits. The only question would be whether there was a *quasi* corporation or a *quasi* recognition having a legal effect on those lines. MR. NEWCOMBE: I think the enacting authority for this section is denied by all the Judges of the Supreme Court of Canada, even those who held that the provincial corporation has no extra provincial effect. Of course if your Lordships say that this is a company incorporated by a province to carry on the business of insurance within the province, it may be incorporated to carry on business in the province in terms on it may be incorporated generally to carry on the business of insurance. It is at page 252 of the book of Acts, sub-section 3: "Any company incorporated by an Act of the legislature of the late province of Canada or by an Act of the legislature of any province now forming part of Canada which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated and which is within the exclusive control of the legislature of such province, may, by leave of the Governor-in-Council, avail itself of the provisions of this Act on complying with the provisions thereof; and if it so avails itself the provisions of this Act shall thereafter apply to it, and such company shall thereafter have the power of transacting its business of insurance throughout Canada."

THE LORD CHANCELLOR: This statute is 1910. MR. NEWCOMBE: This is a consolidation later, but it is in the same section.

LORD SUMNER: It is section 3, sub-section 3. MR. NEWCOMBE: Yes, my Lord.

VISCOUNT HALDANE: This is the section we have been discussing up and down. MR. NEWCOMBE: The statute deals with the case of a company incorporated to carry on business within the province.

LORD PARKER OF WADDINGTON: You have to distinguish there, because it may be that the Provincial Legislature might incorporate a company for the purpose of carrying on the business of insurance, confining its operations in every respect to the province. MR. NEWCOMBE: I might use the words "within the province."

LORD PARKER OF WADDINGTON: Or it might say that they shall not carry on business outside. MR. NEWCOMBE: They might even say that, though I do not suppose there is such a case as that.

LORD PARKER OF WADDINGTON: That is not the case we are dealing with. We are dealing with the case of a company which, on the face of it, has power to carry on anywhere, provided the legislative authority is competent to give them that power. MR. NEWCOMBE: What I mean is that there are companies, local insurance companies, incorporated in both ways carrying on business throughout the Dominion by force of this Dominion enactment. Of course there is no question, I imagine, under a local charter which says the company shall not carry on business outside, but many of the provinces have been brought to accept the view, which has been taken heretofore by the Parliament, and the Government of Canada, that they had no power to authorize extra-provincial business by companies which have been incorporated to carry on business within the province according to the terms of the charter. In other cases the company has been incorporated merely to carry on insurance business.

VISCOUNT HALDANE: There is a difficulty about this. Supposing, for the sake of argument, that we were to take the view that, while the capacity was general, while a provincial company had capacity to accept powers, still the Provincial Legislature might limit that capacity so as to be something like the doctrine in the *Ashbury Company* v. *Riche*, then it would be a question whether, in each case, it had done so, and we should only mislead you in trying to give a general answer. MR. NEWCOMBE: A general answer would not be valuable unless it were directed to the case of a company incorporated by the province of Nova Scotia to carry on insurance within Nova Scotia, supposing those were the terms of the charter. There is a local business locally limited. The company is, you may say, within the exclusive legislative authority of Nova Scotia, yet there is a legislative power resident somewhere to authorize operations of that company throughout the Dominion. It is not in the province. We submit it is in the Dominion. I am not asking your Lordships to say what sort of a company this is after the power is exercised; whether it becomes a new company or remains the old company with added powers, but there it is.

VISCOUNT HALDANE: It may be very awkward to give a yes or no answer to that question as it stands.

LORD PARKER OF WADDINGTON: It may be good as to one company and not as to another. MR. NEWCOMBE: The only thing that I wish to say about it is this, that if your Lordships will consider the question with a view of giving an answer to it on the supposition that the company is incorporated in terms to carry on business within the province I should like to direct your Lordships' attention in that connection to the case of *Valin* v. *Langlois*, which is reported in 5 Appeal Cases, at page 115. This is the argument, upon the authority of that case. The item dealing with the provincial Courts is, under the 14th enumeration of section 92, within local jurisdiction. "The administration of justice in the province, including the constitution, maintenance and organization of provincial Courts both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts." They were conferring powers to try questions of the return of members to the Dominion Parliament, election petitions, and the jurisdiction was, by Dominion Statute, put upon the local Courts. It was held that the jurisdiction was good in either of two ways: first, as constituting a new Court, because there was enough in the legislation to amount to the constitution of a new Court; or, secondly, as a conferring by the Dominion of additional jurisdiction upon the local Courts, the Courts remaining provincial but exercising powers which the province could not confer. Here, in the same way, I submit that this local company, having the full power which can be granted provincially, may still receive from the Dominion additional powers which are not within the jurisdiction of the province to

grant. If that be not so, then there must be an exception to the general rule, which we were told the other day was not disputed, that anything which was not committed to the province was committed by section 91 to the Dominion. SIR ROBERT FINLAY: Our position with regard to this question is this, that we have the power and do not want this license.

THE LORD CHANCELLOR: You say the question does not arise. SIR ROBERT FINLAY: Yes, my Lord.

VISCOUNT HALDANE: It might arise, I suppose, where a provincial company was so limited that it could not accept it. SIR ROBERT FINLAY: What I submit upon that is that it shows shows the extreme inexpediency of answering that question.

VISCOUNT HALDANE: And you are not that company. SIR ROBERT FINLAY: No, my Lord.