THE

BRITISH NORTH AMERICA ACTS

AS INTERPRETED BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, WITH BRIEF EXPLANATORY OR CRITICAL TEXT

A HANDBOOK

BY

EDMUND L. NEWCOMBE

ONE OF HIS MAJESTY'S COUNSEL

THE DEPUTY MINISTER OF JUSTICE FOR CANADA

OTTAWA

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PREFATORY NOTE.

In the arguments before the Supreme Court of Canada and the Judicial Committee of the Privy Council of most of the constitutional cases in which the Dominion of Canada has been represented within the last twelve years the undersigned has had occasion to extract and arrange, more or less systematically, the decisions and observations of their Lordships of the Judicial Committee upon the various sections of the British North America Acts. This material, though very useful for reference, has become rather bulky and inconvenient in manuscript. Hence, in the economy of the Department of Justice, the utility of revising the compilation, expanding some of the writer's explanatory or critical notes, and having the whole turned out in the shape of a convenient handbook.

E. L. NEWCOMBE.

2nd December, 1907.

TABLE OF CASES

THE BRITISH NORTH AMERICA ACTS.

The purpose and method of the British North America Act, 1867, are tersely and comprehensively stated by Lord Watson in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, 1892 A.C., 441-2. His Lordship said:—

'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.'

Bearing in mind the object so stated, let us consider the various statutory provisions by which it is effected, as explained or interpreted by ultimate judicial opinion.

It must not be overlooked in considering the opinions of their Lordships of the Judicial Committee of the Privy Council upon the British North America Acts that their Lordships do not think it advisable to lay down general rules of interpretation. They have intimated that the wiser course is to confine each decision to the questions necessarily arising for determination. Thus in *Hodge v. The Queen*, 9 A. C., 128, Sir Barnes Peacock, delivering the judgment of the Board, said:—

'Their Lordships do not think it necessary in the present case to lay down any general rule or rules for the construction of the British North America Act. They are impressed with the justice of an observation by Hagarty, C.J., "that in all these

questions of *ultra vires* it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy." They do not forget that in a previous decision on this same statute (*Citizens Insurance Company of Canada v. Parsons*, 7 A.C., 96) their Lordships recommended that " in performing the difficult duty of determining such questions, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand." '

This advice, though often quoted, has not, however, as Lord Macnaghten said in a recent case,[1] been always followed, and some general rules have been expressly laid down, while others have grown up from numerous precedents. Moreover, the points necessarily de ided by the Committee in individual cases usually involve principles which may be applied in various circumstances and conditions, so that really the cases upon the British North America Acts are few which do not contain some exposition of general and permanent importance.

Reliance upon the apparent application of the decisions of the Judicial Committee to cases other than those in which they have been pronounced is limited also by the considerations, in so far as they apply, which led to the unqualified denial by Lord Halsbury, L.C., in *Quinn v. Leathem*, 1901 A.C., 506, that a case can be quoted for a proposition which may seem to follow logically from it. 'Such a mode of reasoning,' his Lordship said, 'assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all'—a quality of the law of which, unfortunately, the judicial exposition of the British North America Acts affords some evidence.

In the following pages the interpretation of each section which has been considered by their Lordships, or any remarks aiding in construction, will be stated, so far as convenient, in the words used by their Lordships.

[1] *Attorney-General of Manitoba v. Manitoba License-Holders' Association*, 1902 A.C., 77.

30 V., c. 3.

An Act for the Union of *Canada, Nova Scotia* and *New Brunswick*, and the Government thereof: and for Purposes connected therewith.

[29*th March*, 1867.]

WHEREAS the Provinces of *Canada, Nova Scotia*, and *New Brunswick* have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of *Great Britain* and *Ireland*, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the *British* Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of *British North America*:

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:—

I.—PRELIMINARY.

Short title.

1. This Act may be cited as The *British North America* Act, 1867.

Application of Provisions referring to the Queen.

2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of *Great Britain* and *Ireland*.

II.—UNION.

Declaration of Union.

3. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day

therein appointed, not being more than Six Months after the passing of this Act, the Provinces of *Canada, Nova Scotia,* and *New Brunswick* shall form and be One Dominion under the Name of *Canada*; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.

Construction of subsequent Provisions of Act.

4. The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the Day appointed for the Union taking effect in the Queen's Proclamation; and in the same Provisions, unless it is otherwise expressed or implied, the Name *Canada* shall be taken to mean *Canada* as constituted under this Act.

All the Provinces form Part of Canada.—In *Attorneys-General for New Brunswick and Prince Edward Island v. Attorney-General for Canada* (the *Representation Case*) 1905 A.C., 49, Sir Arthur Wilson, delivering the judgment of the Board, referring to the meaning of the words 'the aggregate population of Canada,' as they occur in s. 51, sub-s. 4, said:—

'By s. 4, Canada is defined as meaning "unless it is otherwise expressed or implied . . . . Canada as constituted under this Act." Under the scheme of the Act the Dominion was not constituted by the immediate operation of the Act itself. The territory included in the four original provinces was incorporated by proclamation issued under the authority of s. 3. The territory included in the provinces subsequently incorporated was admitted by orders-in-council issued under s. 146. In their Lordships' opinion all these provinces equally form part of Canada as constituted under the Act.'

Four Provinces.

5. *Canada* shall be divided into Four Provinces, named *Ontario, Quebec, Nova Scotia,* and *New Brunswick.*

Additional Provinces.—In the *Representation Case, supra,* p. 45, Sir Arthur Wilson, delivering the judgment of the Board, said:—

'Canada in the widest sense of the term now comprises, in addition to the four original provinces of Ontario, Quebec, Nova Scotia and New Brunswick, three other provinces which have entered the Dominion at various dates subsequent to its

first formation—Manitoba, British Columbia, and Prince Edward Island. It also comprises certain territories which have not received the organization of provinces.'

Provinces of Ontario and Quebec.

6. The Parts of the Province of *Canada* (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of *Upper Canada* and *Lower Canada* shall be deemed to be severed, and shall form Two separate Provinces. The Part which formerly constituted the Province of *Upper Canada* shall constitute the Province of *Ontario*; and the Part which formerly constituted the Province of *Lower Canada* shall constitute the Province of *Quebec*.

Provinces of Nova Scotia and New Brunswick.

7. The Provinces of *Nova Scotia* and *New Brunswick* shall have the same Limits as at the passing of this Act.

Decennial Census.

8. In the general Census of the Population of *Canada* which is hereby required to be taken in the Year One thousand eight hundred and seventy-one, and in every Tenth Year thereafter, the respective Populations of the Four Provinces shall be distinguished.

III.—Executive Power.

Declaration of Executive Power in the Queen.

9. The Executive Government and Authority of and over *Canada* is hereby declared to continue and be vested in the Queen.

The Governor-General in Council represents the Crown.—In *Liquidators of Maritime Bank of Canada v. Receiver-General of New Brunswick*, 1892 A.C., 443, Lord Watson, referring to this section, said that the act of the Governor-General and his Council in appointing a lieutenant-governor was, within the meaning of the statute, the act of the Crown.

Application of Provisions referring to Governor General.

10. The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of *Canada*, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of *Canada* on behalf and in the Name of the Queen, by whatever Title he is designated.

Constitution of Privy Council for Canada.

11. There shall be a Council to aid and advise in the Government of *Canada*, to be styled the Queen's Privy Council for *Canada*; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in

as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

All Powers under Acts to be exercised by Governor General with advice of Privy Council or alone.

12. 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, 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 exerciseable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen's Privy Council for *Canada*, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of *Great Britain* or of the Parliament of the United Kingdom of *Great Britain* and *Ireland*) to be abolished or altered by the Parliament of *Canada*.

Powers of the Governor-General.—This section, it will be observed, deals only with powers, authorities and functions under Acts of Parliament or of the several legislatures.

The railway constructed by the government of Nova Scotia previously to Confederation became at the Union the property of the Dominion. At that time there was in existence, between the provincial government and the Windsor and Annapolis Railway Company, which was constructing a railway from Windsor to Annapolis under the authority of provincial legislation, a statutory agreement whereby a traffic arrangement was to be made between the provincial government and the company for running powers to the company over the Windsor branch of the government railway. In September, 1871, the Dominion government to implement this obligation entered into an agreement or traffic arrangement with the company whereby among other provisions the exclusive use and possession

of the Windsor branch was made over to the company. Afterwards by order-in-council of October, 1873, the Governor-in-Council, subject to the sanction of Parliament approved of a proposal made by the Western Counties Railway Company for a transfer to it of the Windsor branch upon certain conditions, and in May, 1874, an Act was passed by Parliament (37 V. c. 16) authorizing such transfer. A question then arose as to whether the rights of the Windsor and Annapolis Railway Company were affected by the latter order-in-council and statute.

The case came before the Judicial Committee upon appeal in *Western Counties Railway Company v. Windsor and Annapolis Railway Company*, 7 A.C., and, p. 188, Lord Watson, delivering the judgment, said:—

'The proposals or provisional agreements which are scheduled to the Act 37 V., c. 16, contain two distinct stipulations, the one relating to the possession and use, and the other to the property of the Windsor branch railway. By the first the appellant company "undertake to receive the said railway and appurtenances on the first day of December, anno Domini eighteen hundred and seventy-three," and to work it efficiently thereafter. Although the company undertake to receive, there is no corresponding obligation laid upon the government to give them possession of the railway, either upon the 1st of December, 1873, or at any other specified date. By the second of these stipulations, it is provided that, upon the completion of the Western Counties Railway, then in course of construction from Yarmouth to Annapolis, the Windsor branch railway and its appurtenances shall be and become the absolute property of the appellant company.

'The Governor-General, with advice of his Council, would probably have been entitled, by virtue of the administrative powers conferred upon him by the 12th section of the British North America Act, 1867, to make a valid agreement in regard to the possession and working of the line; but it is, at least, very doubtful whether he would have had the right to alienate the property of the line without the sanction of the Dominion Parliament.'

The decision turned, however, upon the point that neither the Act 37 V., c. 16, nor the scheduled agreements were intended to disturb the rights of the respondent company.

Application of Provisions referring to Governor General in Council.

13. The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the advice of the Queen's Privy Council for *Canada*.

Power to Her Majesty to authorize Governor General to appoint Deputies.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor General from Time to Time to appoint any Person or any Persons jointly or severally to be his Deputy or Deputies within any Part or Parts of *Canada*, and in that Capacity to exercise during the Pleasure of the Governor General such of the Powers, Authorities, and Functions of the Governor General as the Governor General deems it necessary or expedient to assign to him or them, subject to any Limitations or Directions expressed or given by the Queen; but the Appointment of such a Deputy or Deputies shall not affect the Exercise by the Governor General himself of any Power, Authority, or Function.

Command of Armed Forces to continue to be vested in the Queen.

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in *Canada*, is hereby declared to continue and be vested in the Queen.

Seat of Government of Canada.

16. Until the Queen otherwise directs the Seat of Government of *Canada* shall be *Ottawa*.

IV.—Legislative Power.

Constitution of Parliament of Canada.

17. There shall be One Parliament for *Canada*, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Privileges, &c., of Houses.

18. The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of *Canada*, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of *Great Britain* and *Ireland* and by the Members thereof.

Repeal. 38-39 V., c. 38.—This section was repealed and another substituted by the imperial Act 38-39 V., c. 38, entitled 'An Act to remove certain doubts with respect to the

powers of the Parliament of Canada under section eighteen of the British North America Act, 1867,' assented to 19th July, 1875.

S. 1 of the amending Act and the preamble upon which it proceeds are as follows:—

30 & 31 Vict., c. 3.

WHEREAS by section eighteen of the British North America Act, 1867, it is provided as follows: "The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively shall be such as are, from time to time, defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof;"

And whereas doubts have arisen with regard to the power of defining by an Act of the Parliament of Canada, in pursuance of the said section, the said privileges, powers, or immunities; and it is expedient to remove such doubts:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords, Spiritual and Temporal, and Commons in this present Parliament assembled and by the authority of the same, as follows:—

Substitution of new section for section 18 of 30 & 31 Vict., c. 3.

1. Section eighteen of the British North America Act, 1867, is hereby repealed, without prejudice to anything done under that section, and the following section shall be substituted for the section so repealed:

The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

Reason for s. 18.—In *Fielding v. Thomas*, 1896 A.C., 610, Lord Halsbury, L.C., delivering the judgment of the Board, mentioned the fact that there was no similar enactment

to s. 18 relating to the provincial legislatures. 'But it is to be observed,' his Lordship said, 'that the House of Commons of Canada was a legislative body created for the first time by the British North America Act, and it may have been thought expedient to make express provision for the privileges, immunities and powers of the body so created which was not necessary in the case of the existing legislature of Nova Scotia.'

First Session of the Parliament of Canada.

19. The Parliament of *Canada* shall be called together not later than Six Months after the Union.

Yearly Session of the Parliament of Canada.

20. There shall be a Session of the Parliament of *Canada* once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Parliament in one Session and its first Sitting in the next Session.

The Senate.

Number of Senators.

21. The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.

Representation of provinces in Senate.

22. In relation to the Constitution of the Senate, *Canada* shall be deemed to consist of Three Divisions—

1. *Ontario;*
2. *Quebec;*
3. The Maritime Provinces, *Nova Scotia* and *New Brunswick*; which Three Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate, as follows: *Ontario* by Twenty-four Senators; *Quebec* by Twenty-four Senators; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing *Nova Scotia,* and Twelve thereof representing *New Brunswick.*

In the Case of *Quebec* each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of *Lower Canada* specified in Schedule A. to Chapter One of the Consolidated Statutes of *Canada.*

Qualifications of Senator.

23. The Qualification of a Senator shall be as follows:

(1.) He shall be of the full age of Thirty Years:

(2.) He shall be either a Natural-born Subject of the Queen, or a Subject of the Queen naturalized by an 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 One of the Provinces of *Upper Canada, Lower Canada, Canada, Nova Scotia,* or *New Brunswick*, before the Union, or of the Parliament of *Canada* after the Union.

(3.) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in free and common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same:

(4.) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities:

(5.) He shall be resident in the Province for which he is appointed:

(6.) In the Case of *Quebec* he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division:

Summons of Senator.

24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of *Canada*, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

Summons of First Body of Senators.

25. Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.

Addition of Senators in certain cases.

26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of *Canada*, add to the Senate accordingly.

Reduction of Senate to normal number.

27. In case of such Addition being at any Time made the Governor General shall not summon any Person to the Senate, except on a further like Direction by the

Queen on the like Recommendation, until each of the Three Divisions of *Canada* is represented by Twenty-four Senators and no more.

Maximum number of Senators.

28. The Number of Senators shall not at any Time exceed Seventy-eight.

Tenure of Place in Senate.

29. A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

Resignation of Place in Senate.

30. A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

Disqualification of Senators.

31. The Place of a Senator shall become vacant in any of the following Cases:—

(1.) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate:

(2.) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power:

(3.) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter:

(4.) If he is attainted of Treason or convicted of Felony or of any infamous Crime;

(5.) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of *Canada* while holding an Office under that Government requiring his Presence there.

Summons on Vacancy in Senate.

32. When a Vacancy happens in the Senate by Resignation, Death or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

Questions as to Qualifications and Vacancies in Senate.

33. If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

Appointment of Speaker of Senate.

34. The Governor General may from Time to Time, by Instrument under the Great Seal of *Canada*, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead.

In case of the Absence of the Speaker.—An Act was passed by the Parliament of Canada in 1894 (57-58 V., c. 11) entitled 'An Act respecting the Speaker of the Senate,' providing in effect that when the Speaker is absent for any cause he may call upon any senator to preside, or the Senate may choose any senator to preside, and that any act done by the senator so presiding shall have the same validity as if done by the Speaker.

This Act was declared to be valid by the imperial Parliament (59 V., c. 3) upon the recital that doubts had arisen as to the power of the Parliament of Canada to pass it. The character of these doubts appears from the discussion and correspondence at the time in connection with the Canadian Act, and has some relation to the fact that by s. 47, *infra*, provision is made for the election of a member of the Commons to act in place of the Speaker of that House during his absence from the Chair; but it is submitted that the necessity or expediency of obtaining confirmation by the imperial Parliament of legislation so simple and so necessarily competent to the Parliament of Canada is by no means apparent.

Quorum of Senate.

35. Until the Parliament of *Canada* otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

Voting in Senate.

36. Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

The House of Commons.

Constitution of House of Commons in Canada.

37. The House of Commons shall, subject to the Provisions of this Act, consist of One hundred and eighty-one Members, of whom Eighty-two shall be elected for *Ontario*, Sixty-five for *Quebec*, Nineteen for *Nova Scotia*, and Fifteen for *New Brunswick*.

Summoning of House of Commons.

38. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of *Canada*, summon and call together the House of Commons.

Senators not to sit in House of Commons.

39. A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

Electoral districts of the four Provinces.

40. Until the Parliament of *Canada* otherwise provides, *Ontario, Quebec, Nova Scotia,* and *New Brunswick* shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows:—

1.—*ONTARIO.*

Ontario shall be divided into the Counties, Ridings of Counties, Cities, Parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return One Member.

2.—*QUEBEC.*

Quebec shall be divided into Sixty-five Electoral Districts, composed of the Sixty-five Electoral Divisions into which *Lower Canada* is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of *Canada,* Chapter Seventy-five of the Consolidated Statutes for *Lower Canada,* and the Act of the Province of *Canada* of the Twenty-third Year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the Purposes of this Act an Electoral District entitled to return One Member.

3.—*NOVA SCOTIA.*

Each of the Eighteen Counties of *Nova Scotia* shall be an Electoral District. The County of *Halifax* shall be entitled to return Two Members, and each of the other Counties One Member.

4.—*NEW BRUNSWICK.*

Each of the Fourteen Counties into which *New Brunswick* is divided, including the City and County of *St. John,* shall be an Electoral District. The City of *St. John* shall also be a separate Electoral District. Each of those Fifteen Electoral Districts shall be entitled to return One Member.

Continuance of existing Election Laws until Parliament

41. Until the Parliament of *Canada* otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of

of Canada otherwise provides.

Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of *Canada* otherwise provides, at any Election for a Member of the House of Commons for the District of *Algoma*, in addition to Persons qualified by the Law of the Province of *Canada* to vote, every male *British* Subject, aged Twenty-one Years or upward, being a Householder, shall have a vote.

Controverted Elections.—Provincial Courts.—This section is held to confer impliedly legislative jurisdiction. In *Valin v. Langlois*, 5 A.C., 115, the question arose, upon an application for special leave to appeal, as to the validity of the Dominion Controverted Elections Act of 1874, which conferred upon the provincial courts jurisdiction with respect to elections to the House of Commons. Lord Selborne, delivering the judgment of the Committee, pp. 118-20, said:—

'Their Lordships find that the subject matter of this controversy, that is the determination of the way in which questions of this nature are to be decided as to the validity of the returns of members to the Canadian Parliament, is, beyond all doubt, placed within the authority and the legislative power of the Dominion Parliament by the 41st section of the Act of 1867. . . . . That clause expressly says that the old mode of determining this class of questions was to continue until the Parliament of Canada should otherwise provide. It was, therefore, the Parliament of Canada which was otherwise to provide. It did otherwise provide by the Act of 1873, which Act it afterwards altered, and then passed the Act now in question. So far it would appear to their Lordships very difficult to suggest any ground upon which the competency of the Parliament of Canada so to legislate could be called in ques-

tion. But the ground which is suggested is this, that it has seemed fit to the Parliament of Canada to confer the jurisdiction necessary for the trial of election petitions upon courts of ordinary jurisdiction in the provinces, and it is said, that although the Parliament of Canada might have provided in any other manner for those trials, and might have created any new courts for this purpose, it could not commit the exercise of such a new jurisdiction to any existing provincial court. After all their Lordships have heard from Mr. Benjamin, they are at a loss to follow that argument, even supposing that this were not in truth and in substance the creation of a new court. If the subject-matter is within the jurisdiction of the Dominion Parliament, it is not within the jurisdiction of the provincial parliament, and that which is excluded by the 91st section from the jurisdiction of the Dominion Parliament is not anything else than matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces. The only material class of subjects relates to the administration of justice in the provinces, which, read with the 41st section, cannot be reasonably taken to have anything to do with election petitions. There is, therefore, nothing here to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing provincial courts, or to give them new powers, as to matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces.'

Writs for first Election.

42. For the First Election of Members to serve in the House of Commons the Governor General shall cause Writs to be issued by such Person, in such Form, and addressed to such Returning Officers as he thinks fit.

The Person issuing Writs under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the issuing of Writs for the Election of Members to serve in the respective House of Assembly or Legislative Assembly of the Province of *Canada, Nova Scotia,* or *New Brunswick*; and the Returning Officers to whom Writs are directed under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the returning of Writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.

As to casual Vacancies.

43. In case a Vacancy in the Representation in the House of Commons of any Electoral District happens before the Meeting of the Parliament, or after the Meeting of the Parliament before Provision is made by the Parliament in this Behalf, the Provisions of the last foregoing Section of this Act shall extend and apply to the issuing and returning of a Writ in respect of such vacant District.

As to Election of Speaker of House of Commons.

44. The House of Commons on its first assembling after a General Election shall proceed with all practicable Speed to elect One of its Members to be Speaker.

As to filling up Vacancy in Office of Speaker.

45. In case of a Vacancy happening in the Office of Speaker by Death, Resignation, or otherwise, the House of Commons shall with all practicable Speed proceed to elect another of its Members to be Speaker.

Speaker to preside.

46. The Speaker shall preside at all Meetings of the House of Commons.

Provision in case of absence of Speaker.

47. Until the Parliament of *Canada* otherwise provides, in case of the Absence for any Reason of the Speaker from the Chair of the House of Commons for a period of Forty-eight consecutive Hours, the House may elect another of its Members to act as Speaker, and the Member so elected shall during the Continuance of such Absence of the Speaker have and execute all the Powers, Privileges, and Duties of Speaker.

Quorum of House of Commons.

48. The Presence of at least Twenty Members of the House of Commons shall be necessary to constitute a Meeting of the House for the Exercise of its Powers; and for that Purpose the Speaker shall be reckoned as a Member.

Voting in House of Commons.

49. Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote.

Duration of House of Commons.

50. Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.

Decennial Readjustment of Representation.

51. On the Completion of the Census in the Year One thousand eight hundred and seventy-one, and of each subsequent decennial Census, the Representation of the Four Provinces shall be readjusted by such Authority, in such Manner, and from such Time, as the

Parliament of *Canada* from Time to Time provides, subject and according to the following Rules:—

(1.) *Quebec* shall have the fixed Number of Sixty-five Members:

(2.) There shall be assigned to each of the other Provinces such a Number of Members as will bear the same Proportion to the Number of its Population (ascertained at such Census) as the Number Sixty-five bears to the Number of the Population of *Quebec* (so ascertained):

(3.) In the Computation of the number of Members for a Province a fractional Part not exceeding One Half of the whole Number requisite for entitling the Province to a Member shall be disregarded; but a fractional Part exceeding One Half of that Number shall be equivalent to the whole Number:

(4.) On any such Re-adjustment the Number of Members for a Province shall not be reduced unless the Proportion which the Number of the Population of the Province bore to the Number of the aggregate Population of *Canada* at the then last preceding Re-adjustment of the Numbers of Members for the Province is ascertained at the then latest Census to be diminished by One Twentieth Part or upwards:

(5.) Such Re-adjustment shall not take effect until the Termination of the then existing Parliament.

Aggregate Population of Canada.—The *Representation Case*, 1905 A.C., 37, came before the Judicial Committee upon appeal from the Supreme Court of Canada in respect of questions referred to the Supreme Court by the Governor-General in Council. The question relating to New Brunswick, p. 39, was:—

'In determining the number of representatives in the House of Commons, to which . . . . . New Brunswick . . . . . is entitled after each decennial census, should the words "aggregate population of Canada" in sub-s. 4 of s. 51 of the British North America Act, 1867, be construed as meaning the population of the four original provinces of Canada, or as meaning the whole population of Canada, including that of provinces which had been admitted to the Confederation subsequent to the passage of the British North America Act?'

Sir Arthur Wilson, delivering the judgment of the Committee, pp. 49-50, said:—

'The scheme of s. 51 is clear and simple. In directing a re-adjustment of representation after each decennial census, it provides that Quebec is to have a fixed number of sixty-five representatives, and that each of the other provinces is to have assigned to it a number of representatives bearing the same proportion to its population as sixty-five bears to that of Quebec. This is the enactment by virtue of which the number of representatives of any province can be increased or diminished, and this is the enactment which furnishes the rule for such a change. Nor is there any dispute that upon the principle so laid down taken by itself the reduction in the number of representatives of New Brunswick was right.

'The question arises upon sub-s. 4, a sub-section which introduces a restriction or qualification upon what has gone before, by saying that on any re-adjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the last preceding re-adjustment is ascertained to be diminished by one-twentieth part or upwards. And the point is as to the meaning of the words "the aggregate population of Canada." By s. 4 Canada is defined as meaning "unless it is otherwise expressed or implied . . . Canada as constituted under this Act." Under the scheme of the Act the Dominion was not constituted by the immediate operation of the Act itself. The territory included in the four original provinces was incorporated by proclamation issued under the authority of s. 3. The territory included in the provinces subsequently incorporated was admitted by orders-in-council issued under s. 146. In their Lordships' opinion all these provinces equally form part of Canada as constituted under the Act.

'The contentions raised on behalf of New Brunswick were these:—First, it was said that in sub-s. 4 of s. 51 Canada means only the four original provinces. This contention seems to their Lordships inconsistent with s. 4. It was next said that Canada, in sub-s. 4 of s. 51, could at most only apply to such provinces as were in the fullest sense themselves governed by that section, and that by reason of the terms of incorporation already cited, this was not the case with regard to each of the three provinces admitted since the original formation of the

Dominion. Whatever be the case with regard to the latter part of this contention, it seems clear that the provinces in question form part of Canada as constituted under the Act.

'Lastly, it was contended that the territories should be excluded in estimating the aggregate population of Canada under sub-s. 4. It is doubtful, however, whether this point properly arises on the question submitted to the Supreme Court. It was not suggested that the exclusion of the territories from the calculation could have affected the result of the re-adjustment, and the Supreme Court has rightly not dealt with this matter.'

Reduction of Representation of P. E. Island.—The question raised by the same case, relating to Prince Edward Island, p. 38, was:—

'Although the population of Prince Edward Island, as ascertained at the census of 1901, if divided by the unit of representation ascertained by dividing the number of 65 into the population of Quebec is not sufficient to give six members in the House of Commons of Canada to that province, is the representation of Prince Edward Island in the House of Commons of Canada liable under the British North America Act, 1867, and amendments thereto, and the terms of union of 1873 under which that province entered Confederation, to be reduced below six, the number granted to that province by the said terms of union of 1873 ?'

Sir Arthur Wilson, pp. 50-1, having already disposed of the question as to New Brunswick, said:—

'The case put forward on behalf of Prince Edward Island was somewhat wider in its scope. It was suggested that s. 51 applies only to the distribution of representatives between the four original provinces. But the terms on which Prince Edward Island was incorporated expressly declared that its representation was "to be re-adjusted from time to time under the provisions of the British North America Act, 1867.'

'It was further argued that, supposing s. 51 to apply to Prince Edward Island, still it was not liable to have the number of its representatives reduced in 1903 for the following reasons: that by the terms of sub-s. 4, there could be no reduction on any decennial adjustment unless there was a previous re-

adjustment to afford a comparison, so that for any province the first re-adjustment could not entail a reduction though it might permit of an increase, that there was no re-adjustment for any province unless its representation was altered, and that, therefor, by the combined operation of s. 51 and of the terms on which Prince Edward Island entered the Confederation, its representation could not be reduced unless it had been previously increased.

'This argument assumes that there has been no re-adjustment for any province unless there has been alteration. Their Lordships think this is to give too narrow a meaning to the word. In their opinion, when as the result of a census the representation of the provinces is reconsidered and the necessary changes, if any, made to bring it into harmony with the results of the census, that is a re-adjustment within the meaning of sub-s. 4, whether there be or be not any change in the case of any particular province.'

Increase of number of House of Commons.

52. The Number of Members of the House of Commons may be from Time to Time increased by the Parliament of *Canada*, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

Money Votes; Royal Assent.

Appropriation and tax Bills.

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Recommendation of money votes.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

Royal Assent to Bills, etc.

55. Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

Disallowance by order in Council of Act assented to by Governor General.

56. Where the Governor General assents to a Bill in the Queen's Name; he shall by the first convenient Opportunity send an authentic Copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

Signification of Queen's pleasure on Bill reserved.

57. A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of *Canada*.

V.—Provincial Constitutions.

Executive Power.

Appointment of Lieutenant Governors of Provinces.

58. For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of *Canada*.

The Lieutenant-Governors directly represent His Majesty. —In *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, 1892 A.C., 437, the bank having stopped payment, the question came before the Judicial Committee upon appeal as to whether the provincial government, as a simple contract creditor, was entitled to payment in full over the other depositors and simple contract creditors of the bank.

Lord Watson, delivering the judgment, p. 441, said:—

'The Supreme Court of Canada had previously ruled, in *Reg. v. Bank of Nova Scotia*, 11 S.C.R., 1, that the Crown, as a simple contract creditor for public moneys of the Dominion

deposited with a provincial bank, is entitled to priority over other creditors of equal degree. The decision appears to their Lordships to be in strict accordance with constitutional law. The property and revenues of the Dominion are vested in the Sovereign subject to the disposal and appropriation of the legislature of Canada; and the prerogative of the Queen, when it has not been expressly limited by local law or statute is as extensive in Her Majesty's colonial possessions as in Great Britain. In *Exchange Bank of Canada v. The Queen*, 11 A.C., 157, this Board disposed of the appeal on that footing, although their Lordships reversed the judgment of the Court below, and negatived the preference claimed by the Dominion government upon the ground that by the law of the province of Quebec, the prerogative was limited to the case of the common debtor being an officer liable to account to the Crown for public moneys collected or held by him. The appellants did not impeach the authority of these cases, and they also conceded that, until the passing of the British North America Act, 1867, there was precisely the same relation between the Crown and the province which now subsists between the Crown and the Dominion. But they maintained that the effect of the statute has been to sever all connection between the Crown and the provinces; to make the government of the Dominion the only government of Her Majesty in North America; and to reduce the provinces to the rank of independent municipal institutions. For these propositions, which contain the sum and substance of the arguments addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority.

'Their Lordships do not think it necessary to examine in minute detail, the provisions of the Act of 1867 which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces.'

His Lordship proceeded to refer to the general object and effect of the Act, showing that the legislative functions of the provinces, within the limits prescribed, were in nowise subordinate to the Dominion, and, p. 443, he continued:—

'It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the imperial legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share.

'In asking their Lordships to draw that inference from the terms of the statute, the appellants mainly, if not wholly, relied upon the fact that, whereas the Governor-General of Canada is directly appointed by the Queen, the lieutenant-governor of a province is appointed not by Her Majesty, but by the Governor-General who has also the power of dismissal. If the Act had not committed to the Governor-General the power of appointing and removing lieutenant-governors, there would have been no room for the argument which, if pushed to its logical conclusion, would prove that the Governor-General and not the Queen, whose viceroy he is, became the sovereign authority of the province whenever the Act of 1867 came into operation. But the argument ignores the fact that, by s. 58, the appointment of a provincial governor is made by the "Governor-General in Council by instrument under the great seal of Canada," or, in other words, by the executive government of the Dominion which is, by s. 9, expressly declared "to continue and be vested in the Queen." There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. 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.'

Tenure of office of Lieutenant Governor.

59. A Lieutenant Governor shall hold Office during the Pleasure of the Governor General; but any Lieutenant Governor appointed after the Commencement of the First Session of the Parliament of *Canada* shall not be removable within Five Years from his Appointment, except for Cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons within One Week thereafter if the Parliament is then sitting, and if not then within One Week after the Commencement of the next Session of the Parliament.

Salaries of Lieutenant Governors.

60. The Salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of *Canada*.

Oaths, &c., of Lieu-

61. Every Lieutenant Governor shall, before assuming the Duties of his Office, make and subscribe before the

tenant Governor. Governor General or some Person authorized by him, Oaths of Allegiance and Office similar to those taken by the Governor General.

Application of provisions referring to Lieutenant Governor.

62. The Provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the Time being of each Province or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

Appointment of Executive Officers for Ontario and Quebec.

63. The Executive Council of *Ontario* and of *Quebec* shall be composed of such Persons as the Lieutenant Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely,—the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with in Quebec the Speaker of the Legislative Council and the Solicitor General.

Executive Government of Nova Scotia and New Brunswick.

64. 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.

Powers to be exercised by Lieutenant Governor of Ontario or Quebec with advice or alone.

65. 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 Legislatures 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 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, with the Advice, or with the Advice and Consent of or in conjunction with the respective Executive Councils, or any Members thereof, or by the Lieutenant Governor individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of *Great Britain*, or of the Parliament of the United Kingdom of

Great Britain and *Ireland*,) to be abolished or altered by the respective Legislatures of *Ontario* and *Quebec*.[1]

Section 65 as affecting Legislative Powers.—In *Attorney-General for Quebec v. Reed*, 10 A.C., 141, it was argued that the Quebec legislation, 43-44 V., c. 9, which imposed a duty of ten cents upon every exhibit filed in court in any action pending therein, might be supported under s. 65.

Lord Selborne, L.C., delivering the judgment of the Committee, pp. 145-6, said:—

'With regard to the third argument, which was founded upon the 65th section of the Act, it was one not easy to follow, but their Lordships are clearly of opinion that it cannot prevail. The 65th section preserves the pre-existing powers of the governors or lieutenant-governors in council, to do certain things not there specified. That, however, was subject to a power of abolition or alteration by the respective legislatures of Ontario and Quebec, with the exception, of course, of what depended on imperial legislation. Whatever powers of that kind existed, the Act with which their Lordships have to deal neither abolishes nor alters them. It does not refer to them in any manner whatever. It is said that among those powers, there was a power not taken away to lay taxes of this very kind upon legal proceedings in the courts, not for the general revenue purposes of the province, but for the purpose of forming a special fund, called "the building and jury fund," which was appropriated for purposes connected with the administration of justice. What has been done here is quite a different thing. It is not by the authority of the Lieutenant-Governor in Council. It is not in aid of the building and jury fund. It is a legislative Act without any reference whatever to those powers if they still exist, quite collateral to them; and if they still exist, and if it exists itself, capable of being exercised concurrently with them; to tax for the general purposes of the province, and in aid of the general revenue, these legal proceedings.

'It appears to their Lordships that, unless it can be justified under the 92nd section of the British North America Act, it cannot be justified under the 65th.'

Appointment of Queen's Counsel.—In *Attorney-General for Canada v. Attorney-General for Ontario* (the *Queen's Counsel*

[1] This section, like s. 12, applies in terms only to statutory powers.

Case), 1898 A.C., 253, Lord Watson, delivering the judgment of the Committee, said:—

'In the province of Ontario the right of appointing Queen's Counsel has been committed to the Lieutenant-Governor by an Act passed by the provincial parliament with the sanction of the Crown. 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 s. 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 may be necessary for the government and administration of the new province of Ontario.'

Application of provisions referring to Lieutenant Governor in Council.

66. The Provisions of this Act referring to the Lieutenant Governor in Council shall be construed as referring to the Lieutenant Governor of the Province acting by and with the Advice of the Executive Council thereof.

Administration in absence, &c., of Lieutenant Governor.

67. The Governor General in Council may from Time to Time appoint an Administrator to execute the Office and Functions of Lieutenant Governor during his Absence, Illness or other Inability.

Seats of Provincial Governments.

68. Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the Seats of Government of the Provinces shall be as follows, namely,—of *Ontario*, the City of *Toronto*; of *Quebec*, the City of *Quebec;* of *Nova Scotia*, the City of *Halifax*; and of *New Brunswick*, the City of *Fredericton*.

Legislative Power.

1.—*ONTARIO.*

Legislature for Ontario.

69. There shall be a Legislature for *Ontario* consisting of the Lieutenant Governor and of One House, styled the Legislative Assembly of *Ontario*.

Electoral districts.

70. The Legislative Assembly of *Ontario* shall be composed of Eighty-two Members, to be elected to represent the Eighty-two Electoral Districts set forth in the First Schedule to this Act.

2.—*QUEBEC.*

Legislature for Quebec.

71. There shall be a Legislature for *Quebec*, consisting of the Lieutenant Governor and of Two Houses, styled the Legislative Council of *Quebec* and the Legislative Assembly of *Quebec*.

Constitution of Legislative Council.

72. The Legislative Council of *Quebec* shall be composed of twenty-four Members, to be appointed by the Lieutenant Governor in the Queen's Name, by Instrument under the Great Seal of *Quebec*, one being appointed to represent each of the Twenty-four Electoral Divisions of *Lower Canada* in this Act referred to, and each holding Office for the Term of his Life, unless the Legislature of *Quebec* otherwise provides under the Provisions of this Act.

Qualification of Legislative Councillors.

73. The Qualifications of the Legislative Councillors of *Quebec* shall be the same as those of the Senators for *Quebec*.

Resignation, Disqualification, &c.

74. The Place of a Legislative Councillor of *Quebec* shall become vacant in the Cases, *mutatis mutandis*, in which the Place of Senator becomes vacant.

Vacancies.

75. When a Vacancy happens in the Legislative Council of *Quebec* by Resignation, Death, or otherwise, the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of *Quebec*, shall appoint a fit and qualified Person to fill the Vacancy.

Questions as to Vacancies, &c.

76. If any Question arises respecting the Qualification of a Legislative Councillor of *Quebec*, or a Vacancy in the Legislative Council of *Quebec*, the same shall be heard and determined by the Legislative Council.

Speaker of Legislative Council.

77. The Lieutenant Governor may from Time to Time, by Instrument under the Great Seal of *Quebec*, appoint a Member of the Legislative Council of *Quebec* to be Speaker thereof, and may remove him and appoint another in his Stead.

Quorum of Legislative Council.

78. Until the Legislature of *Quebec* otherwise provides, the Presence of at least Ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a Meeting for the Exercise of its Powers.

Voting in Legislative Council.

79. Questions arising in the Legislative Council of *Quebec* shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the negative.

Constitution of Legislative Assembly of Quebec.

80. The Legislative Assembly of *Quebec* shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts of Lower *Canada* in this Act referred to, subject to Alteration thereof by the Legislature of *Quebec*: Provided that it shall not be lawful to present to the Lieutenant Governor of *Quebec* for Assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed in the Legislative Assembly with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed.

3.—*ONTARIO AND QUEBEC.*

First Session of Legislatures.

81. The Legislatures of *Ontario* and *Quebec* respectively shall be called together not later than Six Months after the Union.

Summoning of Legislative Assemblies.

82. The Lieutenant Governor of *Ontario* and of *Quebec* shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

Restriction on election of holders of offices.

83. Until the Legislature of *Ontario* or of *Quebec* otherwise provides, a Person accepting or holding in *Ontario* or in *Quebec* any Office, Commission, or Employment permanent or temporary, at the Nomination of the Lieutenant Governor, to which an annual Salary, or any Fee, Allowance, Emolument, or profit of any Kind or Amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any Person being a Member of the Executive Council of the respective Province, or holding any of the following Offices, that is to say, the Offices of Attorney General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in *Quebec* Solicitor General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such Office.

Continuance of existing election Laws.

84. Until the Legislatures of *Ontario* and *Quebec* respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following Matters, or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of *Canada*, the Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the Trial of controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members and the issuing and Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of *Ontario* and *Quebec*.

Provided that until the Legislature of *Ontario* otherwise provides, at any Election for a Member of the Legislative Assembly of *Ontario* for the District of *Algoma*, in addition to Persons qualified by the Law of the Province of *Canada* to vote, every British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.

Duration of Legislative Assemblies.

85. Every Legislative Assembly of *Ontario* and every Legislative Assembly of *Quebec* shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of *Ontario* or the Legislative Assembly of *Quebec* being sooner dissolved by the Lieutenant Governor of the Province), and no longer.

Yearly Session of Legislature.

86. There shall be a session of the Legislature of *Ontario* and of that of *Quebec* once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Legislature in each Province in one Session and its first Sitting in the next Session.

Speaker, Quorum, &c.

87. The following Provisions of this Act respecting the House of Commons of *Canada* shall extend and apply to the Legislative Assemblies of *Ontario* and *Quebec*, that is to say,—the Provisions relating to the Election of a Speaker originally and on Vacancies, the Duties of the Speaker, the absence of the Speaker, the Quorum, and the mode of voting, as if those Provisions were here re-enacted and made applicable in Terms to each such Legislative Assembly.

4.—*NOVA SCOTIA AND NEW BRUNSWICK.*

Constitutions of Legislatures of Nova Scotia and New Brunswick.

88. The Constitution of the Legislature of 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; and the House of Assembly of *New Brunswick* existing at the passing of this Act shall, unless sooner dissolved, continue for the Period for which it was elected.

Existing Constitutions Preserved.—In *Fielding v. Thomas*, 1896 A.C., 600, the House of Assembly of Nova Scotia had committed the respondent to the common gaol for contempt in having intentionally disobeyed an order of the House, and he brought an action against the members who voted for the resolution leading to his imprisonment. The acts complained of were justified under R.S., 5th Series, c. 3, ss. 20, 29, 30 and 31, whereby the House of Assembly took the like privileges, immunities and powers as should from time to time be held, enjoyed or exercised by the House of Commons of Canada; and the members were declared to be not liable to any civil action, prosecution or damages by reason of any matter or thing brought or said by them before the House by petition, bill, resolution, motion or otherwise. The House was also declared to be a court of record for the purpose of summarily inquiring into and punishing violations or infringements of the Act.

Their Lordships held that if these provisions were *intra vires* of the legislature there could be no doubt that the House had the power which it had exercised with regard to the respondent.

Lord Halsbury, L.C., delivering the judgment, pp. 609-10, said:—

'According to the decisions which have been given by this Board there is no doubt that the provincial legislature could not confer on itself the privileges of the House of Commons of the United Kingdom or the power to punish the breach of those privileges by imprisonment or committal for contempt without express authority from the imperial legislature. By s. 1 of 38 and 39 V., c. 38, which was substituted for s. 18 of the

British North America Act, 1867, it was enacted that the privileges, immunities and powers to be held, enjoyed and exercised by the Dominion House of Commons should be such as should be from time to time defined by the Act of Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities or powers should not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof. There is no similar enactment in the British North America Act, 1867, relating to the House of Assembly of Nova Scotia and it was argued therefore that it was not the intention of the imperial Parliament to confer such a power on that legislature. But it is to be observed that the House of Commons of Canada was a legislative body created for the first time by the British North America Act, and it may have been thought expedient to make express provision for the privileges, immunities and powers of the body so created which was not necessary in the case of the existing legislature of Nova Scotia. By s. 88 the constitution of the legislature of the province of Nova Scotia was, subject to the provisions of the Act, to continue as it existed at the Union until altered by authority of the Act. It was therefore an existing legislature subject only to the provisions of the Act. By s. 5 of the Colonial Laws Validity Act (28-29 V., c. 63)[1] it had at that time full power to make laws respecting its constitution, powers and procedure. It is difficult to see how this power was taken away from it and the power seems sufficient for the purpose.'

5.—*ONTARIO, QUEBEC, AND NOVA SCOTIA.*

First Elections.

89. Each of the Lieutenant Governors of *Ontario, Quebec* and *Nova Scotia* shall cause Writs to be issued for the First Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such Time and addressed to such Returning Officer as the Governor General directs, and so that the First Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of *Canada* for that Electoral District.

[1] The Colonial Laws Validity Act is printed at length in the Appendix.

6.—*THE FOUR PROVINCES.*

Application to Legislatures of provisions respecting money votes, &c.

90. The following Provisions of this Act respecting the Parliament of *Canada*, namely,—the Provisions relating to the Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for *Canada*.

Substitution of Terms.—The provisions respecting the Parliament of Canada in this section referred to are contained in ss. 53-57. The letter of s. 90 seems to require that, making the substitutions as directed, these sections should read, in their application to provincial proceedings, as follows:—(The substituted words are printed in italics.)

Money Votes; Royal Assent. Provincial.

Appropriation and tax Bills.

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of *Assembly*.

Recommendation of money votes.

54. It shall not be lawful for the House of *Assembly* to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the *Lieutenant Governor of the Province* in the Session in which such Vote, Resolution, Address, or Bill is proposed.

Governor General's Assent to Bills, &c.

55. Where a Bill passed by the *House or Houses of the Legislature* is presented to the *Lieutenant Governor of the Province* for the *Governor General's* Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to the *Governor General's* Instructions, either that he assents thereto in the *Governor General's* Name, or that he withholds the *Governor General's* Assent, or that he reserves the Bill for the Signification of the *Governor General's* Pleasure.

Disallowance by order-in-Council of Act assented to by Lieutenant-Governor.

56. Where the *Lieutenant Governor of the Province* assents to a Bill in the *Governor General's* Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to the *Governor General*, and if the *Governor General* in Council within *One Year* after Receipt thereof by the *Governor General* thinks fit to disallow the Act, such Disallowance (with a Certificate of the *Governor General* of the Day on which the Act was received by him) being signified by the *Lieutenant Governor*, by Speech or Message to *the House, or, if more than one, to* each of the Houses of the *Legislature*, or by Proclamation, shall annul the Act from and after the Day of such Signification.

Signification of Governor General's pleasure on Bill reserved.

57. A Bill reserved for the Signification of the *Governor General's* Pleasure shall not have any Force unless and until within *One Year* from the Day on which it was presented to the *Lieutenant Governor* for the *Governor General's* Assent, the *Lieutenant Governor* signifies, by Speech or Message to *the House, or, if more than one, to* each of the Houses of the *Legislature* or by Proclamation, that it has received the Assent of the *Governor General* in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal *of the House, or* of each House, *if more than one*, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of *the Province*.

Whether or not this is a correct rendering of these sections, and whether or not, having regard to the judgment of the Judicial Committee in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, 1892 A.C., 437, the Committee would require a more limited substitution of terms, are questions which the Committee has not expressly determined. We know that a 'lieutenant-governor when appointed is as much the representative of His Majesty for all purposes of provincial government, as the Governor-General himself is for all purposes of Dominion government.' Yet he is by statute a *lieutenant*-governor, and therefore nominally subordinate; and also by statute, unless the words of s. 90 are to be limited by interpretation, his legislative acts take effect in the name of the Governor-General, who exercises upon the advice of the King's Privy Council for Canada the power of

disallowance. Perhaps in the present circumstances it may be assumed that a lieutenant-governor may, consistently with his quality as representative of His Majesty for all purposes of provincial government, assent to bills in the name of the Governor-General.

The practice in fact varies in the provinces. In Nova Scotia the enacting clause runs in the name of 'the Governor'; in New Brunswick and Prince Edward Island in the name of 'the Lieutenant-Governor'; while in the other provinces it is in the name of 'His Majesty.'

VI.—Distribution of Legislative Power.

Powers of the Parliament.

Legislative Authority of Parliament of Canada.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government[1] of *Canada*, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of *Canada* extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:—

Apparent Conflict between ss. 91 and 92.—In *Citizens and Queen Insurance Companies v. Parsons*, 7 A. C., 107–8, Sir Montague Smith, delivering the judgment of the Board, stated in effect that since it was foreseen that some of the classes of subjects assigned to the provincial legislatures would unavoidably run into and be embraced by some of the enumerated classes of subjects in s. 91, an endeavour appears to have been made to provide for cases of apparent conflict, and that with this object it was declared in the second branch of s. 91 '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

[1] As to effect of the words 'peace, order and good government,' see the observations of Lord Halsbury, L.C., in *Riel v. Regina*, 10 A.C., 678-9, *infra*, pp. 257-8.

of the Parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section, and that with the same object apparently the paragraph at the end of s. 91 was introduced.

Companies.—Inasmuch as the Judicial Committee has affirmed that the authority of the Dominion Parliament to create companies for the purpose of carrying on business throughout the Dominion, or within two or more of the provinces, belongs to the Dominion under its general powers of legislation, the decisions as to the authority of Parliament relating to the incorporation and powers of such companies are grouped under the introductory clause of s. 91. It does not necessarily follow, however, that the power may not definitely rest upon the specific enumeration—'The regulation of trade and commerce.'

In *Dobie v. Temporalities Board,* 7 A. C., 136, a question arose as to whether the legislature of Quebec had the power to modify or repeal the enactments of a statute of the old province of Canada (22 V., c. 66) entitled 'An Act to incorporate the Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland.'

Lord Watson, delivering the judgment of the Committee, pp. 151–2, said:—

'Respondents further maintained that the legislature of Quebec had power to pass the Act of 1875, in respect of these special circumstances: (1), that the domicile and principal office of the Temporalities board is in the City of Montreal; and (2), that its funds also are held or invested within the province of Quebec. These facts are admitted on record by the appellant, but they do not affect the question of legislative power. The domicile of the corporation is merely forensic, and cannot alter its statutory constitution as a board in and for the provinces of Upper Canada and Lower Canada. Neither can the accident of its funds being invested in Quebec give the legislature of that province authority to change the constitution of a corporation with which it would otherwise have no right to interfere. When funds belonging to a corporation in Ontario are so situ-

ated or invested in the province of Quebec, the legislature of Quebec may impose direct taxes upon them for provincial purposes, as authorized by s. 92 (2), or may impose conditions upon the transfer or realization of such funds; but that the Quebec legislature shall have power also to confiscate these funds, or any part of them, for provincial purposes, is a proposition for which no warrant is to be found in the Act of 1867.

'Last of all, it was argued for the respondents that, assuming the incompetency of either provincial legislature, acting singly, to interfere with the Act of 1858, that statute might be altered or repealed by their joint and harmonious action. The argument is based upon fact, because, in the year 1874, the legislature of Ontario passed an Act (38 V., c. 75), authorizing the union of the four churches, and containing provisions in regard to the Temporalities fund and its board of management, substantially the same with those of the Quebec Act, 38 V., c. 62, already referred to. It is difficult to understand how the maxim *juncta juvant* is applicable here, seeing that the power of the provincial legislature to destroy a law of the old province of Canada is measured by its capacity to reconstruct what it has destroyed. If the legislatures of Ontario and Quebec were allowed jointly to abolish the board of 1858, which is one corporation in and for both provinces, they could only create in its room two corporations, one of which would exist in and for Ontario and be a foreigner in Quebec, and the other of which would be foreign to Ontario, but a domestic institution in Quebec. Then the funds of the Ontario corporation could not be legitimately settled upon objects in the province of Quebec, and as little could the funds of the Quebec corporation be devoted to Ontario, whereas the Temporalities fund falls to be applied either in the province of Quebec or in that of Ontario, and that in such amounts or proportions as the needs of the Presbyterian Church of Canada in connection with the Church of Scotland, and of its ministers and congregations, may from time to time require. The Parliament of Canada is, therefore, the only legislature having power to modify or repeal the provisions of the Act of 1858.'

In *Citizens and Queen Insurance Companies v. Parsons,* 7 A.C., 96, there was a controversy as to the application of general provincial legislation, providing for uniform conditions in policies of insurance contracted in Ontario. The Citizens Insurance Company, one of the appellants, was originally in-

corporated by an Act of the late province of Canada, 19-20 V., c. 124, by the name of the Canada Marine Insurance Company. By another Act of the late province, 27-28 V., c. 98, further powers, including the power of effecting contracts of insurance against fire, were conferred on the company, and its name was changed to the Citizens' Insurance and Investment Company; and finally by an Act of the Dominion Parliament, 39 V., c. 55, the company's name was again changed to its defendant title, and it was provided that the company, by its new name, should enjoy all the franchises, privileges and rights, and be subject to all the liabilities of the company under its former name.

The Queen Insurance Company, the other appellant, was an English fire and life insurance company, incorporated under the provisions of the Joint Stock Companies' Act of the imperial Parliament, 7-8 V., c. 110. This company had its principal office in England, and carried on business in Canada.

Sir Montague Smith, delivering the judgment of the Committee, pp. 113-4, said:—

'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.'

Sir Montague Smith further, pp. 116-7, said:—

'Taschereau, J., in the course of his vigorous judgment, seeks to place the plaintiff in the action against the Citizens Company in a dilemma. He thinks that the assertion of the right of the province to legislate with regard to the contracts of insurance companies amounts to a denial of the right of the Dominion Parliament to do so, and that this is, in effect, to

deny the right of that Parliament to incorporate the Citizens Company, so that the plaintiff was suing a non-existent defendant. Their Lordships cannot think that this dilemma is established. The learned Judge assumes that the power of the Dominion Parliament to incorporate companies to carry on business in the Dominion is derived from one of the enumerated classes of subjects, viz., "The regulation of trade and commerce," and then argues that if the authority to incorporate companies is given by this clause, the exclusive power of regulating them must also be given by it, so that the denial of one power involves the denial of the other. But, in the first place, it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislatures being "The incorporation of companies with provincial objects," it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada. But it by no means follows (unless indeed the view of the learned Judge is right as to the scope of the words "the regulation of trade and commerce") that because the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion, that it alone has the right to regulate its contracts in each of the provinces. Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended, if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over "property and civil rights in the province") that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed mortmain Acts, though the corporation would still exist and preserve its status as a corporate body.'

In *Colonial Building and Investment Association v. Attorney-General of Quebec*, 9 A.C., 157, the company was incor-

porated by an Act of the Parliament of Canada, 37 V., c. 103, with power to acquire and hold real estate, construct buildings, sell and dispose of the said property, and lend money on security of mortgages upon real estate or on stocks. The chief office of the company was to be in the city of Montreal, but the company was authorized to establish branch offices or agencies throughout the Dominion, and in London and New York, for such purposes as the directors might determine. It appeared that the operations of the company had been carried on only in the province of Quebec, and it was objected that the incorporation of the company was illegal as *ultra vires* of Parliament, and that it had no authority to carry on its business in a single province.

Sir Montague Smith, delivering the judgment of the Committee, pp. 164-5, said:—

'Their Lordships cannot doubt that the majority of the Court was right in refusing to hold that the association was not lawfully incorporated. Although the observations of this Board in the *Citizens Insurance Company of Canada v. Parsons*, 7 A. C. 96, referred to by the Chief Justice, put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and provincial legislatures in regard to the incorporation of companies.

'It is asserted in the petition, and was argued in the Courts below, and at this bar, that inasmuch as the association had confined its operations to the province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the provincial legislature. But surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the association was originally within the legislative power of the Dominion Parliament. 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; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation,

nor warrant the judgment prayed for, viz.: that the company be declared to be illegally constituted.'[1]

By the judgment of the Court of Queen's Bench it had been declared that the association had no right to act as a corporation in respect of its most important operations within the province of Quebec, and the association was thereby prohibited from so acting within the province. Upon this point Sir Montague Smith, pp. 165-7, said:—

'It was not disputed by the counsel for the Attorney-General that, on the assumption that the corporation was duly constituted, the prohibition was too wide, and embraced some matters which might be lawfully done in the province, but it was urged that the operations of the company contravened the provincial law, at the least, in two respects, viz., in dealing in land, and in acting in contravention of the building Acts of the province.

'It may be granted that, by the law of Quebec, corporations cannot acquire or hold lands without the consent of the Crown. This law was recognized by this Board, and held to apply to foreign corporations in the case of the *Chaudière Gold Mining Company v. Desbarats*, L.R. 5, P. C., 277. It may also be assumed, for the purpose of this appeal, that the power to repeal or modify this law falls within No. 13 of s. 92 of the British North America., viz., 'Property and civil rights within the province,' and belongs exclusively to the provincial legislature; so that the Dominion Parliament could not confer powers on the company to override it. But the powers found in the Act of incorporation are not necessarily inconsistent with the provincial law of mortmain, which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown. If that consent be obtained, a corporation does not infringe the provincial law of mortmain by acquiring and holding lands. 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, viz., throughout the Dominion. Among other things, it has

[1] To the same effect is the decision in *Corporation of the City of Toronto v. Bell Telephone Company of Canada*, 1905 A.C., 56-9. See also *Grand Trunk Railway Company v. Attorney-General of Canada*, 1907 A.C., 67-9. These decisions are quoted *infra* under s. 91 (29).

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 so acquire and hold it, the Act of incorporation gives it capacity to do so.

'It is said, however, that the company has, in fact, violated the law of the province by acquiring and holding land without having obtained the consent of the Crown. It may be so, but this is not the case made by the petition. Proceedings founded on the alleged violation, by a corporation, of the mortmain laws, would involve an inquiry opening questions (some of which were touched upon in the arguments at the bar) regarding the scope and effect of these laws, the fact of the Crown's consent, the nature and sufficiency of the evidence of it, the consequences of a violation of the laws, and the proper parties to take advantage of it; questions which are certainly not raised by the allegations and conclusions of this petition.

'So with respect to the objections founded on the Acts of the province with regard to building societies. Chief Justice Dorion appears to be of opinion that, inasmuch as the legislature of the province had passed Acts relating to such societies, and defined and limited their operations, the Dominion Parliament was incompetent to incorporate the present association, having for one of its objects the erection of buildings throughout the Dominion. Their Lordships, at present, fail to see how the existence of these provincial Acts, if competently passed for local objects, can interfere with the power of the Dominion Parliament to incorporate the association in question.'

The Liquor Traffic.—In *Russell v. The Queen*, 7 A.C., 829, Sir Montague Smith, delivering the judgment, held that the Canada Temperance Act does not delegate any powers of legislation, but that it contains within itself the whole legislation on the matters with which it deals; that the provision that the second part of the Act shall come into operation in any district only by petition of a majority of the electors does not confer on these persons the power to legislate, and that the power cannot be denied to the Parliament of Canada to legislate conditionally when the subject of the legislation is within its competency.

His Lordship referred to the enumerations of s. 92, and held that the subject of the Act did not fall within any of these. He referred to the rules for the construction of ss. 91 and 92 laid down in *Citizens and Queen Insurance Company v. Parsons, supra,* and he said that it could not be contended, and indeed was not contended, that if the Act did not fall within one of the classes of subjects assigned to the provincial legislatures, the Parliament of Canada had not authority to pass it by virtue of its general power to make laws for the peace, order and good government of Canada.

His Lordship concluded that the Act was competent to the Parliament of Canada, although it was unnecessary to discuss the question as to whether its provisions fell within any of the classes of subjects enumerated in s. 91.

The Canada Temperance Act was by the subsequent decision in *Attorney-General for Ontario v. Attorney-General for Canada* (the *Prohibition Case*) 1896 A.C., 348, referred to the general powers of the Dominion Parliament in respect of the peace, order and good government of Canada. The legislation does not therefore, notwithstanding the observations of their Lordships in *Russell v. The Queen,* rest upon the execution of Dominion powers with regard to the criminal law, although having, as stated by their Lordships, direct relation thereto, nor upon the power of the regulation of trade and commerce.

In *Hodge v. The Queen,* 9 A.C., 128-30, it was contended for the appellant that the decision of the Committee in *Russell v. The Queen* was conclusive that the whole subject of the liquor traffic was given to the Dominion Parliament and consequently taken away from the legislatures. Sir Barnes Peacock, delivering the judgment, said that the sole question in *Russell v. The Queen* 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, and that it was not doubted that the Dominion Parliament had such authority under s. 91, unless the subject

fell within some one or more of the classes of subjects by s. 92 assigned exclusively to the legislatures. He quoted from the judgment, and concluded:—'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,* 7 A.C., 96, illustrate is, that subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91.'

Subsequently an Act was passed by the Dominion Parliament known as the Liquor License Act, 1883, (46 V., c. 30). It proceeded upon the recital that it was desirable to regulate the traffic and sale of intoxicating liquors, 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. The Act was amended in the following year, (47 V., c. 32).

By this Act the sale of liquor by wholesale or retail was prohibited except where licensed under the authority of the Act, and provision was made for the issue by the Governor-in-Council of licenses for the sale of liquor in hotels, saloons, shops, vessels and by wholesale.

Two questions were by the Governor-General in Council referred to the Supreme Court of Canada for determination pursuant to s. 26 of the amending Act,—first, whether the Liquor License Act, 1883, and the amending Act of 1884, were in whole or in part within the legislative authority of the Parliament of Canada; and secondly, if in part only within such legislative authority, as to what part or parts of the said Acts were competent to the Parliament.

The Supreme Court was of opinion that these Acts were, with the exception of certain sections, *ultra vires.* Upon appeal to the Judicial Committee their Lordships, as appears from the Queen's order of 12th December, 1885, reported to Her Majesty—'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.'

The grounds of the decision are, however, not reported.

In the *Prohibition Case*, 1896 A.C., 348, Lord Watson, delivering the judgment of the Board, pp. 360-2, said:—

'The general authority given to the Canadian Parliament by the introductory enactments of s. 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 s. 92, which is enacted by the concluding words of s. 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 s. 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 s. 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 s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 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 s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

'In construing the introductory enactments of s. 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 s. 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 s. 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. 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.

'The judgment of this board in *Russell v. Reg.*, 7 A.C., 829, 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 clauses 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 Lordships' opinion, equally applicable to the later Act. It therefore appears to them that the decision in *Russell v. Reg., supra,* 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.'

His Lordship proceeded to state that the authority of the Dominion Parliament to enact the Canada Temperance Act was not derived from s. 91 (2) 'The regulation of trade and commerce'; and it certainly follows from the judgment that the Act is upheld merely as an execution of the general power of Parliament to legislate for the peace, order and good government of Canada.

Questions had in the *Prohibition Case* been referred to the Supreme Court of Canada by the Governor-General in Council. The seventh question was:—

'(7) Has the Ontario legislature jurisdiction to enact s. 18 of Ontario Act, 53 V., c. 56, intituled "An Act to improve the Liquor License Acts" as said section is explained by Ontario Act, 54 V., c. 46, intituled "An Act respecting local option in the matter of liquor selling."

S. 18 is as follows:

'18. Whereas the following provision of this section was at the date of Confederation in force as a part of the Consolidated Municipal Act (29th and 30th Victoria, chapter 51, section

249, sub-section 9), and was afterwards re-enacted as sub-section 7 of section 6 of 32nd Victoria, chapter 32, being the Tavern and Shop License Act of 18[illegible], but was afterwards omitted in subsequent consolidations of the Municipal and the Liquor License Acts, similar provisions as to local prohibition being contained in the Temperance Act of 1864, 27th and 28th Victoria, chapter 18; and the said last mentioned Act having been repealed in municipalities where not in force by the Canada Temperance Act, it is expedient that municipalities should have the powers by them formerly possessed; it is hereby enacted as follows:—

'The council of every township, city, town and incorporated village may pass by-laws for prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any tavern, inn, or other house or place of public entertainment, and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment: Provided that the by-law before the final passing thereof has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act: Provided further that nothing in this section contained shall be construed into an exercise of jurisdiction by the legislature of the province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal.'

The Act 54 V., c. 46, declares that s. 18 was not intended to affect the provisions of s. 252 of the Consolidated Municipal Act, being an Act of the old province of Canada, 29-30 V., c. 51, relating to sales of liquor in original packages of not less than five gallons or one dozen bottles.

Lord Watson, delivering the judgment, pp. 356-8, thus explains the provisions of the Temperance Act of 1864, and of the Canada Temperance Act:—

'The Temperance Act, 1864 (27-28 V., c. 18) conferred upon the municipal council of every county, town, township or incorporated village, "besides the powers at present conferred on it by law," power at any time to pass a by-law prohibiting the sale of intoxicating liquors and the issue of licenses therefor, within the limits of the municipality. Such by-law was not to

take effect until submitted to and approved by a majority of the qualified electors; and provision was made for its subsequent repeal in deference to an adverse vote of the electors.

'The Canada Temperance Act of 1886 (Revised Statutes of Canada, 49 V., c. 106) is applicable to all the provinces of the Dominion. Its general scheme is to give to the electors of every county or city the option of adopting or declining to adopt the provisions of the second part of the Act, which make it unlawful for any person, "by himself, his clerk, servant or agent, to expose or keep for sale, or directly or indirectly, on any pretence or upon any device, to sell or barter, or in consideration of the purchase of any other property, give to any other person any intoxicating liquor." It expressly declares that no violation of these enactments shall be made lawful by reason of any license of any description whatsoever. Certain relaxations are made in the case of sales of liquor for sacramental or medicinal purposes, or for exclusive use in some art, trade or manufacture. The prohibition does not extend to manufacturers, importers or wholesale traders who sell liquors in quantities above a specified limit, when they have good reason to believe that the purchasers will forthwith carry their purchase beyond the limits of the county or city, or of any adjoining county or city in which the provisions of the Act are in force.

'For the purpose of bringing the second part of the Act into operation an order of the Governor-General of Canada in Council is required. The order must be made on the petition of a county or city, which cannot be granted until it has been put to the vote of the electors of such county or city. When a majority of the votes polled are adverse to the petition, it must be dismissed; and no similar application can be made within the period of three years from the day on which the poll was taken. When the vote is in favour of the petition, and is followed by an order-in-council, one-fourth of the qualified electors of the county or city may apply to the Governor-General in Council for a recall of the order which is to be granted in the event of a majority of the electors voting in favour of the application. Power is given to the Governor-General in Council to issue in the like manner, and after similar procedure, an order repealing any by-law passed by any municipal council for the application of the Temperance Act of 1864.

'The Dominion Act also contains an express repeal of the prohibitory clauses of the provincial Act of 1864, and of the

machinery thereby provided for bringing them into operation, (1) as to every municipality within the limits of Ontario in which, at the passing of the Act of 1886, there was no municipal by-law in force, (2) as to every municipality within these limits in which a prohibitive by-law then in force shall be subsequently repealed under the provisions of either Act, and (3) as to every municipality, having a municipal by-law, which is included in the limits of, or has the same limits with, any county or city in which the second part of the Canada Temperance Act is brought into force before the repeal of the by-law, which by-law, in that event, is declared to be null and void.'

It will be observed, therefore, that the general principle and object of the local Act and of the Dominion Act, is the same, namely, prohibition of the sale of intoxicating liquors within municipal divisions to be applied by the exercise of local option. The differences between the two Acts, if and so far as material for the purposes of the case, are indicated by Lord Watson in his remarks to be presently quoted.

The Dominion Act had been held *intra vires* by the Committee in the case of *Russell v. The Queen, supra.* The local Act is in the *Prohibition Case* upheld by the same final authority. The reasoning is remarkable and must be considered.

Lord Watson, delivering the judgment, held that the exception enacted by the concluding words of s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92 as being from a provincial point of view of a local or private nature; and that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen heads, save to the extent of enabling Parliament 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 s. 91. His Lordship further stated, as has been shown, that the exception had no application to Dominion powers of legislation, not specified among the enumerated subjects of s. 91; that in legislating in the execution of its general unenumerated powers the Dominion Parliament had

no authority to encroach upon any class of subjects exclusively assigned to provincial legislatures by s. 92, and that the exercise of the general powers by the Parliament of Canada 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 s. 92. He stated that 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 s. 92 upon which it might not legislate to the exclusion of the provincial legislatures. His Lordship negatived the contention that Parliament had the power to legislate for the purpose of producing general uniformity throughout the Dominion with regard to any matter which is in substance local or provincial and does not truly affect the interests of the Dominion as a whole. He stated, however, p. 361, as already quoted:—

'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.'

Lord Watson proceeded to explain that the Canada Temperance Act, which had been held in *Russell v. The Queen* to be within Dominion authority, was enacted in pursuance of the general authority of the Dominion with respect to the peace, order and good government of Canada, and not in virtue of an enumerated power.

His Lordship held that the authority of the legislature of Ontario to enact 53 V., c. 56, s. 18, did not arise under s. 92 (8) 'Municipal institutions in the province,' or (9) 'Shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes;' and he stated that the only enactments of s. 92 which appear to have any relation to the authority of the provincial legislatures to make laws for the suppression of the liquor traffic are to be found in (13) 'Property and civil rights in the province,' and (16) 'Generally all matters of a merely local or private nature in the province.'

His Lordship stated, pp. 364-5:—'A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the province. It is not impossible that the vice of intemperance may prevail in particular localities within a province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling *prima facie* within No. 16.'

It was not necessary, in his Lordship's opinion, to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of s. 92 (13) and (16), was authorized by one or the other of these heads, although it could not logically be held to fall within both of them.

His Lordship stated, p. 365:—'In s. 92, No. 16, appears to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and although its terms are wide enough to cover, they were obviously not meant to include provincial legislation in relation to the classes of subjects already enumerated.'

Apparently, therefore, the Judicial Committee came to the conclusion that the Ontario enactment, 53 V., c. 56, s. 18, was a competent exercise of the authority conferred by s. 92 (13) or (16), with a suggestion of preference for (16). In the later case of *Attorney-General of Manitoba v. Manitoba License-Holders' Association*, 1902 A.C., 78, Lord Macnaghten, as will be shewn, stated the conclusion that in the opinion of the Board the Ontario enactment fell under s. 92 (16), rather than under (13).

With regard to the argument that the Dominion by the Canada Temperance Act had occupied the whole possible field of legislation upon the restriction of the liquor traffic, and that provincial authority was thereby suspended or superseded, Lord Watson, pp. 366-70, continued:—

'It has been frequently recognized by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliaments of Canada, in so far as these are within its competency, must override provincial legislation. But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial statute, whether it does or does not come within the limits of jurisdiction prescribed by s. 92. The repeal of a provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion; and if the existence of such repugnancy should become matter of dispute the controversy cannot be settled by the action either of the Dominion or of the provincial legislature, but must be submitted to the judicial tribunals of the country. In their Lordships' opinion, the express repeal of the old provincial Act of 1864 by the Canada Temperance Act of 1886 was not within the authority of the Parliament of Canada. It is true that the Upper Canada Act of 1864 was continued in force within Ontario by s. 129 of the British North America Act, until repealed, abolished or altered by the Parliament of Canada, or by the provincial legislature, according to the authority of that Parliament or of that legislature. It appears to their Lordships that neither the Parliament of Canada nor the provincial legislatures have authority to repeal statutes which they could not directly enact. Their Lordships had occasion, in *Dobie v. Temporalities Board*, 7 A.C., 136, to consider the

power of repeal competent to the legislature of a province. In that case the legislature of Quebec had repealed a statute continued in force after the Union by s. 129, which had this peculiarity, that its provisions applied both to Quebec and to Ontario, and were incapable of being severed so as to make them applicable to one of these provinces only. Their Lordships held that the powers conferred "upon the provincial legislatures of Ontario and Quebec to repeal and alter the statutes of the old parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867," and that it was beyond the authority of the legislature of Quebec to repeal statutory enactments which affected both Quebec and Ontario. The same principle ought, in the opinion of their Lordships, to be applied to the present case. The old Temperance Act of 1864 was passed for Upper Canada, or, in other words, for the province of Ontario[1]; and its provisions, being confined to that province only, could not have been directly enacted by the Parliament of Canada. 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. In like manner the express repeal, in the Canada Temperance Act of 1886, of liquor prohibitions adopted by a municipality in the province of Ontario under the sanction of provincial legislation does not appear to their Lordships to be within the authority of the Dominion Parliament.

'The question must next be considered whether the provincial enactments of s. 18 to any, and if so to what extent, come into collision with the provisions of the Canadian Act of 1886. In so far as they do, provincial must yield to Dominion legislation, and must remain in abeyance unless and until the Act of 1886 is repealed by the Parliament which passed it.

'The prohibitions of the Dominion Act have in some respects an effect which may extend beyond the limits of a province, and they are all of a very stringent character. They draw an arbitrary line at eight gallons in the case of beer, and at ten gal-

[1]This is a mistake. The Temperance Act of 1864 was passed for the province of Canada, including both Upper and Lower Canada, and the conclusions founded upon the statement that its provisions were confined to the province of Upper Canada are, therefore, erroneous, so far as concern the particular case. They may be taken, however, to indicate the view of their Lordships as to the power of the Dominion Parliament to repeal a pre-confederation statute providing for the prohibition of the liquor traffic and affecting a single province.

lons in the case of other intoxicating liquors, with the view of discriminating between wholesale and retail transactions. Below the limit, sales within a district which has adopted the Act are absolutely forbidden, except to the two nominees of the lieutenant-governor of the province, who are only allowed to dispose of their purchases in small quantities for medicinal and other specified purposes. In the case of sales above the limit the rule is different. The manufacturers of pure native wines from grapes grown in Canada have special favour shown 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.

'On the other hand, the prohibitions which s. 18 authorizes municipalities to impose within their respective limits do not appear to their Lordships to affect any transactions in liquor which have not their beginning and their end within the province of Ontario. The first branch of its prohibitory enactments strikes against sales of liquor by retail in any tavern or other house or other place of public entertainment. The second extends to sales in shops and places other than houses of public entertainment; but the context indicates that it is only meant to apply to retail transactions; and that intention is made clear by the terms of the explanatory Act 54 V., c. 46, which fixes the line between wholesale and retail at one dozen of liquor in bottles, and five gallons if sold in other receptacles. The importer or manufacturer can sell any quantity above that limit, and any retail trader may do the same, provided that he sells the liquor in the original packages in which it was received by him from the importer or manufacturer.

'It thus appears that, in their local application within the province of Ontario, there would be considerable difference between the two laws; but it is obvious that their provisions could not be in force within the same district or province at one and the same time. In the opinion of their Lordships, the question of conflict between their provisions which arises in this case does not depend upon their identity or non-identity, but upon a feature which is common to both. Neither statute is

imperative, their prohibitions being of no force or effect until they have been voluntarily adopted and applied by the vote of a majority of the electors in a district or municipality. In *Russell v. Reg., supra,* it was observed by this Board, with reference to the Canada Temperance Act of 1878, "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." No fault can be found with the accuracy of that statement. *Mutatis mutandis,* it is equally true as a description of the provisions of s. 18. But in neither case can the statement mean more than this, that on the passing of the Act each district or municipality within the Dominion or the province, as the case might be, became vested with a right to adopt and enforce certain prohibitions if it thought fit to do so. But the prohibitions of these Acts, which constitute their object and their essence, cannot with the least degree of accuracy be said to be in force anywhere until they have been locally adopted.

'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 s. 18 or any similar law had been superseded. In that case no provincial prohibitions such as are sanctioned by s. 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. 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. In a district which has by the votes of its electors rejected the second part of the Canadian Act, the option is abolished for three years from the date of the poll, and it hardly admits of doubt that there could be no repugnancy whilst the option given by the Canadian Act was suspended. 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 authorized, the provincial parliament is to be debarred from exercising the legislative authority given it by s. 92 for

the suppresson 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. Even if the provisions of s. 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.

'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 s. 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.'

Hence it is affirmed or follows that there are matters not included in the enumerations of s. 91 upon which Parliament has power to legislate because they concern the peace, order and good government of the Dominion. The suppression of the liquor traffic in the manner achieved by the Canada Temperance Act is one of these. The Dominion in the execution of these general powers has no authority to encroach upon any of the exclusive subjects of provincial legislation enumerated in s. 92. The Dominion has no authority to legislate with regard to these subjec s for the purpose of uniformity or with the object of making a law applicable to the whole Dominion. If, however, a matter otherwise within the enumerations of s. 92 and not within those of s. 91 attain such dimensions as to affect the body politic of the Dominion, or to justify Parliament in passing laws for its abolition or regulation in the interest of the Dominion, the project of legislation ceases to be merely local or provincial and becomes matter of national concern in a sense to bring it within the jurisdiction of Parliament. The Canada Temperance Act and the Ontario enactment, 53 V., c. 56, s. 18, authorizing the local councils to pass by-laws for prohibiting the sale of intoxicating liquors subject to the approval of the electors, apparently do not, except as to extra-provincial sales, differ essentially with regard to subject-matter or method, but only as to extent of capacity for application, the former being applicable to all the provinces, the latter merely to one.

Yet, inasmuch as the second part of the Canada Temperance Act and the prohibitions which 53 V., c. 56, s. 18, authorizes the municipalities to impose cannot consistently be in force within the same locality at the same time, the latter provisions must become inoperative in any district where the second part of the Canada Temperance Act is adopted. Consequently, in respect of the suppression of the liquor traffic, Parliament may under its general powers of legislation for the peace, order and good government of Canada override, or supersede, or encroach, or trench upon legislation competently enacted by a province in the execution of its exclusive powers; and, this is apparently so because of the exceptional condition that the matter of the suppression of the liquor traffic has attained such dimensions as to affect the body politic of the Dominion, and to justify parliament in passing laws for that object in the interest of the Dominion.

The Ontario enactment, 53 V., c. 56, s. 18, is upheld either as affecting property and civil rights in the province, or as generally a matter of a merely local or private nature in the province. Whether or not matters strictly relating to property and civil rights or of a merely local or private nature in the province, other than those affecting the liquor traffic, have attained or will attain such magnitude as to affect the body politic of the Dominion remains to be disclosed; but, if so, it would seem that Parliament thereby acquires an additional and paramount legislative power.

Is the accomplishment of this condition to be in the judgment of Parliament or of the courts? Probably the latter, in the opinion of Lord Watson, because he says that great caution must be observed in distinguishing between that which is local and provincial and that which has ceased to be local and provincial, and has become matter of national concern. But, if the courts are to determine, must it not be upon evidence?—and what is to be the nature of the evidence, or how is the condition to be established? In this case there was no evidence beyond the statutes themselves, unless it were the fact appearing by

the records of the Board that questions as to legislative authority for controlling the liquor traffic had previously been three times before the Committee. That circumstance does not, however, seem to afford reason for attributing to the Dominion an overriding power. The difficulties in the application of this decision seem to invite further judicial exposition of the law.

In *Attorney-General of Manitoba v. Manitoba License-Holders' Association,* 1902 A.C., 78, Lord Macnaghten, referring to the decision in the *Prohibition Case,* said that a careful perusal of the judgment led to the conclusion that in the opinion of the Board the said enactment 53 V., c. 56, s. 18, fell under s. 92 (16) rather than under (13), and that this seemed to their Lordships to be the better opinion. Lord Macnaghten added: '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.'

This remark, however, seems scarcely satisfactory, because Lord Watson distinctly held that it was unnecessary to determine whether the provincial legislation fell under s. 92 (13) or (16), and yet he held that in any case it would be overridden in any district where the second part of the Canada Temperance Act was brought into force. His Lordship also held that the terms of s. 92 (16) are wide enough to cover, although obviously not meant to include, provincial legislation in relation to all the classes of subjects enumerated in the section; and of course this paragraph, like all the other enumerations of s. 92, is descriptive of powers declared to be exclusive in the first clause of the section.

If the Dominion Parliament can in the execution of its general unenumerated powers, which are not expressed to be exclusive, displace provincial legislation enacted under the authority of any one of the enumerations of s. 92, all of which are exclusive, it is difficult to see, notwithstanding the observation of Lord Macnaghten, in what the relative immunity of paragraph 13 consists.

The suggestion is made, with diffidence, that the ultimate exposition of the true meaning of Lord Watson's judgment will rest upon the view that the exclusive authority of a provincial legislature as to any of the enumerations of s. 92 is confined to the local or provincial aspect or relations of the subject-matter; and that in so far as the subject-matter has a broader aspect, or if it expands or differentiates so as to affect the whole Dominion, or more provinces than one, it falls within the general legislative powers of Parliament, the execution of which is effective to override provincial enactments which are in their local operation inconsistent. The limitations imposed by such words as 'in the province,' 'provincial objects,' 'provincial,' etc., in the respective enumerations of s. 92 cannot be disregarded[1]; and it has been frequently affirmed by the Committee that the legislative authority of Parliament extends to all matters not committed to the legislatures.[2]

Subject to the statement that the answers were not meant to have and could not have the weight of a judicial determination, except in so far as their Lordships might have occasion to refer to the opinions already expressed upon the seventh question, the Committee answered the third and fourth questions propounded in the *Prohibition Case* as follows:—

'Question 3.—Has a provincial legislature jurisdiction to prohibit the manufacture of spirituous, fermented or other intoxicating liquors within the province?

'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.

'Question 4.—Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province?

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[1] See *infra*, pp. 161-2, and note, p. 162.

[2] See *Valin v. Langlois*, 5 A.C., 119-20,; *Bank of Toronto v. Lambe*, 12 A.C., 587-8; *Liquidators of Maritime Bank of Canada v. Receiver-General of New Brunswick*, 1892 A.C., 441-2; *Brophy v. Attorney-General of Manitoba*, 1895 A.C., 222; *Union Colliery Company of British Columbia v. Bryden*, 1899 A.C., 585.

'Answer.—Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament.'

Provincial Licenses.—It was held in *Russell v. The Queen,* 7 A.C., 837-8, quoted at length in this particular under s. 92 (9), that Dominion legislation, though it may interfere with the sale or use of an article included in a license granted under s. 92 (9), is not in itself legislation upon or within the subject of that enumeration, and consequently is not, by reason of it, taken out of the general powers of Parliament. Hence a Dominion enactment, whether in the execution of the general or special powers of s. 91, is not incompetent merely because it affects the sale of articles authorized to be sold by a provincial license.

Deportation of Aliens.—In *Attorney-General for Canada v. Cain and Gilhula,* 1906 A.C., 544-8, Lord Atkinson, delivering the judgment of the Committee, said:—

'The question for decision in this case is whether s. 6 of the Dominion statute 60-61 V., c. 11 (styled in the respondents' case 'The Alien Labour Act'), as amended by 1 E. VII, c. 13, s. 13, is, or is not, *ultra vires* of the Dominion legislature.

'In the events which have happened, the question has in this instance become more or less an academic one, inasmuch as the two persons arrested under the Attorney-General's warrant granted under the authority of s. 6 were on June 17, 1905, discharged from custody by order of Anglin, J., and a year having therefore elapsed since the date of their entry into Canada, they cannot be re-arrested.'

'S. 9 of 60-61 V., c. 11, has been amended by 61 V., c. 2; and ss. 1, 6 and 9 of the Alien Labour Act, as amended, are in the terms following:—

'"(1) From and after the passing of this Act it shall be unlawful for any person, company, partnership or corporation, in any manner to prepay the transportation, or in any way to assist or encourage the importation or immigration of any alien or foreigner into Canada, under contract or agreement,

parole or special, express or implied, made previous to the importation of such alien or foreigner, to perform labour or service of any kind in Canada.

'"(6) The Attorney-General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person, partnership, company, or corporation violating section 1 of this Act.'

'"(9) This Act shall apply only to the importation or immigration of such persons as reside in or are citizens of such foreign countries as have enacted and retained in force, or as enact and retain in force, laws or ordinances applying to Canada, of a character similar to this Act."

'The validity of s. 6 was impeached on several grounds, and was held to transcend the powers of the Dominion Parliament, inasmuch as it purported to authorize the Attorney-General or his delegate to deprive persons against whom it was to be enforced of their liberty without the territorial limits of Canada, and upon this point alone the decision of the case turned. It was conceded in argument before their Lordships, on the principle of law laid down by this Board in the case of *MacLeod v. Attorney-General for New South Wales*, 1891 A.C., 455, at p. 459, that the statute must, if possible, be construed as merely intending to authorize the deportation of the alien across the seas to the country whence he came if he was imported into Canada by sea, or if he entered from an adjoining country, to authorize his expulsion from Canada across the Canadian frontier into that adjoining country. The judgment of the learned Judge was, in effect, based upon the practical impossibility of expelling an alien from Canada into an adjoining country without such an exercise of extra-territorial constraint of his person by the Canadian officer as the Dominion Parliament could not authorize. No special significance was attached to the word "return." The reasoning of the judgment would apply with equal force if the word used had been "expel" or "deport" instead of "return."

'In 1763, Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any time been held or acquired by the Crown of France

were ceded to Great Britain, *St. Catherine's Milling and Lumber Company v. Reg.*, (1888), 14 A.C., 46, at p. 53. Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and, save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it is still possessed of them. One of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it considers his presence in the state opposed to its peace, order, and good government, or to its social or material interests; Vattel, *Law of Nations*, Book I., sec. 231; Book II., sec. 125. The imperial government might delegate those powers to the governor or the government of one of the colonies, either by royal proclamation which has the force of a statute, *Campbell v. Hall*, (1774) 1 Cowper 204, or by a statute of the imperial Parliament, or by the statute of a local parliament to which theCrown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them. The following cases establish these propositions: *In re Adam* (1837) 1 Moo., P.C. 460, at pp. 472-476; *Donegani v. Donegani* (1835) 3 Knapp 63, at p. 88; *Cameron v. Kyte* (1835), 3 Knapp 332, at p. 343; *Jephson v. Riera* (1835), 3 Knapp 130. But as it is conceded that by the law of nations the supreme power in every state has the right to make laws for the exclusion or expulsion of aliens, and to enforce those laws, it necessarily follows that the state has the power to do those things which must be done in the very act of expulsion, if the right to expel is to be exercised effectively at all, notwithstanding the fact that constraint upon the person of the alien outside the boundaries of the state, or the commission of a trespass by the state officer on the territories of its neighbour in the manner pointed out by Anglin, J. in his judgment, should thereby result. Accordingly it was in *In re Adam* definitely decided that the Crown had power to remove a foreigner by force from the island of Mauritius, though, of course, the removal in that case would necessarily involve an imprisonment of the alien, outside British territory, in the ship on board of which he would be put while it traversed the high seas.

'The question therefore for decision in this case resolves itself into this: Has the Act 60-61 V., c. 11, assented to by the Crown, clothed the Dominion government with the power the Crown itself theretofore undoubtedly possessed to expel an alien from the Dominion, or to deport him to the country whence he entered the Dominion? If it has, then the fact that extra-territorial constraint must necessarily be exercised in effecting the expulsion cannot invalidate the warrant directing expulsion issued under the provisions of the statute which authorizes the expulsion.

'It has already been decided in *Musgrove v. Chun Teeong Toy,* 1891 A.C., 272, that the government of the colony of Victoria by virtue of the powers with which it was invested to make laws for the peace, order, and good government of the colony, had authority to pass a law preventing aliens from entering the colony of Victoria. On the authority of this case, s. 1 of the above-mentioned statute would be *intra vires* of the Dominion Parliament. The enforcement of the provisions of this section no doubt would not involve extra-territorial constraint, but it would involve the exercise of sovereign powers closely allied to the power of expulsion and based on the same principles. The power of expulsion is in truth but the complement of the power of exclusion. If entry be prohibited it would seem to follow that the government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws. In *Hodge v. Reg.,* 9 A.C., 117, it was decided that a colonial legislature has within the limits prescribed by the statute which created it "an authority as plenary and as ample . . as the imperial Parliament in the plenitude of its power possessed and could bestow." If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the imperial government could itself have imposed the constraint for a similar purpose had the statute never been passed.

'Their Lordships therefore think that the decision of Anglin, J., was wrong.'

1. The Public Debt and Property.

Power of Parliament to extinguish Private Rights.—In *Western Counties Railway Company v. Windsor and Annapolis Railway Company,* 7 A.C., 178, the government of Canada having acquired by virtue of s. 108 of the British North America Act, 1867, the provincial railways in Nova Scotia, including the Windsor branch, subject to an obligation previously contracted by the government of the province to make traffic arrangements with the Windsor and Annapolis Railway Company as to the Windsor branch, on 22nd September, 1871, entered into a contract with the company, providing for traffic arrangements and the exclusive use and possession of the Windsor branch by the company. Subsequently, the Dominion Act, 37 V., c. 16, was passed, which it was contended extinguished all right and interest which the company had under the said agreement and transferred the possession of the Windsor branch to the Western Counties Railway Company. The question was argued as to whether the legislative authority to extinguish this interest rested with the Dominion or with the local legislature.

Lord Watson, delivering the judgment of the Committee, p. 191, said:—

'It becomes unnecessary to decide whether, if it had chosen to do so, the Parliament of Canada would have had the power to extinguish the rights of the respondent company under the agreement of the 22nd of September, 1871. Whether that power is given by the provisions of the British North America Act to the Dominion Parliament or to the legislature of Nova Scotia is a question of difficulty and importance; but seeing that it does not arise for decision in the present case, their Lordships express no opinion whatever in regard to it.'

2. The Regulation of Trade and Commerce.

Regulation of Insurance Contracts in a Single Province not Included.—In *Citizens and Queen Insurance Companies v. Parsons,* 7 A.C., 111-3, Sir Montague Smith, deliver-

ing the judgment of the Committee, having referred to this enumeration, proceeded:—

'A question was raised which led to much discussion in the Courts below and at this bar, viz., whether the business of insuring buildings against fire was a trade. This business, when carried on for the sake of profit, may, no doubt, in some sense of the word be called a trade. But contracts of indemnity made by insurers can scarcely be considered trading contracts, nor were insurers who made them held to be "traders" under the English bankruptcy laws; they have been made subject to those laws by special description. Whether the business of fire insurance properly falls within the description of a "trade" must, in their Lordships' view, depend upon the sense in which that word is used in the particular statute to be construed; but in the present case their Lordships do not find it necessary to rest their decision on the narrow ground that the business of insurance is not a trade.[1]

'The words "regulation of trade and commerce," in their unlimited sense, are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of Parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place, the collocation of No. 2, with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature when conferring this power on the Dominion Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in s. 91 would have been unnecessary; as, 15, "Banking"; 17, "Weights and measures"; 18, "Bills of exchange and promissory notes"; 19, "Interest"; and even 21, "Bankruptcy and insolvency."

'"Regulation of trade and commerce" may have been used in some such sense as the words "regulations of trade" in the Act of Union between England and Scotland (6 Anne, c. 11),

[1] In the *Prohibition Case*, 1896 A. C., 363, Lord Watson said that in *Citizens Insurance Company v. Parsons*, the business of fire insurance was admitted to be a trade.

and as these words have been used in acts of state relating to trade and commerce. Article V. of the Act of Union enacted that all the subjects of the United Kingdom should have "full freedom and intercourse of trade and navigation" to and from all places in the United Kingdom and the Colonies; and article VI., enacted that all parts of the United Kingdom, from and after the Union, should be under the *same* "prohibitions, restrictions and *regulations of trade.*" Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the articles of union. Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

'Construing, therefore, the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of 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, 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 s. 92.

'Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the Dominion Parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects. Questions of this kind, it may be observed, arose and were treated of by this Board in the cases of *L'Union St. Jacques de Montreal v. Belisle*, L.R. 6 P.C., 31; *Cushing v. Dupuy*, 5 A.C., 409.'

Sir Montague Smith further, pp. 114-5, said:—

'It was further argued on the part of the appellants that the Ontario Act was inconsistent with the Act of the Dominion Parliament, 28 V., c. 20, which requires fire insurance companies to obtain licenses from the Minister of Finance as a condition to their carrying on the business of insurance in the Dominion, and that it was beyond the competency of the provincial legislature to subject companies who had obtained such licenses, as the appellant companies had done, to the conditions imposed by the Ontario Act. But the legislation does not really conflict or present any inconsistency. The statute of the Dominion Parliament enacts a general law applicable to the whole Dominion, requiring all insurance companies, whether incorporated by foreign, Dominion, or provincial authority, to obtain a license from the Minister of Finance, to be granted only upon compliance with the conditions prescribed by the Act. Assuming this Act to be within the competency of the Dominion Parliament as a general law applicable to foreign and domestic corporations, it in no way interferes with the authority of the legislature of the province of Ontario to legislate in relation to the contracts which corporations may enter into in that province. 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 of any province of the Dominion of Canada, from carrying on any business of insurance within the limits of the late province of Canada, or of such province only, according to the powers granted to such insurance company within such limits as aforesaid, without such license as hereinafter mentioned."

'This recognition is directly opposed to the construction sought to be placed by the appellants' counsel on the words "provincial objects" in No. 11 of s. 92—"The incorporation of companies with provincial objects," by which he sought to limit these words to "public" provincial objects, so as to exclude insurance and commercial companies.

'Ritchie, C.J., refers to an equally explicit recognition of the power of the provinces to incorporate insurance companies contained in an earlier Act of the Dominion Parliament (31 V., c. 48) which was passed shortly after the establishment of the Dominion.

'The learned Chief Justice also refers to a remarkable section contained in the Act of the Dominion Parliament consolidating certain Acts respecting insurance, 40 V., c. 42. S. 28 of that Act is as follows:—

'"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 it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall then have the power of transacting its business of insurance throughout Canada."

'This provision contains a distinct declaration by the Dominion Parliament that each of the provinces had exclusive legislative control over the insurance companies incorporated by it, and, therefore, is an acknowledgment that such control was not deemed to be an infringement of the power of the Dominion Parliament as to "the regulation of trade and commerce."'

Provincial Taxation not Affected.—In *Bank of Toronto v. Lambe*, 12 A.C., 585-6, Lord Hobhouse, delivering the judgment of the Committee, stated:—

'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*, 2, S.C.R., 70, it was the view of the Supreme Court that they operated to invalidate the license duty which was there in question. But since that case was decided, the question has been more completely sifted before the Committee in *Parson's Case*, 7 A.C., 96; 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 inter-provincial regulations. 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.'

Prohibition of the Liquor Traffic not Included.—In *Russell v. The Queen*, 7 A.C., 842, their Lordships having come to the conclusion that the Canada Temperance Act, 1878, did not fall within any of the classes of subjects assigned exclusively to the legislatures, found it unnecessary to discuss the question whether its provisions also fell within any of the classes of subjects enumerated in s. 91, but Sir Montague Smith, delivering the judgment stated that:—

'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.'

In the Prohibition Case, 1896, A.C., Lord Watson, pp. 362-3, said:—

'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 s. 91. If it were so, the Parliament of Canada would, under the exception from s. 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 s. 91 were discussed by this Board at some length in *Citizens Insurance Company v. Parsons*, 7 A.C., 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 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. 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 A.C., 93, in these terms: "Their Lordships think there is a 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."'

His Lordship made no observation upon the point urged in argument that the authority conferred was to regulate, not the liquor traffic, but trade and commerce generally, and that a branch or particular trade might, in the exercise of a power so general, be the subject of prohibitive enactments. No exception can, of course, be taken to Lord Davey's judgment in *Municipal Corporation of the City of Toronto v. Virgo.* That was the case of a by-law of the city of Toronto prohibiting hawkers from plying their trade in a substantial and important portion of the city, no apprehended nuisance being suggested; and it was attempted to justify the making of the by-law in the execution of a statutory power 'for regulating and governing' hawkers. It was contended that the by-law was *ultra vires* and also in restriction of trade and unreasonable. Lord Davey said that the two questions ran very much into each other, and that in the view which their Lordships took it was not necessary to consider the second question separately. This case does not seem, therefore, to conclude the question as to the

power of the Dominion Parliament to restrict or even prohibit a particular branch of trade in the exercise of its constitutional authority to regulate trade and commerce. Possibly, therefore, when that point arises, a reason may be found for the decision in the *Prohibition Case* consistent with a broader construction of this power than that stated by Lord Watson.

3. The Raising of Money by any Mode or System of Taxation.

Apparent Conflict with s. 92 (2) *how Reconciled.*—In *Dow v. Black,* L.R., 6 P.C., 282, Sir James Colville, delivering the judgment of the Committee, stated that their Lordships conceived that s. 91 (3) is to be reconciled with s. 92 (2) by treating the former as empowering Parliament to raise revenue by any mode of taxation whether direct or indirect, and the latter as confining the legislatures to direct taxation within the province for provincial purposes.

In *Citizens and Queen Insurance Companies v. Parsons,* 7 A.C., 108, Sir Montague Smith, referring to the apparent conflict of power between ss. 91 and 92, by way of illustration of the principle that the powers exclusively assigned to the provincial legislatures were not to be absorbed in those given to the Dominion Parliament, said:—

'So, the raising of money by any mode or system of taxation is enumerated among the classes of subjects in s. 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 s. 92, it obviously could not have been intended that in this instance also the general power should override the particular one.'

In *Bank of Toronto v. Lambe,* 12 A.C., 585, Lord Hobhouse, delivering the judgment, having held that the Act of Quebec, 45 V., c. 22, was not *ultra vires* as authorizing indirect taxation, proceeded:—

'Then is there anything in s. 91 which operates to restrict the meaning above ascribed to s. 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,* 7 A.C., 96. Their Lordships there said: "So the raising of money by any mode or system of taxation is enumerated among the classes of subjects in s. 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 s. 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.'

It may be observed, however, that there is, perhaps, having regard to the context, really no literal conflict between ss. 91 (3) and 92 (2) if the enumerations of s. 91 are to be construed as limited by the general words 'for the peace, order and good government of Canada.' These enumerations are expressly declared to be made for greater certainty, but not to restrict. Neither, possibly, are they intended to enlarge the general words as to the subject-matters for legislation included. Consequently it may be that the question will admit of further consideration, should it ever arise, as to whether, for example, the Dominion may impose indirect taxes within a province in order to the raising of a revenue for provincial purposes.

Power not limited by Considerations of Expediency.—In *Bank of Toronto v. Lambe,* 12 A.C., 586, Lord Hobhouse, delivering the judgment of the Committee, said:—

'Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of Parliament to erect banks. But their Lordships cannot conceive that when the imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights

may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of classes 2 and 9, is, in their Lordships' judgment, what the imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construction of the federation Act.'

Licenses to Fish Included.—In Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia, (the *Fisheries Case*) 1898 A.C., 713-4, Lord Herschell delivering the judgment of the Committee, said:—

'In addition, however, to the legislative power conferred by the 12th item of s. 91, the 4th item of that section confers upon the Parliament of Canada the power of raising money by any mode or system of taxation. Their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of license as a condition of the right to fish.

'It is true that, by virtue of s. 92, the provincial legislature may impose the obligation to obtain a license in order to raise a revenue for provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention.

'Their Lordships are quite sensible of the possible inconveniences to which attention was called in the course of the arguments which might arise from the exercise of the right of imposing taxation in respect of the same subject-matter and within the same area by different authorities. They have no doubt, however, that these would be obviated in practice by the good sense of the legislatures concerned.'

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.

Lands in a Province may be taken for Military Purposes.—In *L'Union St. Jacques v. Belisle,* L.R., 6 P.C., 37, in illustrating the principle that a legislature is not to be re-

strained in the exercise of its powers merely because Parliament has overlapping jurisdiction which it might execute inconsistently, Lord Selborne, expressly referring to s. 91 (7) as the source of authority, stated as a premise that any part of the lands in a province might be taken by the Dominion Parliament for the purpose of military defence.

Perhaps the illustration is somewhat inapt, so far at least as concerns public lands, since express provision is made by s. 117 that the Dominion may assume any lands or public property of a province required for fortifications or for the defence of the country.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of *Canada*.
9. Beacons, Buoys, Lighthouses, and *Sable Island*.
10. Navigation and Shipping.

Works in Navigable Waters.—In the *Fisheries Case*, 1898 A.C., 717, their Lordships entertained no doubt that the Dominion Parliament had power to pass chapter 92 of the Revised Statutes of Canada, entitled 'An Act respecting certain works constructed in or over Navigable Waters,' this statute clearly relating to navigation.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.

Seacoast.—In *L'Union St. Jacques v. Belisle*, L.R., 6 P.C., 37, Lord Selborne, referred to a suggestion made in the argument that a provincial legislature could not deal with any part of the lands upon the seacoast of the province, because by possibility the land might be required for a lighthouse, and an Act might be passed by the Dominion Parliament to make a lighthouse there. He said that this was not a happy illustration because the whole of the seacoast is by s. 91 (12) put within the exclusive cognizance of the Dominion Parliament. This observation was, however, outside the point of the case, and apparently not carefully considered, as, obviously,

'seacoast' in this connection is used as composite with, or as an adjective qualifying 'fisheries,' and not as descriptive of an independent subject of legislation.

Proprietary Rights not Affected.—In the *Fisheries Case,* 1898 A.C., 712-3, Lord Herschell, delivering the judgment of the Committee, said:—

'Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Seacoast and inland fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected. If, however, the legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by s. 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the British North America Act, been left to the provinces and not vested in it.'

His Lordship continued, p. 714:—

'It follows from what has been said that in so far as s. 4 of the Revised Statutes of Canada, c. 95, empowers the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion, but to the provinces, it was not within the jurisdiction of the Dominion Parliament to pass it. This was the only section of the Act which was impeached in the course of the argument; but the subsidiary provisions in so far as they are intended to enforce a right which it was not competent for the Dominion to confer, would of course fall with the principal enactment.'

Regulations.—Lord Herschell in the *Fisheries Case*, pp. 714-5, further said:—

'The sections of the Ontario Act of 1892, intituled "An Act for the Protection of the Provincial Fisheries," which are in question, consist almost exclusively of provisions relating to the manner of fishing in provincial waters. Regulations controlling the manner of fishing are undoubtedly within the competence of the Dominion Parliament. The question is whether they can be the subject of provincial legislation also in so far as it is not inconsistent with the Dominion legislation.

'By s. 91 of the British North America Act, the Parliament of the Dominion of Canada is empowered 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 that Act assigned exclusively to the legislatures of the provinces, "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is declared that (notwithstanding anything in the Act) the exclusive legislative authority of the Parliament of Canada, extends to all matters coming within the classes of subjects next thereinafter enumerated." The 12th of them is "Seacoast and inland fisheries."

'The earlier part of this section read in connection with the words beginning "and for greater certainty" appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in s. 91 is not within the legislative competence of the provincial legislatures under s. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a provincial legislature is in their Lordships' opinion

incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of s. 91, and in particular to the word "exclusively." It would authorize, for example, the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act.'

13. Ferries between a Province and any *British* or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.

Provincial Taxation.—In *Bank of Toronto v. Lambe,* 12 A.C., 585-6, Lord Hobhouse, with regard to the contention that the taxation of banks by a province would undoubtedly cut down the powers of Parliament under s. 91 (15), said:—

'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.'

Banking Legislation may modify Civil Rights in a Province. —In *Tennant v. Union Bank of Canada,* 1894, A.C., 31, a question was presented as to the validity of certain provisions of the Bank Act with regard to warehouse receipts.

Lord Watson, delivering the judgment of the Committee, pp. 45-7, said:—

'The question turns upon the construction of two clauses in the British North America Act, 1867. S. 91 gives the Parliament of Canada power to make laws in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the legislatures of the Provinces, and also exclusive legislative authority in relation to certain enu-

merated subjects, the fifteenth of which is "Banking, incorporation of banks, and the issue of paper money." S. 92 assigns to each provincial legislature the exclusive right to make laws in relation to the classes of subjects therein enumerated; and the thirteenth of the enumerated classes is "Property and civil rights in the province."

'Statutory regulations with respect to the form and legal effect, in Ontario, of warehouse receipts, and other negotiable documents, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that province; and the objection taken by the appellant to the provisions of the Bank Act would be unanswerable, if it could be shown that, by the Act of 1867, the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by s. 92. But s. 91 expressly declares that, "notwithstanding anything in this Act," the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in s. 91 are "Patents of invention and discovery," and "Copyrights." It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects, without affecting the property and civil rights of individuals in the provinces.

'This is not the first occasion on which the legislative limits laid down by ss. 91 and 92 have been considered by this Board. In *Cushing v. Dupuy*, 5 A.C., 409, their Lordships had before them the very same question of statutory construction which has been raised in this appeal. 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 s. 91, their Lordships upheld the validity of the statute. In delivering the judgment of the Board, Sir Montague Smith pointed out that it would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates, without interfering with and modifying some of the ordinary rights of property.

'The law being so far settled by precedent, it only remains for consideration whether warehouse receipts, taken in security by a bank, in the course of the business of banking, are matters coming within the class of subjects described in s. 91, sub-s. 15, as "Banking, incorporation of banks, and the issue of paper money." If they are, the provisions made by the Bank Act with respect to such receipts are *intra vires*. Upon that point, their Lordships do not entertain any doubt. The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the province does not, and cannot, attach to it. It also comprehends "banking," an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.

'The appellant's counsel hardly ventured to dispute that the lending of money on the security of goods, or of documents representing the property of goods, was a proper banking transaction. Their chief contention was that, whilst the legislature of Canada had power to deprive its own creature, the bank, of privileges enjoyed by other lenders under the provincial law, it had no power to confer upon the bank any privilege as a lender, which the provincial law does not recognize. It might enact that a security, valid in the case of another lender, should be invalid in the hands of the bank; but could not enact that a security should be available to the bank, which would not have been effectual in the hands of another lender. It was said, in support of the argument, that the first of these things did, and the second did not, constitute an interference with property and civil rights in the province. It is not easy to follow the distinction thus suggested. There must be two parties to a transaction of loan; and, if a security, valid according to provincial law, was made invalid in the hands of the lender by a Dominion statute, the civil rights of the borrower would be affected, because he could not avail himself of his property in his dealings with a bank.

'But the argument, even if well founded, can afford no test of the legislative powers of the Parliament of Canada. These depend upon s. 91, and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights in the province. And it appears to their

Lordships that the plenary authority given to the Parliament of Canada by s. 91, sub-s. 15, to legislate in relation to banking transactions, is sufficient to sustain the provisions of the Bank Act which the appellant impugns.'

16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.

Special Provincial Legislation as to a Private and Local Society not Affected.—In *L'Union St. Jacques v. Belisle*, L.R., 6 P.C., 31, the question was whether a provincial Act, dealing solely with the affairs of a particular society which were in an embarrassed situation, and imposing a forced commutation of existing rates upon two annuitants of the society, came within the Dominion powers of legislation expressed in s. 91 (21). Lord Selborne, delivering the judgment, pp. 36-7, said:—

'Now it has not been alleged that it comes within any other class of the subjects so enumerated except the 21st "Bankruptcy and insolvency"; and the question therefore is, whether this is a matter coming under that class 21, of bankruptcy and insolvency? Their Lordships observe that the scheme of enumeration in that section is, to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may be properly described as general legislation; such legislation as is well expressed by Mr. Justice Caron when he speaks of the general laws governing *faillite*, bankruptcy and insolvency, all which are well known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation. Well, no such general law

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

In the conclusion of his reasons, pp. 37-8, his Lordship stated:—

'The fact that this particular society appears upon the face of the provincial Act to have been in a state of embarrassment, and in such a financial condition that, unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity, and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be reinstated.'

Parliament may interfere with Property and Civil Rights and Procedure.—In *Cushing vs. Dupuy,* 5 A.C., 415-6, Sir

Montague Smith, delivering the judgment of the Committee, said:—

'It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is, therefore, to be presumed, indeed it is a necessary implication, that the imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to those subjects might affect them. Their Lordships therefore think that the Parliament of Canada would not infringe the exclusive powers given to the provincial legislatures by enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by article 1178 of the *Code of Civil Procedure.*'

Local Legislation respecting Priority of Assignments, Judgments and Executions not Affected.—In *Attorney-General for Ontario v. Attorney-General for Canada* (the *Assignments and Preferences Case*) 1894 A.C., 189, the question was as to the validity of s. 9, of R. S. O., 1887, c. 124, entitled 'An Act respecting Assignments and Preferences by Insolvent Persons.' This section is as follows:—

'An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs, who has the first execution in the sheriff's hands.'

Lord Herschell, L.C., delivering the judgment of the Committee, pp. 200-1, said:—

'It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define what is covered by the words

"bankruptcy" and "insolvency" in s. 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate.

'In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.'

In the *Fisheries Case,* 1898 A.C., 715-6, Lord Herschell, delivering the judgment of the Committee, said:—

'It is true that this Board held in the case of *Attorney-General of Canada v. Attorney-General of Ontario,* 1894 A.C.,

189, that a law passed by a provincial legislature which affected the assignments and property of insolvent persons was valid as falling within the heading "Property and civil rights," although it was of such a nature that it would be a suitable ancillary provision to a bankruptcy law. But the ground of this decision was that the law in question did not fall within the class "Bankruptcy and insolvency" in the sense in which these words were used in s. 91.'

22. Patents of Invention and Discovery.

Property and Civil Rights may be Affected.—In *Tennant v. Union Bank of Canada,* 1894 A.C., 45, Lord Watson said by way of example that it would be practically impossible for the Dominion Parliament to legislate upon 'patents of invention and discovery' without affecting the property and civil rights of individuals in the provinces.

23. Copyrights.

Property and Civil Rights may be Affected.—In the same place Lord Watson said by way of example that it would be practically impossible for the Dominion Parliament to legislate upon 'copyrights' without affecting the property and civil rights of individuals in the provinces.

Copyright Legislation.—The Copyright Act of 1875, passed by the Parliament of Canada (38 V., c. 88) was reserved for the signification of Her Majesty's pleasure, and subsequently assented to pursuant to the authority of the imperial Canada Copyright Act, 1875 (38-39 V., c. 53). The imperial legislation was deemed necessary or expedient, owing to conflict between the Canadian Act and the imperial Copyright Act, 5-6 V., c. 45, and its amendments, in the application of these imperial statutes to the Dominion, and owing to doubts as to the power of the Parliament of Canada under the British North America Act, 1867, and in view of the Colonial Laws Validity Act (28-29 V., c. 63)[1]. Upon similar considerations the operation of the amending Act passed by the Parliament of Canada in 1889 (52 V., c. 29), which now appears as Part II. of the Copyright Act, was suspended to a day to be named by proclamation

[1] Printed in the Appendix.

of the Governor-General; and, notwithstanding much correspondence and discussion between the government of Canada and the imperial government as to the enacting authority of the Parliament of Canada, or the propriety of assenting to the proclamation of the Act, neither of these points has been conceded, and the statute has not been proclaimed. The government of Canada has refrained from submitting any issue arising in this correspondence for the determination of the Judicial Committee.

24. *Indians,* and Lands reserved for the *Indians.*

Proclamation of 1763—Indian Title, Reserves.—In *St. Catherines Milling and Lumber Company v. The Queen,* 14 A.C., 53-5, Lord Watson, delivering the judgment of the Committee, said:—

'The capture of Quebec in 1759, and the capitulation of Montreal in 1760, were followed in 1763 by the cession to Great Britain of Canada and all its dependencies, with the sovereignty, property and possession, and all other rights which had at any previous time been held or acquired by the Crown of France. A royal proclamation was issued on the 7th of October, 1763, shortly after the date of the Treaty of Paris, by which His Majesty King George erected four distinct and separate governments, styled respectively, Quebec, East Florida, West Florida, and Grenada, specific boundaries being assigned to each of them. Upon the narrative that it was just and reasonable that the several nations and tribes of Indians who lived under British protection should not be molested or disturbed in the "possession of such parts of Our dominions and territories as, not having been ceded to or purchased by Us, are reserved to them or any of them as their hunting grounds," it is declared that no governor or commander-in-chief in any of the new colonies of Quebec, East Florida, or West Florida, do presume on any pretense to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments, or "until Our further pleasure be known," upon any lands whatever which, not having been ceded or purchased as aforesaid, are reserved to the said Indians or any of them. It was further declared "to be Our royal will, for the present, as aforesaid, to reserve under Our sovereignty, protection and dominion,

for the use of the said Indians, all the land and territories not included within the limits of Our said three new governments or within the limits of the territory granted to the Hudson's Bay Company." The proclamation also enacts that no private person shall make any purchase from the Indians of lands reserved to them within those colonies where settlement was permitted, and that all purchases must be on behalf of the Crown, in a public assembly of the Indians, by the governor or commander-in-chief of the colony in which the lands lie.

'The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the provincial governments, and (since the passing of the British North America Act, 1867) by the government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or headmen convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under sovereignty and protection of the British Crown. It was suggested, in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never been "ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which show that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories," and it is declared to be the will and pleasure of the Sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion

upon the point. It appears to them to be sufficient for the purposes of this case, that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished.'

His Lordship continuing, pp. 58-60, said:—

'The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the Union, land vested in the Crown, subject to 'an interest other than that of the province in the same,' within the meaning of s. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

'In the course of the argument the claim of the Dominion to the ceded territory was rested upon the provisions of s. 91 (24), which in express terms confer upon the Parliament of Canada power to make laws for "Indians, and lands reserved for the Indians." It was urged that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of showing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in section 91 (24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

'Their Lordships are, however, unable to assent to the argument for the Dominion founded on section 91 (24). There can be no *a priori* probability that the British legislature, in a branch of the statute which professes to deal only with the distribution

of legislative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

'By the treaty of 1873 the Indian inhabitants ceded and released the territory in dispute in order that it might be opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit, "to the government of the Dominion of Canada," for the Queen and her successors for ever. It was argued that a cession in these terms was in effect a conveyance to the Dominion government of the whole rights of the Indians, with consent of the Crown. That is not the natural import of the language of the treaty, which purports to be from beginning to end a transaction between the Indians and the Crown; and the surrender is in substance made to the Crown. Even if its language had been more favourable to the argument of the Dominion upon this point, it is abundantly clear that the commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that province by the imperial statute of 1867.'

In *Attorney-General for Canada v. Attorney-General for Ontario* (the *Robinson Treaties Case*), 1897 A.C., 210-1, Lord Watson said that the expression in s. 109—'an interest other than that of the province in the same'—appeared to their Lordships to denote some right or interest in a third party independent of and capable of being vindicated in competition with the beneficial interest of the province.

It therefore appears that lands reserved for Indians subject to a title such as existed in the *St. Catherines Milling Case* are vested in the Crown in the right of the province subject to the Indian title or interest, which, though a mere burden, is an interest 'other than that of the province in the same' within the meaning of s. 109, and therefore apparently an interest inde-

pendent of and capable of being vindicated in competition with the beneficial interest of the province. The title is in the Crown burdened with the Indian interest, and, subject to this, the beneficial interest is in the province within which the lands lie.

The Dominion, after making the Northwest Angle Treaty of 1873, whereby it was stipulated as one of the considerations that certain special reserves should be made for the Indians, purported to set out and appropriate as such special reserves for the use of the Indians, but without the concurrence of Ontario, portions of the land surrendered, and among others one known as Reserve 38 B. A portion of this reserve was in 1886 surrendered to the Crown in trust to sell and invest the proceeds and pay the interest to the Indians and their descendants forever. This surrender was made in pursuance of the Indian Act, and the Dominion having accordingly sold and conveyed these lands, the question arose in *Ontario Mining Company v. Seybold*, 1903 A.C., 73, as to the power of the Dominion to convey the fee or other interest of the Indians. At the trial of the action before the Chancellor of Ontario he held in his reasons for judgment that:—

'Over the Reserve 38 B the Dominion had and might exercise legislative and administrative jurisdiction, while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the province of Ontario. The treaty land was, in this case, set apart out of the surrendered territory by the Dominion—that is to say, the Indian title being extinguished for the benefit of the province, the Dominion assumed to take of the provincial land to establish a treaty reserve for the Indians. Granted that this might be done, yet when the subsequent surrender of part of this treaty reserve was made in 1886 the effect was again to free the part in litigation from the special treaty privileges of the band, and to leave the sole proprietary and present ownership in the Crown as representing the province of Ontario. That is the situation so far as the title to the land is concerned.'

Upon appeal to the Judicial Committee, Lord Davey, delivering the judgment, p. 82, said:—

'Their Lordships agree with the Courts below that the decision of this case is a corollary from that of the *St. Catherines Milling Company v. Reg.*, 14 A.C., 46. The argument of the learned counsel for the appellants at their Lordships' bar was that at the date of the letters patent issued by the Dominion officers to their predecessors in title the land in question was held in trust for sale for the exclusive benefit of the Indians, and therefore there was no beneficial interest in the lands left in the province of Ontario. This argument assumes that the Reserve 38 B was rightly set out and appropriated by the Dominion officers as against the government of Ontario, and ignores the effect of the surrender of 1873 as declared in the previous decision of this Board. By s. 91 of the British North America Act, 1867, the Parliament of Canada has exclusive legislative authority over "Indians and lands reserved for the Indians." But this did not vest in the government of the Dominion any proprietary rights in such lands, or any power by legislation to appropriate lands which by the surrender of the Indian title had become the free public lands of the province as an Indian reserve, in infringement of the proprietary rights of the province. Their Lordships repeat for the purposes of the present argument what was said by Lord Herschell in delivering the judgment of this Board in the *Fisheries Case*, 1898 A.C., 700, as to the broad distinction between proprietary rights and legislative jurisdiction. Let it be assumed that the government of the province, taking advantage of the surrender of 1873, came at least under an honourable engagement to fulfil the terms on the faith of which the surrender was made, and, therefore, to concur with the Dominion government in appropriating certain undefined portions of the surrendered lands as Indian reserves. The result, however, is that the choice and location of the lands to be so appropriated could only be effectively made by the joint action of the two governments.'

His Lordship proceeded to show that by the agreement between the Dominion and Ontario incorporated in the statute of the Dominion, 54-55 V., c. 5, and in that of Ontario, 54 V., c. 3, and subsequently signed by the proper officers of the two governments on 16th April, 1894, it had been admitted and agreed that the concurrence of the province of Ontario in the selection of these special reserves was necessary; and His Lordship concluded, therefore, that in fact the special reserves including 38 B., had not been effectively set apart or constituted.

Lord Davey, p. 84, said, however:—

'It is unnecessary for their Lordships, taking the view of the rights of the two governments which has been expressed, to discuss the effect of the second surrender of 1886. Their Lordships do not, however, dissent from the opinion expressed by the Chancellor of Ontario on that question.'

This decision, therefore, determines nothing with regard to the quality or extent of the interest acquired by the Indians in special reserves competently selected and appropriated for them under the provisions of the treaty of 1873. Moreover, the case is not properly reported so far as the statement goes that counsel were heard on behalf of the Dominion, the fact being that during the argument the practical questions in difference between the Dominion and Ontario were arranged by agreement between counsel as stated by Lord Davey at the conclusion of his judgment; and consequently counsel for the Dominion were not called upon nor was any argument made on behalf of the Dominion in support of the contention put forward in the case of the Dominion, that, assuming Reserve 38 B to have been validly created according to the intention of the treaty of 1873, the Indians acquired therein an interest which, upon surrender to the Dominion for sale, it became competent to the Dominion to convey. This point, therefore, remains open so far as the Judicial Committee is concerned.

25. Naturalization and Aliens.

Provincial Legislation against the Employment of Aliens Invalid.—By s. 4 of the Coal Mines Regulation Act, 1890, of British Columbia, it is enacted that 'no boy under the age of twelve years, and no woman or girl of any age, *and no Chinaman* shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground.'

In *Union Colliery Company of British Columbia v. Bryden*, 1899 A.C., 580, the action was brought against the appellant company by the respondent, a shareholder, for a declaration, and the controversy before the Judicial Committee was

limited to the single question whether the enactments of s. 4, in regard to which the appellant company had stated the plea of *ultra vires*, were within the competency of the legislature.

Lord Watson, delivering the judgment of the Committee, pp. 585-6, said:—

'There can be no doubt that, if s. 92 of the Act of 1867 had stood alone and had not been qualified by the provisions of the clause which precedes it, the provincial legislature of British Columbia would have had ample jurisdiction to enact s. 4 of the Coal Mines Regulation Act. The subject matter of that enactment would clearly have been included in s. 92, sub-s. 10, which extends to provincial undertakings such as the coal mines of the appellant company. It would also have been included in s. 92, sub-s. 13, which embraces "property and civil rights in the province."

'But s. 91, sub-s. 25, extends the exclusive legislative authority of the Parliament of Canada to "naturalization and aliens." S. 91 concludes with a proviso to the effect 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."

'S. 4 of the provincial Act prohibits Chinamen who are of full age from employment in underground coal workings. Every alien when naturalized in Canada becomes *ipso facto*, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalized, but are natural-born Canadians. It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada; but s. 91, sub-s. 25, might possibly be construed as conferring that power in the case of naturalized aliens after naturalization. The subject of "naturalization" seems *prima facie* to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada, after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term "naturalization" was intended to bear, as it occurs in s. 91, sub-s. 25. But it seems clear that the expression "aliens" occurring in that

clause refers to, and at least includes, all aliens who have not yet been naturalized; and the words "no Chinaman," as they are used in s. 4 of the provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not been naturalized.'

Lord Watson proceeded to state, pp. 587-8, that the provisions of s. 4 are capable of being viewed in two different aspects, according to the one of which they would fall under s. 92, while according to the other they would belong to the class of subjects described by s. 91 (25). He said:—

'They may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and, if that were an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature, by virtue either of s. 92, sub-s. 10, or section 92, sub-s. 13. But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the province of British Columbia.

'Their Lordships see no reason to doubt that, by virtue of s. 91, sub-s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada. The learned judges who delivered opinions in the full Court noticed the fact that the Dominion legislature had passed a 'Naturalization Act, No. 113 of the Revised Statutes of Canada, 1886,' by which a partial control was exercised over the rights of aliens. Walkem, J., appears to regard that fact as favourable to the right of the provincial parliament to legislate for the exclusion of aliens being Chinamen from underground coal mines. The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could

not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by s. 91, of the Act of 1867.'

Provincial Franchise Laws not Affected.—In *Cunningham v. Tomey Homma,* 1903 A.C., 155-7, Lord Halsbury L.C., delivering the judgment of the Committee, said:—

'In this case a naturalized Japanese claims to be placed upon the register of voters for the electoral district of Vancouver City, and the objection which is made to his claim is that by the electoral law of the province it is enacted that no Japanese, whether naturalized or not, shall have his name placed on the register of voters or shall be entitled to vote. Application was made to the proper officer to enter the applicant's name on the register, but he refused to do so upon the ground that the enactment in question prohibited its being done. This refusal was overruled by the Chief Justice sitting in the county court, and the appeal from his decision to the Supreme Court of British Columbia was disallowed. The present appeal is from the decision of the Supreme Court.

'There is no doubt that, if it is within the capacity of the province to enact the electoral law, the claimant is qualified by the express language of the statute; but it is contended that the 91st and 92nd sections of the British North America Act have deprived the province of the power of making any such provision as to disqualify a naturalized Japanese from electoral privileges. It is maintained that s. 91, sub-s. 25, enacts, that the whole subject of naturalization is reserved to the exclusive jurisdiction of the Dominion, while the Naturalization Act of Canada enacts that a naturalized alien shall within Canada be entitled to all political and other rights, powers and privileges to which a natural born British subject is entitled in Canada. To this it is replied that, by s. 92, sub-s. 1, the constitution of the province and any amendment of it are placed under the exclusive control of the provincial legislature. The question which their Lordships have to determine is which of these two views is the right one, and, in determining that question, the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider.

'The first observation which arises is that the enactment, supposed to be *ultra vires* and to be impeached upon the ground

of its dealing with alienage and naturalization, has not necessarily anything to do with either. A child of Japanese parentage born in Vancouver City is a natural born subject of the King, and would be equally excluded from the possession of the franchise. The extent to which naturalization will confer privileges has varied both in this country and elsewhere. From the time of William III. down to Queen Victoria no naturalization was permitted which did not exclude the alien naturalized from sitting in Parliament or in the Privy Council.

'In Lawrence's *Wheaton*, p. 903 (2nd annotated ed., 1863), it is said that "though (in the United States) the power of naturalization be nominally exclusive in the federal government, its operation in the most important particulars, especially as to the right of suffrage, is made to depend on the local constitution and laws.' The term "political rights" used in the Canadian Naturalization Act is, as Walkem, J., very justly says, a very wide phrase, and their Lordships concur in his observation that, whatever it means, it cannot be held to give necessarily a right to the suffrage in all or any of the provinces. In the history of this country the right to the franchise has been granted and withheld on a great number of grounds, conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign.

'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 s. 91, subs. 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.

'This, indeed, seems to have been the opinion of the learned judges below; but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of *Union Colliery Company v.*

Bryden, 1889 A.C., 587. That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia, and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.'

Deportation.—In *Attorney-General for Canada v. Cain and Gilhula,* 1906 A.C., 542, quoted under the first paragraph of s. 91, *supra,* the authority of the Parliament of Canada to enact provisions for the deportation from Canada of aliens was affirmed by the Judicial Committee.

26. Marriage and Divorce.

Solemnization of Marriage not Affected.—In *Citizens and Queen Insurance Companies v. Parsons,* 7 A.C., 108, Sir Montague Smith, by way of illustrating the statement that Parliament could not have intended that the powers exclusively assigned to the provincial legislatures should be absorbed in those given to the Dominion Parliament, said:—

'Take as one instance the subject, "Marriage and divorce" contained in the enumeration of subjects in s. 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 s. 92, and no one can doubt, notwithstanding the general language of s. 91, that this subject is still within the exclusive authority of the legislatures of the provinces.'

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

Disqualification and Punishment for Corrupt Practices at Elections.—In *Theberge v. Laudry,* 2 A.C., 102, upon an appli-

cation for leave to appeal from the judgment of the Superior Court of Quebec, finding that the petitioner under the Quebec Controverted Elections Act, 1875, as a candidate, was guilty of corrupt practices, and declaring his seat to be vacant, Mr. Benjamin in support of the application had urged that the Quebec Controverted Elections Act under which the proceedings were taken provided for punishment for corruption, but that by the British North America Act, 1867, ss. 91 and 84, it appeared that the Quebec legislature had no power to pass any provision relating to qualification or disqualification except as bestowed by s. 84, and that it was therefore *ultra vires* of the legislature to provide disqualification and other punishments for corrupt practices, pointing out that the provincial legislature was in fact prohibited from criminal legislation, even in regard to criminal procedure.

Lord Cairns, in disposing of this argument, p. 109, stated:—

'Their Lordships were in one part of Mr. Benjamin's argument pressed with another matter, that, even if an appeal should not be here admitted generally, yet that there was in the finding of the Judge a subordinate part, which ought to be brought by way of review before this tribunal. Mr. Benjamin said that the Judge had found that the petitioner was personally guilty of corrupt practices; and then he said that the Quebec Election Act, by a particular section, the 267th, provided that if it is proved before the Court that corrupt practices have been committed by or with the actual knowledge or consent of any candidate, not only the election shall be void, but the candidate shall, during the seven years next after the date of such decision, be incapable of being elected to and of sitting in the Legislative Assembly, of voting at any election of a member of the House, or holding an office in the nomination of the Council of the Lieutenant Governor of the province. Mr. Benjamin contended that the Act of parliament, so far as it engrafted on the decision of the Judge, this declaration of incapacity was *ultra vires* the power of the legislature of the province. Upon that point their Lordships do not think it necessary to express any opinion whatever. If the Act of Parliament was in this respect, as contended, *ultra vires* the provincial legislature, the only result will be that the consequence declared by this section of

the Act of Parliament will not enure against and will not affect the petitioner; but is not a subject which should lead to any different determination with regard to that part of the case.'

Provincial Criminal Law.—In *Russell v. The Queen*, 7 A.C., p. 840, Sir Montague Smith, delivering the judgment, said:—

'It was argued by Mr. Benjamin that if the Act related to criminal law, it was provincial criminal law, and he referred to sub-s. 15 of s. 92, viz.:—"The imposition of any (*sic*) punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section." No doubt this argument would be well founded if the principal matter of the Act could be brought within any of these classes of subjects; but as far as they have yet gone, their Lordships fail to see that this has been done.'

This statement is of importance inasmuch as it recognizes the existence of provincial criminal law, or the authority of a provincial legislature to enact provisions which if enacted by the imperial Parliament would be denominated criminal, or fall within the category of the criminal law. It seems to be involved in this that there may be enactments of criminal law competent to a local legislature but incompetent to the Dominion Parliament.

Local House of Assembly cannot constitute itself a Court of Record to try Criminal Offences.—By the Revised Statutes of Nova Scotia, 5th Series, c. 3, s. 30, it was provided that each House of the legislature should be a court of record and have all the rights and privileges of a court of record for the purpose of summarily inquiring into and punishing the acts, matters or things declared by the said chapter to be violations or infringements thereof; and each House was declared to possess all such powers and jurisdiction as might be necessary for such inquiry, execution and punishment.

In *Fielding v. Thomas*, 1896 A.C., 612, Lord Halsbury, L.C., referring to this section, said that their Lordships were disposed to think that the House of Assembly could not consti-

tute itself a court of record for the trial of criminal offences, and that read in the light of other sections, and having regard to the subject-matter, s. 30 was merely intended to give the House the powers of a court of record for the purpose of dealing with breaches of privileges and contempt by way of commitment. His Lordship added that if the section meant more than this, or if it were taken as a power to try or punish criminal offences otherwise than as incident to the protection of members in their proceedings, s. 30 could not be supported.

Profanation of the Lord's Day.—The case of *Attorney-General for Ontario v. Hamilton Street Railway Company* (the *Lord's Day Case*), 1903 A.C., 524, came before the Judicial Committee upon appeal from the Court of Appeal for Ontario. Questions had been referred to the Court by the Lieutenant Governor, among others (1) 'Had the legislature of Ontario jurisdiction to enact c. 246 of the Revised Statutes of Ontario, 1897, entitled "An Act to prevent the Profanation of the Lord's Day," and in particular ss. 1, 7 and 8 thereof?'

Lord Halsbury, L.C., delivering the judgment of the Committee, pp. 528-9, said:—

'Their Lordships are of opinion that the Act in question, Revised Statutes of Ontario, 1897, c. 246, intituled "An Act to prevent the Profanation of the Lord's Day," treated as a whole, was beyond the competency of the Ontario legislature to enact, and they are accordingly of opinion that the first question which was referred to the Court of Appeal for Ontario by the Lieutenant Governor, pursuant to c. 84 of the Revised Statutes of Ontario, 1897, ought to be answered in the negative.

'The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. S. 91, sub-s. 27 of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada "the criminal law, except the constitution of courts of criminal jurisdiction." It is, therefore, the criminal law in

its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt than an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, "the constitution of courts of criminal jurisdiction," renders it more clear, if anything were necessary to render it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament.'

It is to be observed that their Lordships give no opinion with respect to the validity of the amendment introduced after Confederation. By this amendment tramway companies were, subject to certain exceptions, prohibited from working their trams on Sunday. The judgment indeed determines nothing more than that the Act, R.S.O., 1897, c. 246, contains a criminal enactment; and this is apparent upon inspection of the Act.

The statement that the criminal law in its widest sense is reserved for the exclusive legislative authority of Parliament must, it is conceived, be taken subject to an exception of the legislation which is competent to a legislature under s. 92 (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,' and which may, as in *Russell v. The Queen, supra,* be termed provincial criminal law.

The Canada Temperance Act.—In *Russell v. The Queen,* 7 A.C., 838-9, Sir Montague Smith, delivering the judgment, said that the Canada Temperance Act did not belong to the class of subjects 'property and civil rights,' but had in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs or of dangerous explosives, and that this sort of legislation related rather to public order and safety. Moreover, his Lordship said:—

'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 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.'

Nothwithstanding such direct relationship to the criminal law, it was ultimately held, as has been already shown, that the Canada Temperance Act was not passed in the execution of the powers of the Dominion Parliament with regard to the criminal law.

> 28. The Establishment, Maintenance, and Management of Penitentiaries.
>
> 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The Exceptions.—The subjects expressly excepted in the enumeration of s. 92, which defines exclusive powers of the legislatures, are mentioned in paragraphs 1, 7 and 10 of that section as follows:—

> 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.
>
> 7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

10. 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:

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.

The classes of subjects so excepted fall by s. 91 (29) within the exclusive legislative authority of Parliament, and the decisions with regard to these excepted classes of subjects are, therefore, grouped in this place.

Marine hospitals, excepted by s. 92 (7), are also named in s. 91 (11).

It will be observed that paragraph 10 is not well expressed. The sub-paragraphs *a*, *b* and *c* are stated as exceptions from 'local works and undertakings,' but the works and undertakings mentioned in sub-paragraphs *a* and *b* are not local, and it is only in sub-paragraph *c* that any local works are described. The drafting would have been improved by transferring sub-paragraphs *a* and *b* directly to the enumerations of s. 91.

It is questionable whether s. 93 (1) states an exception within the meaning of s. 91 (29).

Dominion Railways and Telephones.—In *Bourgoin v. La Compagnie du Chemin de Fer de Montreal, Ottawa et Occidental*, 5 A.C., 402-3, Sir James Colville said, referring to a notarial act or deed confirmed by a statute of the Quebec legislature (39 V., c. 2):—

'The combined effect, therefore, of the deed and of this statute, if the transaction was valid, was to transfer a federal railway, with all its appurtenances, and all the property, liabilities, rights, and powers of the existing company, to the Quebec government, and, through it, to a company with a new title and a different organization; to dissolve the old federal company, and to substitute for it one which was to be governed by, and subject to, provincial legislation.

'It is contended on the part of the appellants that this transaction was invalid, and altogether inoperative to affect the obligations of the company. They insist that, by the general law, and by reason of the special legislation which governed it, the company was incompetent thus to dissolve itself, to abandon its undertaking, and to transfer that, and its own property, liabilities, powers, and rights to another body, without the sanction of an Act of a competent legislature; and, further, that the legislature of Quebec was incompetent to give such sanction. This contention appears to their Lordships to be well founded.

'That such a transfer, except under the authority of an Act of Parliament, would in this country be held to be *ultra vires* of a railway company, appears from the judgment of Lord Cairns in *Gardner v. London, Chatham and Dover Railway Company*, L. R., 2 Ch. 201, 212. That it is equally repugnant to the law of the Province of Quebec, so far as that is to be gathered from the Civil Code, is shown by the 369th article of that Code. But the strongest ground in favour of the appellants' contention is to be found in the special legislation touching this railway company.'

His Lordship then referred to the history of the legislation showing that the railway, originally authorized by a statute of Quebec, had been by Dominion statute declared a work for the general advantage of Canada, subject to the Dominion Railway Act of 1868; that it was enacted that no part of the Quebec Railway Act, 1869, should apply to the railway or the company, and in effect that the Quebec legislation incorporating the company should be read and construed as if enacted by Parliament.

His Lordship, p. 404, continued:—

'These provisions, taken in connection with, and read by the light of those of the imperial statute, the British North America Act, 1867, which are contained in s. 91, and sub-s. 10c. of s. 92, establish, to their Lordships' satisfaction, that the transaction between the company and the government of Quebec could not be validated to all intents and purposes by an Act of the provincial legislature, but that an Act of the Parliament of Canada was essential in order to give it full force and effect.'

In *Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame de Bonsecours*, 1889 A.C., 367, a

question arose as to a railway ditch and the application of the local law. By the Municipal Code of Quebec, articles 867 to 878 inclusive, municipal watercourses, which apparently are held to include a ditch such as the one in respect of which the action was brought, are required to be kept, by the owner or occupant of the land through which the watercourse passes, in good order and free from obstruction which would impede the water-flow; and by articles 21 and 22 every railway company is subject to the enactments of the Municipal Code with regard to the maintenance of watercourses upon the properties possessed or occupied by it in a municipality, and liable for refusal to perform the work for which it is responsible, not only to damages, but also to a fine of twenty dollars for each day of neglect.

Where the Canadian Pacific Railway passes through the Parish of Notre Dame de Bonsecours, and through the lands belonging to Julien Gervais, there was a ditch upon the land of the company between the line of rails and the boundary of Julien Gervais' lands. This ditch became obstructed and the rural inspector of the parish served the company with a notice requiring the company within eight days, 'à voir à nettoyer, réparer et mettre en bon état le fossé sud de votre voie, à l'endroit ou elle traverse la terre portant le numéro huit des plan et livre de renvoi officiels de la dite municipalité, et appartenant à Julien Gervais.'

The company did not comply with the notice and the action was brought by the corporation of the parish to recover the statutory penalties. Upon appeal to the Judicial Committee the defence urged by the company was that the regulation of the matters to which the order of the inspector related, and which the corporation was seeking to enforce by penalty, belonged to the Parliament of Canada and not to the local legislatures.

Lord Watson, delivering the judgment of the Committee, pp. 372-3, said:—

'The British North America Act, whilst it gives the legislative control of the appellants' railway *qua* railway to the

Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so called, applicable to those lines which were placed under its charge, should belong to the Dominion Parliament. It therefore appears to their Lordships that any attempt by the legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the legislature of Quebec.'

Lord Watson stated further that the question depended upon the character of the ditch and the real nature of the operation which the company was by the notice required to perform. As to the structure of the ditch itself there was no information, but it appeared that the ditch had become obstructed so that the water from it escaped and inundated the land of Julien Gervais.

Their Lordships construed the notice served by the rural inspector as amounting simply to a requisition that the company should clean the ditch by removing the obstruction and restoring the ditch to the state in which it was before the obstruction occurred. They did not consider that any structural alteration of the ditch was required, and they held therefore that the company was subject to the requirements of the Municipal Code.

In *Madden v. Nelson and Fort Sheppard Railway Company*, 1899 A.C., 626, the question is concerned with the absence of a fence which it was claimed the provincial legislature required. The Cattle Protection Act of British Columbia, 1891, 54 V., c. 1, as amended by 58 V., c. 7, provided in effect that every railway company operating a railway in British Columbia under the authority of the Parliament of Canada should be liable in damages to the owner of any cattle injured or killed on its railway by its engines or trains, unless a fence of a certain character, on each side of the railway, were erected to prevent cattle from getting on the railway; and that when the fence was not of the character required the company should be held liable for all damages caused through the insufficiency of the fence to prevent cattle from trespassing upon adjoining lands.

The action was brought to recover the value of two horses killed on the railway of the respondent company by reason of there being no fence on the side of the railway. The company objected that the railway having been declared by the Parliament of Canada to be a work for the general advantage of Canada it was subject in respect thereof only to Dominion legislation, and not to the Cattle Protection Act of British Columbia.

Lord Halsbury, L.C., delivering the judgment of the Committee, pp. 627-9, said:—

'The course of the argument has been rather to suggest that if there is no direct enactment in the statute (Cattle Protection Act, 1891, 54 V., c. 1(B.C.), as amended by the Cattle Protection Act, 1895, 58 V., c. 7 (B.C.)—the validity of which is in question) to create any erection or construction of the works of the railway that it would avoid the objection of the statute being *ultra vires*. But their Lordships are not disposed to yield to that suggestion, even if it were true to say that this statute was only an indirect mode of causing the construction to be made, because it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly. But it is an under-statement of the difficulties in the way of the appellants to speak of it as an indirect operation of the statute to direct that this company should erect fences and provide against the particular class of

accident which happened in this case, because the provincial legislature that passed this enactment seem to have been under the impression that they were not proceeding indirectly at all —that they were proceeding directly, and the preamble of their statute points out what they were intending to do. That preamble recites: "And whereas railway companies incorporated under the authority of the Parliament of Canada, or declared by the said Parliament to be for the general advantage of Canada, or for the advantage of two or more of the provinces, do not recognize any obligation on their part to fence against such cattle: and whereas it is just that such railway companies should, in the absence of proper fences, be held responsible for cattle injured or killed on their railways by their engines or trains." In other words, the provincial legislature have pointed out by their preamble that in their view the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the provincial legislature ,the Dominion Parliament ought to have made; and they thereupon proceed to do that which they recite the Dominion Parliament has omitted to do. It would have been impossible, as it appears to their Lordships, to maintain the authority of the Dominion Parliament if the provincial parliament were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them, and is, therefore, manifestly *ultra vires.*

'Their Lordships think it unnecessary to do more than to say that in this case the line seems to have been drawn with sufficient precision in the case of the *Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame de Bonsecours,* 1899 A.C., 367, where it was decided that although any direction of the provincial legislature to create new works on the railway and make a new drain and to alter its construction would be beyond the jurisdiction of the provincial legislature, the railway company were not exempted from the municipal state of the law as it then existed—that all landowners, including the railway company, should clean out their ditches so as to prevent a nuisance. It is not necessary to do more here than to say that this case raises no such question anywhere near the line, because in this case there is the actual provision that there shall be a liability on the railway company unless they create such and such works upon their roadway. This is manifestly and clearly beyond the jurisdiction of the provincial legislature.'

This case and that of *Canadian Pacific Railway Company v. Parish of Notre Dame de Bonsecours, supra,* considered together, give rise to some uncertainty, though it is probable that neither of them involves the denial of any Dominion legislative power. A Dominion railway company may not be required by provincial statute to construct a ditch or erect a fence. If, however, the company do construct a ditch, the company apparently becomes subject to existing provincial legislation in respect of keeping the ditch open and free from obstruction, just as it does, it is assumed, in the same respect become subject to the common law of the province. If the company build a fence, is it in like manner affected by provincial legislation with regard to keeping the fence in repair? The point is not determined by the case of *Madden v. Nelson and Fort Sheppard Railway Company,* but it seems to be inconsistent with the earlier decision to answer the question in the affirmative. It is difficult to suppose that the relative jurisdiction of the Dominion and the provinces over a Dominion railway can be affected by the circumstance that the company has seen fit to exercise its power to construct a ditch; and it can hardly admit of doubt that, if it should become advisable in the interest of the railway to fill up or discontinue the use of the ditch, Parliament would have the jurisdiction to authorize the doing of this, notwithstanding any provincial enactment.

In *Corporation of the City of Toronto v. Bell Telephone Company of Canada,* 1905 A.C., 52, the respondent company was incorporated by the Dominion Act, 43 V., c. 67, whereby it was authorized to enter upon the streets and highways of the city of Toronto, and to construct conduits or lay cables thereunder, or to erect poles with wires upon the streets. The consent of the municipal corporation was not by the Dominion statute required. The question was whether the power so conferred was affected by the Ontario Act, 45 V., c. 71, which was passed to authorize the exercise of these powers within the province, but subject to the consent of the municipal corporation.

Lord Macnaghten, delivering the judgment of the Committee, pp. 56-9, said:—

'The company had been incorporated by a Dominion statute of April 29, 1880 (43 V., c. 67), for the purpose of carrying on the business of a telephone company. The scope of its business was not confined within the limits of any one province. It was authorized to acquire any lines for the transmission of telephone messages " in Canada or elsewhere," and to construct and maintain its lines along, across or under any public highways, streets, bridges, watercourses, or other such places, or across or under any navigable waters, " either wholly in Canada or dividing Canada from any other country," subject to certain conditions and restrictions mentioned in the Act, which are not material for the present purpose.

'The British North America Act, 1867, in the distribution of legislative powers between the Dominion Parliament and provincial legislatures, expressly excepts from the class of " local works and undertakings " assigned to provincial legislatures, " 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 " (s. 92, sub-s. 10a). S. 91 confers on the Parliament of Canada exclusive legislative authority over all classes of subjects so expressly excepted. It can hardly be disputed that a telephone company, the objects of which as defined by its Act of incorporation contemplate extension beyond the limits of one province, is just as much within the express exception as a telegraph company with like powers of extension. It would seem to follow that the Bell Telephone Company acquired from the legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and that no provincial legislalature was or is competent to interfere with its operations, as authorized by the Parliament of Canada. It appears, however, that shortly after the incorporation of the company doubts arose as to its right to carry on local business. The question was raised in the province of Quebec, and decided adversely to the company in the case of *Reg. v. Mohr*, 7 Q.L.R., 183. In consequence of this decision, with which their Lordships are unable to agree, the company applied for and obtained from the legislature of Ontario an Act of March 10, 1882 (45 V., c. 71, Ontario), authorizing it to exercise within that province the powers which the Dominion

Act had purported to confer upon it. This Act, however, according to the construction placed upon it by the corporation (which, for the present purpose, their Lordships assume to be correct) makes the consent of the municipal council a condition precedent to the exercise of the company's powers in cities, towns, and incorporated villages.

'The company was proceeding to construct its lines in the city of Toronto without having obtained the consent of the corporation, when the corporation brought the two actions which resulted in the special case the subject of the present appeal.

'The case was heard in the first instance by Street, J., who decided in favour of the corporation; but his decision was reversed by the Court of Appeal for Ontario, Maclennan, J. A., dissenting.

'The view of Street, J., apparently was that, inasmuch as the Act of incorporation did not expressly require a connection between the different provinces, the exclusive jurisdiction of the Parliament of Canada over the undertaking did not arise on the passing of the Act, and would not arise unless and until such a connection was actually made. In the meantime, in his opinion, the connection was a mere paper one, and nothing could be done under the Dominion Act without the authority of the legislature of the province. This view, however, did not find favour with any of the learned Judges of Appeal. In the words of Moss, C.J.O., "the question of the legislative jurisdiction must be judged of by the terms of the enactment, and not by what may or may not be thereafter done under it. The failure or neglect to put into effect all the powers given by the legislative authority affords no ground for questioning the original jurisdiction." If authority be wanted in support of this proposition, it will be found in the case of *Colonial Building and Investment Association v. Attorney-General of Quebec*, (1883) 9 A.C., 157, at p. 165, to which the learned Judges of Appeal refer.

'Maclennan, J. A., differed from the rest of the court on one point only. He agreed in thinking that it would not be competent for a provincial legislature of itself to limit or interfere with powers conferred by the Parliament of Canada, but he seems to have thought that the Bell Telephone Company by reason of its application to the Ontario legislature was precluded or estopped from disputing the competency of that legislature, and that the enactment making the consent of the corporation a condition precedent amounted to a legislative bar-

gain between the company and the corporation to the effect that the company would not use the powers conferred upon it by the Dominion Parliament without the consent of the corporation. Their Lordships, however, cannot accept this view. They agree with the Chief Justice in thinking that no trace is to be found of any such bargain, and that nothing has occurred to prevent the company from insisting on the powers which the Dominion Act purports to confer upon it.'

It was argued that the company was formed to carry on and was carrying on two separate and distinct businesses, a local business and a long distance business, and that the local business and the undertaking of the company so far as it dealt with local business fell within provincial jurisdiction ,but their Lordships found that the facts did not support this contention.

Lord Macnaghten, p. 60, referred to one other point as follows:—

'An Act of May 17, 1882 (45 V., c. 95) amending the company's Act of incorporation, and passed by the Dominion legislature immediately after the passing of the Ontario Act, was referred to in the course of the argument. This Act seems to have been intended, partly at any rate, to neutralize the effect of the Ontario Act. It declares the Act of incorporation as thereby amended and the works thereunder authorized "to be for the general advantage of Canada." It is not very easy to see what the part of the section declaring the Act of incorporation to be for the general advantage of Canada means. As regards the works therein referred to, if they had been "wholly situate within the province," the effect would have been to give exclusive jurisdiction over them to the Parliament of Canada; but, inasmuch as the works and undertaking of the company authorized by the Act of incorporation were not confined within the limits of the province, this part of the declaration seems to be unmeaning.'

In *Attorney-General for British Columbia v. Canadian Pacific Railway Company*, 1906 A.C., 210, the defendant company justified the right to take and appropriate for the purposes of its railway and works a part of the foreshore in the city of Vancouver under the authority of its Act of incorporation, 44 V., c. 1, s. 18 (a), which provides that:—'The company shall have the right to take, use, and hold the beach and

land below high-water mark in any stream, lake, navigable water, gulf or sea in so far as the same shall be vested in the Crown, and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways.'

Sir Arthur Wilson, delivering the judgment of the Committee, pp. 210-1, said:—

'The second contention in support of the right of the Dominion Parliament to legislate for the foreshore in question is rested upon s. 91, read with s. 92, of the British North America Act, which secures to the Dominion Parliament exclusive legislative authority in respect of lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting any province with any other or others of the provinces, or extending beyond the limits of the province, a description which clearly applies to the Canadian Pacific Railway.

'It was argued for the appellant that these enactments ought not to be so construed as to enable the Dominion Parliament to dispose of provincial Crown lands for the purposes mentioned. But their Lordships cannot concur in that argument. In *Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame de Bonsecours*, 1899 A.C., 367, (a case relating to the same company as the present) the right to legislate for the railway in all the provinces through which it passes was fully recognized. In *Toronto Corporation v. Bell Telephone Company of Canada*, 1905 A.C., 52, which related to a telephone company whose operations were not limited to one province, and which depended on the same sections, this Board gave full effect to legislation of the Dominion Parliament over the streets of Toronto which are vested in the city corporation. To construe the sections now in such a manner as to exclude the power of Parliament over provincial Crown lands would, in their Lordships' opinion, be inconsistent with the terms of the sections which they have to construe, with the whole scope and purpose of the legislation, and with the principle acted upon in the previous decisions of this Board. Their Lordships think, therefore, that the Dominion Parliament had full power, if it thought fit, to authorize the use of provincial Crown lands by the company for the purposes of this railway.'

A similar view had been suggested by Lord Selborne in 1874 in *L'Union St. Jacques v. Belisle,* L.R., 6 P.C., 37.

In *Grand Trunk Railway Company v. Attorney-General for Canada,* 1907 A.C., pp. 67-9, Lord Dunedin, delivering judgment of the Committee, said:—

'The question in this appeal is as to the competency of the Dominion Parliament to enact the provisions contained in s. 1 of 4 E. VII., c. 31, of the statutes of Canada. These provisions may be generally described as a prohibition against any "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants.

'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 s. 92 sub-s. (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,* 1894 A.C., 189, and *Tennant v. Union Bank of Canada,* 1894 A.C., 31, seems to establish these two propositions: *First*, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and *Secondly*, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

'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. It would tend to negligence on the part of employees, and other results of an injurious character to the public service and the safety of the travelling public would necessarily result from such a far reaching statute."

'This argument is really conclusive against the appellants. Of the merits of the policy their Lordships cannot be judges. But if the appellants' factum properly describes its scope, then it is indeed plain that it is properly ancillary to through railway legislation.'[1]

> And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Object of this Clause.—In *Citizens and Queen Insurance Companies v. Parsons*, 7 A.C., 107-8, the Committee stated in effect that inasmuch as it was foreseen that some of the classes of subjects assigned to the provincial legislatures would unavoidably run into and be embraced by some of the enumerated classes of subjects in s. 91, an endeavour appears to have been made for cases of apparent conflict, and that with this object the paragraph at the end of

[1] See also the most recent case (November, 1907) of *Corporation of the City of Toronto v. Canadian Pacific Railway Company*, the judgment in which, pronounced by Lord Collins, was published after these pages had been printed.

s. 91 was introduced, though, as their Lordships stated, 'it may be observed that this paragraph applies in its grammatical construction only to No. 16 of s. 92.'

In the *Prohibition Case*, 1896 A.C., 359-60, Lord Watson said:—

'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 s. 91 might, occasionally and incidentally, involve legislation upon matters which are *prima facie* committed exclusively to the provincial legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 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 Company of Canada v. Parsons*, 7 A.C., 108, that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 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 s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 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. That view was stated and illustrated by Sir Montague Smith in *Citizens' Insurance Company of Canada v. Parsons*, 7 A.C., 108-9, and in *Cushing v. Dupuy*, 5 A.C., 415; and it has been recognized by this Board in *Tennant v. Union Bank of Canada*, 1894 A.C., 46, and in *Attorney General of Ontario v. Attorney General for the Dominion*, 1894 A.C., 200.'

In *L'Union St. Jacques v. Belisle*, L. R., 6 P.C., 35-6, Lord Selborne, referring to s. 92 (16), held that the provincial legislation in question related to a private and

local matter, and that unless the general effect of s. 92 (16) was, for the purpose, qualified by something in s. 91, it was a matter not only within the competency, but within the exclusive competency of the provincial legislature. S. 91, Lord Selborne said, referring to its concluding paragraph, undoubtedly qualified s. 92 (16) if the subject-matter were within any one of the different classes of subjects in s. 91 specially enumerated; and he added that the *onus* was on the respondent (who was denying the validity of the Act) to show that the subject matter, being of itself of a local or private nature, did also come within one or more of the classes of subjects specially enumerated in s. 91.

Exclusive Powers of Provincial Legislatures.

Subjects of exclusive Provincial Legislation.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say,—

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.

Powers and Privileges of the Legislatures.—In *Fielding v. Thomas*, 1896 A.C., 600, questions arose as to the power of the legislature of Nova Scotia to enact certain clauses of c. 3 of the Revised Statutes (fifth series) respecting the composition, powers and privileges of the Houses of the legislature. S. 20 of this Act provided that the Houses of the legislature and the committees and members thereof should respectively hold, enjoy and exercise the like privileges, immunities and powers as should for the time being be held, enjoyed and exercised by the Senate and House of Commons of Canada respectively, and the committees and members thereof. S. 26 enacted that no member of either House should be liable to any civil action or damages by reason of any matter or thing brought by him before the House. S. 29 provided that insults to or assaults or libels upon members of either House during the session of the legislature should be deemed infringements of the Act; and ss. 30 and 31 provided that each House

should be a court of record and have all the rights and privileges of a court of record for the purpose of summarily inquiring into and punishing the acts, matters and things declared to be violations or infringements of the Act, and that every person guilty of any such infringement or violation should be liable to imprisonment for such time during the session of the legislature then being held as might be determined by the House.

The respondent having signed and published a petition annexing exhibits which contained statements reflecting upon a member of the House of Assembly, a resolution was passed by the House that the respondent had by such publication been guilty of a breach of the privileges of the House and should be summoned to attend. The respondent attended and was ordered to withdraw and remain in attendance, and subsequently ordered to be called in and reprimanded. He refused to obey, whereupon he was, by order of the House, arrested by the Sergeant-at-Arms, brought to the Bar of the House, and directed by the House to be committed to the common jail at Halifax for forty-eight hours, with the proviso that the punishment should cease if any prorogation supervened. The respondent, having been discharged by *habeas corpus*, brought his action against the appellants, all of whom were present and voted for the passing of the resolution which led to the imprisonment. The defence rested upon the enactments above mentioned.

Lord Halsbury L.C., delivering the judgment of the Committee, pp. 610-3, said:—

'Their Lordships are, however, of opinion that the British North America Act itself confers the power (if it did not already exist) to pass Acts for defining the powers and privileges of the provincial legislature. By s. 92 of that Act the provincial legislatures may exclusively make laws in relation to matters coming within the classes of subjects enumerated, (*inter alia*) the amendment from time to time of the constitution of the province, with but one exception, namely as regards the office of lieutenant-governor.

'It surely cannot be contended that the independence of the provisional legislature from outside interference, its protection, and the protection of its members from insult while in

the discharge of their duties, are not matters which may be classed as part of the constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitutional law of the province.

'It is further argued that the order which the respondent disobeyed was not a lawful order or one which he was under any obligation to obey. The argument seems to be that the original cause of complaint was a libel; that though the particular breach of the Act complained of was the disobedience to the orders of the House, yet as those orders were issued in reference to a certain petition presented to the House the contents of which were alleged to be libellous and during the investigation of the question—who was responsible for its presentation? and as it must be assumed that a libel is a matter beyond the jurisdiction of the House to be inquired into, inasmuch as libel is a criminal offence and the criminal law is one of the matters reserved for the exclusive jurisdiction of the Dominion Parliament, the whole matter was *ultra vires*, and both the members who voted and the officers who carried out the orders of the House are responsible to an ordinary action at law.

'Their Lordships are unable to acquiesce in any such contention. It is true that the criminal law is one of the subjects reserved by the British North America Act for the Dominion Parliament, but that does not prevent an inquiry into and the punishment of an interference with the powers conferred upon the provincial legislatures by insult or violence. The legislature has none the less a right to prevent and punish obstruction to the business of legislation because the interference or obstruction is of a character which involves the commission of a criminal offence or brings the offender within reach of the criminal law. Neither in the House of Commons of the United Kingdom nor the Nova Scotia Assembly could a breach of the privileges of either body be regarded as subjects ordinarily included within that department of state government which is known as the criminal law.

'The effort to drag such questions before the ordinary courts when assaults or libels have been in question in the British Houses of legislature have been invariably unsuccessful, and it may be observed that, 1, W. and M., Sess. II., c. 2, s. 1, sub-s. 9, "That the freedom of speech and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament," is declaratory and not enacting.

'Their Lordships are therefore of opinion that s. 20 of the provincial Act is not *ultra vires* and affords a defence to the action. It may be that ss. 30, 31 of the provincial Act, if construed literally and apart from their context, would be *ultra vires*. Their Lordships are disposed to think that the House of Assembly could not constitute itself a court of record for the trial of criminal offences. But read in the light of the other sections of the Act, and having regard to the subject-matter with which the legislature was dealing, their Lordships think that those sections were merely intended to give to the House the powers of a court of record for the purpose of dealing with breaches of privilege and contempt by way of committal. If they mean more than this, or if it be taken as a power to try or punish criminal offences otherwise than as incident to the protection of members in their proceedings, s. 30 could not be supported.

'It is to be observed that the case of *Barton v. Taylor*, 11 A.C., 197, referred to by one of the learned judges below, is no authority in favour of the contention here. No statute was there relied upon, but the Legislative Assembly itself in that case had in pursuance of statutory powers adopted certain standing rules or orders for the orderly conduct of the business of the Assembly. The trespasses complained of were adjudged by this Board not to be justifiable under the standing orders. It was then sought to justify the acts in question as being within a power incident or inherent in a colonial legislative assembly. This Board refused to adopt that contention, but their Lordships expressly added:—

'"They think it proper to add that they cannot agree with the opinion which seems to have been expressed by the Court below, that the powers conferred upon the Legislative Assembly by the constitution Act do not enable the Assembly "to adopt from the imperial Parliament, or to pass by its own authority, any standing order giving itself the power to punish an obstructing member, or remove him from the chamber, for any longer period than the sitting during which the obstruction occurred." This, of course, could not be done by the Assembly alone without the assent of the Governor. But their Lordships are of opinion that it might be done with the Governor's assent; and that the express powers given by the constitution Act are not limited by the principles of common law applicable to those inherent powers which must be implied (without express grant) from mere necessity, according to the maxim, *Quando*

lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest. Their Lordships' affirmance of the judgment appealed from is founded on the view, not that this could not have been done, but that it was not done, and that nothing appears on the record which can give the resolution suspending the respondent a larger operation than that which the Court below has ascribed to it."

'But independently of these considerations the provisions of s. 26 of the Act of the provincial legislature would in their Lordships' opinion form a complete answer to the action even if the act complained of had been in itself actionable. Their Lordships are here dealing with a civil action and they think it sufficient to say that the legislature could relieve members of the House from civil liability for acts done and words spoken in the House whether they could or could not do so from liability to a criminal prosecution.

'No such question as that which arose in *Barton v. Taylor, supra*, arises here. All these matters—the express enactment of the privileges of the House of Commons of the United Kingdom—the express power to deal with such acts by the provincial Assembly—the express indemnity against any action at law for things done in the provincial parliament, are all explicitly given and the only arguable question is that which their Lordships have dealt with, namely, whether it was within the power of the provincial legislature to make such laws.'

Queen's Counsel.—In the *Queen's Counsel Case*, 1898 A.C., 247, Ontario having passed a statute in 1873 (36 V., c. 3), subsequently revised as c. 139 of the Revised Statutes, 1877, authorizing the Lieutenant-Governor by letters patent to appoint Queen's Counsel, questions as to the authority of the Lieutenant-Governor to make such appointments were referred by the Lieutenant-Governor to the Court of Appeal for Ontario. Upon appeal to the Judicial Committee, Lord Watson, delivering the judgment, pp. 251-5, said:—

'The appointment of counsel for the Crown, and the granting of precedence at the bar to certain of its members, are matters which do not appear to their Lordships to stand upon precisely the same footing. In England the first of these rights has always been matter of prerogative in this sense, that it has been personally exercised by the Sovereign with the advice of the

Lord Chancellor, the appointment being made by letters patent under the sign-manual. In early times the appointment was accompanied with a fee or retainer of moderate amount, but that formality has long since fallen into abeyance. The terms of the patent have been limited to appointing the grantees to be of counsel for the Sovereign, subject to the condition that they are to take precedence *inter se* according to the priority of their appointment. Royal patents of precedence *inter se* were in use to be granted to sergeants-at-law who did not derive their position from the Crown. (*See* note, 16 C.B., N.S., 1.) Beyond these limits the Sovereign has never in modern times professed to confer upon Crown Counsel, or other members of the bar, a right of precedence or pre-audience in the courts of England. These are matters which have been regulated in practice either by the discretion of the bench or by the courtesy of the profession. The effect of an appointment as Queen's Counsel is that the holder cannot appear in court as counsel for any party litigating with the Crown unless he has obtained a license from Her Majesty.

'The exact position occupied by a Queen's Counsel duly appointed is a subject which might admit of a good deal of discussion. It is in the nature of an office under the Crown, although any duties which it entails are almost as unsubstantial as its emoluments; and it is also in the nature of an honour or dignity to this extent, that it is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred. But it does not necessarily follow that, as in the case of a proper honour or dignity, the elevation of a member of the bar to the rank of Queen's Counsel cannot be delegated by the Crown, and can only be effected by the direct personal act of the Sovereign. Even in the case of titles of honour, it does not appear to be doubtful that the Sovereign may, with the assistance of an Act of the legislature, exercise the prerogative in a manner which would but for its provisions be unconstitutional. It was adjudged by the House of Lords in the case of the *Wensleydale Peerage* that it was beyond the constitutional right of the Monarch to confer upon a life peer, of any rank whom Her Majesty might choose to create, the privilege of sitting and voting in Parliament. But life peerages carrying that privilege have since then been created by the Crown under the authority of and to the extent permitted by the Appellate Jurisdiction Act, 1876.

'In the province of Ontario the right of appointing Queen's Counsel has been committed to the Lieutenant-Governor by an

Act passed by the provincial parliament with the sanction of the Crown. 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 s. 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 may be necessary for the government and administration of the new province of Ontario.

'The next and only other point requiring to be considered in this case is, whether the legislature of Ontario had jurisdiction to confer upon the Lieutenant-Governor those powers which are now embodied in the revised statute of December, 1877. That is a question which can only be solved by reference to the provisions of the imperial Act of 1867; and there are three of the enactments of s. 92 which appear to their Lordships to have an immediate bearing upon it. The first head of that clause gives to the legislature of each province exclusive authority to make laws from time to time for the amendment of the constitution of the province, "except as regards the office of lieutenant-governor." By sub-s. 4 of the same clause, "the establishment and tenure of provincial offices, and the payment of provincial officers." Again, by the 14th head, the legislature is empowered to make laws in relation to the administration of justice in the province, "including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts."

'By the combined effect of these enactments it is entirely within the discretion of the provincial legislature to determine by what officers the Crown, or in other words the executive government of the province, shall be represented in its courts of law or elsewhere, and to define by Act of parliament the duties, whether substantial or honorary, which are to be incumbent upon these officers, and the rights and privileges which they are to enjoy. The revised statute of 1877, in so far as it relates to the appointment of Queen's Counsel, is, in the opinion of their Lordships, within the limits of that legislative authority; and, that being so, there appears to them to be no ground for the suggestion that its provisions, when given effect to by the Lieutenant-Governor will constitute an encroachment upon the pre-

rogative of the Crown, or upon the rights of any representative of the Crown to whom, by the terms of his commission, the right of appointing counsel to represent the Sovereign may have been delegated.

'On the other hand, the enactments of s. 92, sub-s. 14, confer upon the provincial legislature in wide and general terms power to regulate the constitution and organization of all courts of law in the province, civil or criminal. It is no doubt true that, with two exceptions, these being the Courts of Probate in Nova Scotia and New Brunswick, the appointment of the judges of the superior district, and county courts in each province, is committed to the Governor-General of Canada by s. 96, subject to the condition that, until the laws of the provinces are made uniform, these judges must be selected from the bar of the province in which the appointment is made. And, by s. 100, the right to fix the salaries, allowances, and pensions of these judges, except in the case of the Courts of Probate in Nova Scotia and New Brunswick, is vested in the Parliament of Canada, upon which there is also imposed the duty of providing the salaries, allowances, and pensions so fixed. But in all other respects the courts of each province, including the judges and the officials of the court, together with those persons who practise before them, are subject to the jurisdiction and control of the provincial legislature: that legislature and no other has the right to prescribe rules for the qualifications and admission of practitioners, whether they be pleaders or solicitors. Their Lordships, in these circumstances, do not entertain any doubt that the parliament of Ontario had ample authority to give the Lieutenant-Governor power to confer precedence by patent upon such members of the bar of the province as he may think fit to select.'

Electoral Franchise.—In *Cunningham v. Tomey Homma*, 1903 A.C., 151, (quoted *supra* under s. 91 (25), a question arose as to the validity of the electoral law of British Columbia whereby it was enacted that no Japanese, whether naturalized or not, should have his name placed on the register of voters or be entitled to vote. Rival considerations were urged as to whether the enactment could be justified under s. 92 (1), or whether it did not affect the subject of naturalization and aliens assigned by s. 91 (25) to the Dominion. The Judicial Committee upheld the legislation apparently as in execution of the powers conferred by s. 92 (1).

2. Direct[1] Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

Local Assessment.—In *Dow v. Black*, L.R., 6 P.C., 281-2, upon the question as to whether the legislature of New Brunswick had power to pass an Act by which an assessment for local purposes could be imposed on the town of St. Stephen, Sir James Colville, delivering the judgment of the Committee, said:—

'It has been argued that whereas the 91st section reserves to the Parliament of Canada exclusive power of legislation in respect of, amongst other subjects, "The raising of money by any mode or system of taxation," the only qualifications imposed on that general reservation are to be found in the 2nd and 9th articles of the 92nd section. The latter has obviously no bearing on the present question. As to the former, it was contended that it authorizes direct taxation only for the purpose of raising a revenue for general provincial purposes, that is, taxation incident on the whole province for the general purposes of the whole province.

'Their Lordships see no ground for giving so limited a construction to this clause of the statute. They think it must be taken to enable the provincial legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province. They conceive that the 3rd article of s. 91 is to be reconciled with the 2nd article of s. 92, by treating the former as empowering the supreme legislature to raise revenue by any mode of taxation, whether direct or indirect; and the latter as confining the provincial legislature to direct taxation within the province for provincial purposes.'

Direct Taxation.—In *Attorney-General for Quebec v. Queen Insurance Company*, 3 A.C., 1100-1, their Lordships having considered that a statute imposing a tax upon certain policies of insurance and receipts or renewals was not a licensing Act, but really a stamp Act, it became necessary to consider the effect of s. 92 (2), and Sir G. Jessel, M.R., delivering the judgment, said:—

'The single point to be decided upon this is whether a stamp Act—an Act imposing a stamp on policies, renewals, and re-

[1] Their Lordships explained, in *Bank of Toronto v. Lambe*, 12 A.C., 586, that this power is so limited because the power of indirect taxation would be felt all over the Dominion, *infra*, p. 135.

ceipts, with provisions for avoiding the policy, renewal, or receipt, in a court of law, if the stamp is not affixed—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and, in trying to find out their meaning we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the courts of law. Taken in either way there is a multitude of authorities to show that such a stamp imposed by the legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau, in his elaborate judgment, it is not necessary here to more than refer to. But surely if one could have been found in favour of the appellants, it was the duty of the appellants to call their Lordships' attention to it. No such case had been found. Their Lordships, therefore, think they are warranted in assuming that no such case exists. As regards judicial interpretation, there are some English decisions and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all treat stamps either as indirect taxation, or as not being direct taxation. Again, no authority on the other side has been cited on the part of the appellant.

'Lastly, as regards the popular use of the word, two cyclopaedias at least have been produced, showing that the popular use of the word is entirely the same in this respect as the technical use of the word. And here again there is an utter deficiency on the part of the appellants in producing a single instance to the contrary. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation. All that it is necessary for them to say is that finding these words used in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must con-

sider it was not the intention of the legislature of England to include it in the term "direct taxation," and therefore that the imposition of this stamp duty is not warranted by the terms of the 2nd sub-s. of s. 92 of the Dominion Act.'

In *Attorney-General for Quebec v. Reed,* 10 A.C., 141, a question arose as to the validity of the Quebec Act, 43-44 V., c. 9, which imposed a duty of ten cents upon every exhibit filed in court in any action pending therein, and the first point considered was whether this charge could be justified under s. 92. Lord Selborne, L.C., delivering the judgment of the Committee, pp. 143-4, referring to 'direct taxation,' said:—

'Now it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated, more or less scientifically, such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill and those who agree with him is less unfavourable to the appellant's arguments than the other view, that of Mr. McCulloch, and M. Littré. It is, that you are to look to the ultimate incidence of the taxation, as compared with the moment of time at which it is to be paid; that a direct tax is —in the words which are printed here from Mr. Mill's book on political economy—"one which is demanded from the very persons who it is intended or desired should pay it." And then the converse definition of indirect taxes is, "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

'Well now, taking the first part of that definition, can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very persons who it is intended or desired should pay it? It must be paid in the course of the legal proceeding, whether that is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain; and from the very nature of such proceedings until they terminate, as a rule,

and speaking generally, the ultimate incidence of such a payment cannot be ascertained. In many proceedings of a friendly character the person who pays it may be a trustee and administrator, a person who will have to be indemnified by somebody else afterwards. In most proceedings of a contentious character the person who pays it is a litigant expecting or hoping for success in the suit; and, whether he or his adversary will have to pay it in the end, must depend upon the ultimate termination of the controversy between them. The legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon any one else. Therefore, it cannot be a tax demanded "from the very persons who it intended or desired should pay it," for in truth that is a matter of absolute indifference to the intention of the legislature. And, on the other hand, so far as relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified, and the law which exacts it cannot assume that that expectation and intention may not be realized. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment, and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd section of the 92nd clause of the Act in question, still less can it be called so, if the other view, that of Mr. McCulloch, is correct.'

In *Bank of Toronto v. Lambe*, 12 A.C., 575, the validity of a statute of Quebec (45 V., c. 22) was in controversy. This Act imposed taxes on certain commercial corporations carrying on

business within the province. Lord Hobhouse, delivering the judgment, pp. 579-80, thus described the effect of the Act:—

'In the year 1882, the Quebec legislature passed a statute entitled, "An Act to impose certain direct taxes on certain commercial corporations." It is thereby enacted that every bank carrying on the business of banking in this province; every insurance company accepting risks and transacting the business of insurance in this province; every incorporated company carrying on any labour, trade, or business in this province; and a number of other specified companies, shall annually pay the several taxes thereby imposed upon them. In the case of banks, the tax imposed is a sum varying with the paid-up capital, and an additional sum for each office or place of business.'

One of the grounds urged against the Act was that it authorized indirect taxation. Lord Hobhouse, pp. 581-4, stated:—

'First, is the tax a direct tax? For the argument of this question, the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz.:—What the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct," and "indirect," according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers, or by private bargains about its payment. Doubtless such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax, that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But, that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation, valid or invalid, according to its actual results in particular cases. It must have

contemplated some tangible dividing line, referable to, and ascertainable by the general tendencies of the tax, and the common understanding of men as to those tendencies.

'After some consideration, Mr. Kerr chose the definition of John Stuart Mill, as the one he would prefer to abide by. That definition is as follows:—

'"Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

'It is said that Mill adds a term—that to be strictly direct, a tax must be general; and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

'Their Lordships then take Mill's definition above quoted, as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellant's counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them, to embody with sufficient accuracy for this purpose an understanding, of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the federation Act.

'Now, whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec legislature must have intended and desired that the very corporations from whom the tax is demanded

should pay and finally bear it. It is carefully designed for that purpose. It is not like a customs duty, which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank, apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec government. For these reasons their Lordships hold the tax to be direct taxation within class 2 of s. 92 of the federation Act. There is nothing in the previous decisions on the question of direct taxation which is adverse to this view. In the case of *Queen Insurance Company*, 3 A.C., 1090, the disputed tax was imposed under cover of a license to be taken out by insurers. But nothing was to be paid directly on the license, nor was any penalty imposed upon failure to take one. The price of the license was to be a percentage on the premiums received for insurances, each of which was to be stamped accordingly. Such a tax would fall within any definition of indirect taxation, and the form given to it was apparently with the view of bringing it under class 9 of s. 92, which relates to licenses. In *Reed's Case*, 10 A.C., 141, the tax was a stamp duty on exhibits produced in courts of law, which in a great many, perhaps most, instances would certainly not be paid by the person first chargeable with it. In *Severn's Case*, 2 S.C.R., 70, the tax in question was one for licenses which by a law of the legislature of On-

tario were required to be taken for dealing in liquors. The Supreme Court held the law to be *ultra vires* mainly on the grounds that such licenses did not fall within class 9 of s. 92, and that they were in conflict with the powers of Parliament under class 2 of s. 91. It is true that all the judges expressed opinions that the tax being a license duty, was not a direct tax. Their reasons do not clearly appear, but, as the tax now in question is not either in substance or in form a license duty, further examination of that point is unnecessary.'

In *Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario,* 1897 A.C., 231, there was an appeal from the decision of the Court of Appeal for Ontario as to two questions referred for opinion by the Lieutenant-Governor in Council. These questions were:—

'(1) Is sub-s. 2 of s. 51 of the Liquor License Act (Revised Statutes of Ontario, c. 194), requiring every brewer, distiller, or other person duly licensed by the government of Canada, as mentioned in sub-s. 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?'

Lord Herschell, delivering the judgment of the Committee, pp. 235-7, said:—

'The determination of the appeal depends on what is the true meaning and effect of the 2nd and 9th sub-ss. of s. 92 of the British North America Act. The judgment appealed from can only be supported by establishing either that the fee imposed is "direct taxation" within the meaning of sub-s. 2, or that the license is comprised within the term "other licenses" in sub-s. 9.

'The question what is "direct taxation" within the meaning of sub-s. 2 does not come now before this Board for consideration for the first time. In the case of *Bank of Toronto v. Lambe,* 12 A.C., 575, it was necessary to put a

construction on those words. The legislature of Quebec had imposed a tax on every bank carrying on business within the province. This tax was a sum varying with the paid-up capital, with an additional sum for each office or place of business. The question at once arose, was this "direct taxation"? It was contended that the tax was not direct, but indirect. All the arguments in favour of the view that the taxation was indirect, which have been forcibly put before their Lordships by the learned counsel for the appellants in the present case, were then pressed upon this Board in vain. The legislation impeached was held valid on the ground that the tax imposed was direct taxation in the province within the meaning of sub-s. 2.

'Their Lordships are quite unable to discover any substantial distinction between the case of *Bank of Toronto v. Lambe* and the present case. So far as there is any difference it does not seem to them to be favourable to this appeal.

'Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious indicia of direct and indirect taxation which were likely to have been present to the minds of those who passed the federation Act.

'The definition referred to is in the following terms: "A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs."

'In the present case, as in *Lambe's Case*, 12 A.C., 575, their Lordships think the tax is demanded from the very person whom the legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person. No such transfer of the burden would in ordinary course take place or can have been contemplated as the natural result of the legislation in the case of a tax like the present one, a uniform fee trifling in amount imposed alike upon all brewers and distillers without any relation to the quantity of goods which they sell. It cannot have been intended by the imposition of such a burden to tax the customer or consumer. It is of course possible that

in individual instances the person on whom the tax is imposed may be able to shift the burden to some other shoulders. But this may happen in the case of every direct tax.

'It was argued that the provincial legislature might, if the judgment of the court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer, and that they might thus seek to raise a revenue by indirect taxation in spite of the restriction of their powers to the imposition of direct taxation. Such a case is conceivable . But if the legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise.'

Taxation within the Province.—In *Dobie v. Temporalities Board*, 7 A.C., 151, Lord Watson, delivering the judgment of the Committee said, referring to the funds of the Temporalities Board which were invested in the province of Quebec:—'When funds belonging to a corporation in Ontario are so situated or invested in the province of Quebec the legislature of Quebec may impose direct taxes on them for provincial purposes as authorized by s. 92 (2), or may impose conditions upon the transfer or realization of such funds.'

In *Bank of Toronto v. Lambe*, 12 A.C., 584-5, Lord Hobhouse, delivering the judgment, said:—

'The next question is whether the tax is taxation within the province. It is urged that the bank is a Toronto corporation, having its domicile 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 s. 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, nor 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.'

Court will not inquire as to Propriety of Tax.—In *Bank of Toronto v. Lambe, supra,* Lord Hobhouse, p. 586, said:—

'Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of Parliament to erect banks. But their Lordships cannot conceive that when the imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of classes 2 and 9, is, in their Lordships' judgment, what the imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construction of the federation Act.'

3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

Queen's Counsel.—In the *Queen's Counsel Case*, 1898 A.C., 253, this enumeration is referred to by their Lordships as authorizing in combination with s. 92 (1) and (14) the Act

of Ontario (36 V., c. 3) conferring upon the Lieutenant-Governor the power to appoint Queen's Counsel.

> 5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

Disposal of Property in Fisheries.—In the *Fisheries Case,* 1898 A.C., 716, Lord Herschell, delivering the judgment of the Committee, said:—

'So, too, the terms and conditions upon which the fisheries, which are the property of the province, may be granted, leased, or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion Parliament, may be conferred therein, appear proper subjects for provincial legislation, either under class 5 of s. 92, "The management and sale of public lands," or under the class "Property and civil rights." Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not, in their Lordships' opinion, intended to be within the scope of the class "fisheries," as that word is used in s. 92.'

R.S.O., 1887, *c.* 24, *s.* 47.—Lord Herschell in the same case, p. 714, expressed the view that R.S.O., 1887, c. 24, s. 47, is within the legislative authority of Ontario except so far as concerns lands in public harbours and canals, if any of the latter be included. This section authorizes the Lieutenant-Governor to make sales or appropriations of 'land covered with water in the harbours, rivers and other navigable waters in Ontario under such conditions as it has been or it may be deemed requisite to impose, but not so as to interfere with the use of any harbour as a harbour or with the navigation of any harbour, river or other navigable waters.'

R.S.Q., 1888, *ss.* 1375-7.—His Lordship stated also, p. 717, that ss. 1375 and 1376, and the first sub-s. of s. 1377 of the Revised Statutes of Quebec, 1888, relating to the disposal of public lands, afforded good illustrations of legislation such as their Lordships regarded as within the functions of a provincial legislature.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

In and for the Province.—In *Dobie v. Temporalities Board,* 7 A.C., 151, it was urged that the legislature of Quebec had authority to enact the statute 38 V., c. 64, under s. 92 (7), (11) or (13). Lord Watson considered that the most plausible argument was founded upon the terms of s. 92 (13), but he held that the legislation, the effect of which was to destroy a corporation created by the legislature of the old province of Canada, with corporate existence, rights and objects in both the provinces of Ontario and Quebec, and to alter the class of persons interested in the funds of the corporation, was not competent to the legislature under s. 92 (13), and for the same reason that it did not fall under s. 92 (11).

The Temporalities Board was incorporated and provisions made for the management of the fund by statute of old Canada, 22 V., c. 66. The fund was created by arrangement with the government as a commutation of certain rights in the clergy reserves of the ministers of the Presbyterian Church of Canada in connection with the Church of Scotland. His Lordship stated that even assuming that the Temporalities fund might be correctly described as a charity or as an eleemosynary institution, it was not in any sense established, maintained or managed 'in or for' the province of Quebec.

8. Municipal Institutions in the Province.

This Enumeration confers merely the Right to Create.—In the *Prohibition Case,* 1896 A.C., 363-4, Lord Watson said:—

'The authority of the legislature of Ontario to enact s. 18 of 53 V., c. 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 s. 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 s. 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 s. 92 other than No. 8.'

In *Hodge v. The Queen*, 9 A.C., 131, Sir Barnes Peacock, delivering the judgment of the Committee, said that the subjects of legislation in the Ontario Liquor License Act, R.S.O., 1877, c. 181, ss. 4 and 5, seemed to come within the heads Nos. 8, 15 and 16 of s. 92 of the British North America Act, 1867. But in view of the later decisions of the Committee and particularly the observations of Lord Watson, just quoted, it is understood that these remarks must refer distributively to separate and distinct provisions of the Liquor License Act, and that it was not intended to attribute in anywise to s. 92 (8) the comprehensive authority to regulate the liquor traffic. It is, in fact, not unlikely that the statement of Sir Barnes Peacock was rather too broad in including number 8 as a foundation for the power exercised in the enactment of ss. 4 and 5 of the Ontario Liquor License Act. At all events, it seems clear both in reason and authority that a legislature derives no power to prohibit the liquor traffic from its legislative capacity with respect to municipal institutions.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

Stamp Tax upon Insurance Policies.—In *Attorney-General for Quebec v. Queen Insurance Company*, 3 A.C., 1890, a question arose as to the validity of a statute of the legislature of Quebec (39 V., c. 7), which imposed a tax upon certain policies of insurance and certain receipts or renewals. Their Lordships considering the various provisions and effect of this statute came to the conclusion that it was not intended to operate as a licensing Act, but as providing a stamp duty. Sir G. Jessel, M.R., delivering the judgment of the Committee, p. 1099, said:—

'It is not in substance a license Act at all. It is nothing more nor less than a simple stamp Act on policies, with provisions referring to a license, because it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license.'

The decision therefore affirms nothing with regard to the scope of s. 92 (9), and it has been considered in its appropriate place under s. 92 (2).

Parliament may exercise its Powers although Licenses thereby Affected.—In *Russell v. The Queen*, 7 A.C., 829, upon appeal from the decision of the Supreme Court of Canada refusing an application for a writ of certiorari to remove a conviction for unlawfully selling liquor contrary to the second part of the Canada Temperance Act, 1878, it was contended that the legislation was *ultra vires* of the Dominion because it fell within s. 92 (9).

Sir Montague Smith, delivering the judgment of the Committee, pp. 837-8, said:—'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 de-

stroy 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 an 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 s. 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.'

Abolition of the Liquor Traffic.—In the *Prohibition Case*, 1896 A.C., 364, Lord Watson said:—

'Their Lordships are likewise of opinion that s. 92, No. 9, does not give provincial legislatures any right to make laws for the abolition of the liquor traffic. It assigns to them "shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes." It was held by this Board in *Hodge v. Reg.*, 9 A.C., 117, to include the right to impose reasonable conditions upon the licensees which are in the nature of regulation; but it cannot, with any show of reason, be construed as authorizing the abolition of the sources from which revenue is to be raised.'[1]

Brewers' and Distillers' Licenses: No Idem Genus.—In *Brewers' and Maltsters' Association of Ontario v. Attorney-General for Ontario*, 1897, A.C., 231, upon the question as to the validity of sub-s. 2 of s. 51 of the Ontario Liquor License Act, requiring every brewer and distiller, or other person duly licensed by the government of Canada, as mentioned in sub-s. 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, Lord Herschell, delivering the judgment of the Committee, held that the taxation so imposed was direct taxation within the province, and he stated that that view was sufficient to dispose of the appeal. Lord Herschell added, however, p. 237:—

[1] In fact, article 9 is not named in the judgment in *Hodge v. The Queen*. The legislative power in question in that case was expressly attributed by their Lordships to articles 8, 15 and 16 of s. 92. See the judgment *infra*, pp. 176-7.

'But their Lordships were not satisfied by the argument of the learned counsel for the appellants that the license which the enactment renders necessary is not a license within the meaning of sub-s. 9 of s. 92. They do not doubt that general words may be restrained to things of the same kind as those particularized, but they are unable to see what is the genus which would include "shop, saloon, tavern and auctioneer" licenses, and which would exclude brewers' and distillers' licenses.'

10. 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:

    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.

Provincial Legislature may subsidize an Excepted Work.—In *Dow v. Black*, L.R., 6 P.C., 272, the facts were that previously to the coming into force of the British North America Act, 1867, the Houlton Branch Railway Company had been incorporated by the legislature of New Brunswick with power to construct a railway from Debec, New Brunswick, to the boundary line between New Brunswick and the state of Maine. Afterwards by Act of the legislature of New Brunswick (33 V., c. 47), reciting that the town of Houlton, Maine, had agreed to the payment of a bonus of $30,000 to the Houlton Branch Railway Company for the construction of a railway from Houlton to Debec; that the company was willing to construct the railway upon condition that the town of St. Stephen in New Brunswick would give the company an additional bonus of $15,000; that the inhabitants of the lower district of the town of St. Stephen were willing to give the said bonus, and that it should

be raised upon the credit of the real and personal property of the inhabitants of the said district in such manner as might be thought most advisable, authority was given for raising the said sum of $15,000 by the issue of debentures, to be retired with the interest by assessment of the real and personal property of all persons resident in the lower district of St. Stephen.

The question arose upon certiorari of a rate assessment for payment of the interest upon these debentures, and the Supreme Court of New Brunswick thereupon pronounced the Act *ultra vires* for reasons arising out of exception *a* of the 10th enumeration of s. 92.

Sir James Colville, delivering the judgment of the Judicial Committee, upon appeal, said that their Lordships were of the opinion that the validity of the Act did not depend upon the 10th enumeration, and, p. 281, His Lordship added:—'They are of opinion that the Act cannot be said to be a law in relation to a local work or undertaking within the fair and reasonable meaning of these words. The incorporation of the company, with its powers, and the construction of the railway up to the frontier, and therefore, so far as any legislative power within the British Dominions could determine that construction, had been already authorized by the Acts passed before the imperial statute came into operation. The Act now in question did not purport to enlarge the powers of the railway company, nor could it give them powers to be exercised on the foreign soil of Maine. Their Lordships consider that if the railway company had chosen to make an arrangement with the inhabitants of Houlton, in the state of Maine, for the construction of the railway on the terms of the bonus of $30,000 which had been offered to them from Houlton, there would have been no legal objection to their carrying out that arrangement. The Act was merely one which enabled the majority of the inhabitants of the parish of St. Stephen to raise by local taxation a subsidy designed to promote a work which they considered to be for the benefit of their town, and to place the inhabitants in a position to bargain and to act for their common benefit in the same manner as a private person might have thought it for his benefit to do. In substance and principle it does not differ from a private Act authorizing the trustees or guardians of a minor to let a warehouse to such a company. Supposing the work, in-

stead of being a railway, had been a canal, and the inhabitants had been authorized to make a bargain for the supply of water to the district, could any doubt have been entertained on the subject. Their Lordships are therefore of opinion that no objection to the validity of the Act is to be found in the sub-section in question.'

Lines extending from a Province into a Foreign Country.—In the same case, p. 280, Sir James Colville, referring to s. 92 (10*a*), said:—

'A question touching the construction of this sub-section has been raised both here and in the Court below. The respondents insist that the lines of railways which are thereby put within the exclusive jurisdiction of the Parliament of Canada are all railways which extend either beyond the limits of the province into other provinces within the Dominion or into foreign countries. On the other hand, the appellants contend that a more limited construction is to prevail, and that if the sub-section be taken in connection with the following sub-section (*b*) it will be found to apply only to railways extending beyond the limits of one province into another province of the Dominion.'

Their Lordships, however, did not find it necessary to determine this question of construction, being of the opinion that the validity of the Act did not depend upon this sub-paragraph.

General Advantage of Canada.—In *Corporation of the City of Toronto v. Bell Telephone Company of Canada,* 1905, A.C., 60, Lord Macnaghten, delivering the judgment of the Committee, said:—

'An Act of May 17, 1882 (45 V., c. 95), amending the company's Act of incorporation, and passed by the Dominion legislature immediately after the passing of the Ontario Act, was referred to in the course of the argument. This Act seems to have been intended, partly at any rate, to neutralize the effect of the Ontario Act. It declares the Act of incorporation as thereby amended and the words thereunder authorized "to be for the general advantage of Canada." It is not very easy to see what the part of the section declaring the Act of incorporation to be for the general advantage of Canada means. As regards the works therein referred to, if they had been "wholly situate within the province," the effect would have been to give exclusive jurisdiction over them to the Parliament

of Canada; but, inasmuch as the works and undertaking of the company authorized by the Act of incorporation were not confined within the limits of the province, this part of the declaration seems to be unmeaning.'[1]

Transfer of a Dominion Railway.—In *Bourgoin v. La Compagnie du Chemin de fer de Montreal, Ottawa et Occidental*, 5 A.C., 381, where the intended effect of a deed and a statute of Quebec was to transfer a federal railway with all its appurtenances, property, liabilities, rights and powers to the Quebec government, and through it to a company with a new title and a different organization, to dissolve the federal company and to substitute for it one which was to be governed by and subject to provincial legislation, it was held that such a transfer could not operate except under authority of a competent legislature, and that the legislature of Quebec was incompetent to sanction the transfer. Sir James Colville, p. 404, said:—'These provisions, taken in connection with, and read by the light of those of the imperial statute, the British North America Act, 1867, which are contained in s. 91 and sub-s. 10*c* of s. 92, establish to their Lordships' satisfaction, that the transaction between the company and the government of Quebec could not be validated to all intents and purposes by an Act of the provincial legislature, but that an Act of the Parliament of Canada was essential in order to give it full force and effect.'

11. The Incorporation of Companies with Provincial Objects.

Provincial Insurance Companies.—In *Citizens and Queen Insurance Companies v. Parsons*, 7 A.C., 96, the contention having been raised that an Ontario statute (39 V., c. 24), regulating the conditions of fire insurance contracts within the province, was inconsistent with the Dominion Act (38 V., c. 20), which required fire insurance companies to obtain licenses from the Minister of Finance as a condition to their carrying on the business of insurance within the Dominion, and that it was *ultra vires* of the Ontario legislature to subject companies which had obtained such licenses to the conditions imposed by

[1] See also *McGregor v. Esquimalt and Nanaimo Railway Company*, 1907 A.C., 468, *infra*, pp. 160-1.

the Ontario Act, Sir Montague Smith, delivering the judgment, pp. 114-6, held that the legislation did not really conflict or present any inconsistency. His Lordship referred to a section of the Dominion Act which provided in effect that nothing therein contained should prevent any insurance company incorporated by a provincial legislature from carrying on business within the limits of the incorporating province, according to the powers granted by the province, and without Dominion license.

His Lordship proceeded:—'This recognition is directly opposed to the construction sought to be placed by the appellant's counsel on the words "provincial objects" in No. 11 of s. 92—"The incorporation of companies with provincial objects," by which he sought to limit these words to "public" provincial objects, so as to exclude insurance and commercial companies.

'Ritchie, C. J., refers to an equally explicit recognition of the power of the provinces to incorporate insurance companies contained in an earlier Act of the Dominion Parliament (31 V., c. 48) which was passed shortly after the establishment of the Dominion.

'The learned Chief Justice also refers to a remarkable section contained in the Act of the Dominion Parliament consolidating certain Acts respecting insurance (40 V., c. 42). S. 28 of that Act is as follows:—

'"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 it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall then have the power of transacting its business of insurance throughout Canada."

'This provision contains a distinct declaration by the Dominion Parliament that each of the provinces had exclusive legislative control over the insurance companies incorporated by it, and, therefore, is an acknowledgment that such control was not deemed to be an infringement of the power of the Dominion Parliament as to "the regulation of trade and commerce."

'The declarations of the Dominion Parliament are not, of course, conclusive upon the construction of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered.'

Provincial Objects.—His Lordship in the same case held that it was not necessary to rest the authority of the Dominion Parliament to incorporate companies on the specific and enumerated power of s. 91 (2), and pp. 116-7, stated that:—'The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislatures being "the incorporation of companies with provincial objects," it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada.[1] But it by no means follows (unless indeed the view of the learned Judge is right as to the scope of the words "the regulation of trade and commerce") that because the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion, that it alone has the right to regulate its contracts in each of the provinces. Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended, if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over "property and civil rights in the province"), that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed mortmain Acts, though the corporation would still exist and preserve its status as a corporate body.'

In *Dobie v. Temporalities Board*, 7 A.C., 136, by an Act of the legislature of the old Province of Canada (22 V., c. 66), entitled 'An Act to incorporate the Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland,' the commissioners appointed to administer the fund, which had been created for the ministers of the Presbyterian Church of Canada in connection with the Church of Scotland, were together with four additional members and their

[1] As to whether provincial legislation can authorize any project beyond the limits of the province, see *infra*, pp. 161-2.

successors constituted a body politic and corporate by the name of the 'Board for the Management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland,' and the funds held by them as commissioners were vested in the board 'in trust for the said church,' subject to the condition that the annual interest should remain chargeable with the stipends and allowances payable to the persons entitled thereto, in terms of the arrangement under which the fund was contributed by the commutors. It was expressly enacted that all members of the board should also be members of the Presbyterian Church of Canada in connection with the Church of Scotland; and provision was made for filling up vacancies occasioned by the death or resignation of a member, by his removal from the province of Canada, or by his leaving the communion of the said church.

Subsequently by Act of the legislature of Quebec (38 V., c. 64), the constitution of the board and the purposes of the trust created by the Act (22 V., c. 66), were altered, and it was urged that this was competent to the legislature of Quebec under s. 92 (11). The legislation necessarily affected the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interest of individual incorporators in that province, and the fund administered by the corporate board under the Act (22 V., c. 66), which was held in perpetuity for the benefit of the ministers and members of a church having its local situation in both provinces. The proportion of the fund and its revenues falling to either province were uncertain and fluctuating, so that it was impossible for the legislature of Quebec to appropriate a definite share of the corporate funds to its own province without trenching on the rights of the corporation in Ontario.

Their Lordships therefore held that the Quebec Act (38 V., c. 64) could not be upheld as in execution of the power conferred by s. 92 (11), and they said, p. 151, that if the Board incorporated by the Act (22 V., c. 66) could be held to be a 'company' within the meaning of clause 11, its objects were certainly not provincial.

In *Colonial Building and Investment Association v. Attorney-General of Quebec*, 9 A.C., 165, Sir Montague Smith, delivering the judgment of the Committee, said:—

'It is asserted in the petition, and was argued in the courts below, and at this bar, that inasmuch as the association had confined its operations to the province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the provincial legislature. But surely the fact that the association has hitherto thought fit to confine the exercise of its powers to one province cannot affect its status or capacity as a corporation, if the Act incorporating the association was originally within the legislative power of the Dominion Parliament. 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; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation, nor warrant the judgment prayed for, viz., that the company be declared to be illegally constituted.'

In *Dow v. Black*, L.R., 6 P.C., 272, the legislature of New Brunswick had authorized payment of a bonus to the Houlton Branch Railway Company, incorporated by the legislature previously to the Union, to assist the company to extend its railway to Houlton in the state of Maine. This legislation was upheld as affecting matters of a merely local or private nature in the province; and, the legislature of Maine having authorized the town of Houlton to grant a bonus to the company for the same purpose, their Lordships considered that if the railway company had chosen to make an arrangement with the inhabitants of Houlton in the state of Maine for the construction of the railway on the terms of the bonus which had been so offered to it from Houlton there would have been no legal objection to the company carrying out that arrangement. It is to be observed that this railway company had been, as stated by the Committee, duly incorporated by Act of a competent legislature previously to the coming into force of the British North

America Act, 1867, and that apparently no question was raised as to the capacity of the company to construct a railway in the state of Maine. This case, therefore, does not affect the question as to the capacity or power of a company incorporated under s. 92(11).

Domicile.—In *Dobie v. Temporalities Board,* 7 A.C., 151, Lord Watson, delivering the judgment, said:—'The respondents further maintained that the legislature of Quebec had power to pass the Act of 1875, in respect of these special circumstances, (1) that the domicile and principal office of the Temporalities Board is in the city of Montreal; and (2) that its funds also are held or invested within the province of Quebec. These facts are admitted on record by the appellant, but they do not affect the question of legislative power. The domicile of the corporation is merely forensic, and cannot alter its statutory constitution as a board in and for the provinces of Upper Canada and Lower Canada. Neither can the accident of its funds being invested in Quebec give the legislature of that province authority to change the constitution of a corporation with which it would otherwise have no right to interfere. When funds belonging to a corporation in Ontario are so situated or invested in the province of Quebec, the legislature of Quebec may impose direct taxes upon them for provincial purposes, as authorized by s. 92 (2), or may impose conditions upon the transfer or realization of such funds; but that the Quebec legislature shall have power also to confiscate these funds, or any part of them, for provincial purposes, is a proposition for which no warrant is to be found in the Act of 1867.'

Juncta juvant.—Lord Watson, in the same case, pp. 151-2, further said:—'Last of all, it was argued for the respondents that, assuming the incompetency of either provincial legislature, acting singly, to interfere with the Act of 1858, that statute might be altered or repealed by their joint and harmonious action. The argument is based upon fact, because, in the year 1874, the legislature of Ontario passed an Act (38 V., c. 75), authorizing the union of the four churches, and containing provisions in regard to the Temporalities fund and its board of management, substantially the same with those of the Quebec Act, 38 V., c. 62, already referred to. It is difficult to understand how the maxim *juncta juvant* is applicable here, seeing that the power of the provincial

legislature to destroy a law of the old province of Canada is measured by its capacity to reconstruct what it has destroyed. If the legislatures of Ontario and Quebec were allowed jointly to abolish the Board of 1858, which is one corporation in and for both provinces, they could only create in its room two corporations, one of which would exist in and for Ontario and be a foreigner in Quebec, and the other of which would be foreign to Ontario, but a domestic institution in Quebec. Then the funds of the Ontario corporation could not be legitimately settled upon objects in the province of Quebec, and as little could the funds of the Quebec corporation be devoted to Ontario, whereas the Temporalities fund falls to be applied either in the province of Quebec or in that of Ontario, and that in such amounts or proportions as the needs of the Presbyterian Church of Canada in connection with the Church of Scotland, and of its ministers and congregations, may from time to time require. The Parliament of Canada is, therefore, the only legislature having power to modify or repeal the provisions of the Act of 1858.'

12. The Solemnization of Marriage in the Province.

Not included in s. 91 (26).—In *Citizens and Queen Insurance Companies v. Parsons,* 7 A.C., 108, Sir Montague Smith, by way of illustrating the statement that Parliament could not have intended that the powers exclusively assigned to the provincial legislatures should be absorbed in those given to the Dominion Parliament, stated:—'Take as one instance the subject "Marriage and divorce" contained in the enumeration of subjects in s. 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 s. 92, and no one can doubt, notwithstanding the general language of s. 91, that this subject is still within the exclusive authority of the legislatures of the provinces.'

13. Property and Civil Rights in the Province.

Powers enumerated in s. 91 *Paramount.*—In *Cushing v. Dupuy,* 5 A.C., 415-6, Sir Montague Smith, delivering the judgment of the Committee, said:—

'It would be impossible to advance a step in the construction

of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is, therefore, to be presumed, indeed it is a necessary implication, that the imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces, so far as a general law relating to those subjects might affect them. Their Lordships therefore think that the Parliament of Canada would not infringe the exclusive powers given to the provincial legislatures, by enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by article 1178 of the Code of Civil Procedure.'

In *Tennant v. Union Bank of Canada*, 1894 A.C., 46-7, quoted above under s. 91 (15), (22) and (23), the judgment of their Lordships proceeds upon the passage just quoted from *Cushing v. Dupuy*, and it is said that the power to legislate conferred by s. 91 may be fully exercised, although with the effect of modifying civil rights in the provinces.

In *Attorney-General of Ontario v. Mercer*, 8 A.C., 776, Lord Selborne, L.C., delivering the judgment of the Board, said 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 ss. 91 and 102.

The reasons on account of which R.S.O., 1887, c. 124, s. 9, was held *intra vires* of the Ontario legislature in the absence of a system of Dominion bankruptcy legislation are stated under s. 91 (21), *supra*, quoting the judgment of Lord Herschell in the *Assignments and Preferences case*, 1894 A.C., 189. The effect of the local enactment was to give to assignments for the general benefit of creditors priority over

unsatisfied judgments and executions, and it was held that this was a provision properly ancillary to bankruptcy legislation, but nevertheless competent to a province so long as it did not affect any existing Dominion law.

Civil Rights—Insurance Contracts.—In *Citizens and Queen Insurance Companies v. Parsons,* 7 A.C., 109-11, Sir Montague Smith, delivering the judgment of the Board, said:—

'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 s. 92, viz., "Property and civil rights in the province." The Act deals with policies of insurance entered into or in force in the province of Ontario for insuring property situate therein against fire, and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising from them, it was argued, came legitimately within the class of subject, "Property and civil rights." The appellants, on the other hand, contended that civil rights meant only such rights as flowed from the law, and gave as an instance the *status* of persons. Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words "civil rights." The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in express terms in any of the enumerated classes of subjects in s. 91.

'It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in ss. 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 s. 91, it will be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, viz., "18. Bills of exchange and promissory notes," which it would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the Dominion Parliament.

'The provision found in s. 94 of the British North

America Act, which is one of the sections relating to the distribution of legislative powers, was referred to by the learned counsel on both sides as throwing light upon the sense in which the words "property and civil rights," are used. By that section the Parliament of Canada is empowered to make provision for the uniformity of any laws relative to "property and civil rights" in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the courts in these three provinces, if the provincial legislatures choose to adopt the provisions so made. The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law, as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces. The words "property and civil rights" are, obviously, used in the same sense in this section as in No. 13 of s. 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity. If, however, the narrow construction of the words, "civil rights," contended for by the appellants, were to prevail, the Dominion Parliament could, under its general power, legislate in regard to contracts in all and each of the provinces, and, as a consequence of this, the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the Dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act.

'It is to be observed that the same words, "civil rights," are employed in the Act of 14 G. III., c. 83, which made provision for the government of the province of Quebec. S. 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.'

Dominion Corporations.—His Lordship proceeded to hold that it did not follow that because the Dominion

Parliament had alone the right to create a corporation to carry on business throughout Canada, the Parliament alone had the right to regulate its contracts in each of the provinces; and, p. 117, he added by way of illustration:—'Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended, if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over "property and civil rights in the province"), that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed mortmain Acts, though the corporation would still exist and preserve its status as a corporate body.'

In *Colonial Building and Investment Association v. Attorney-General of Quebec,* 9 A.C., 168-9, Sir Montague Smith, delivering the judgment of the Committee, said:—

'It should be observed that their Lordships, in the case supposed in their judgment in the appeal of the *Citizens Insurance Company,* in regard to corporations created by the Dominion Parliament with power to hold land being subject to the law of mortmain existing in any province in which they sought to acquire it, had not in view the special law of any one province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent. The object was merely to point out that a corporation could only exercise its powers subject to the law of the province, whatever it might be, in this respect.'

In *Dobie v. Temporalities Board,* 7 A.C., 136, the Quebec Act, 38 V., c. 64, as explained by Lord Watson in delivering the judgment of the Committee, dealt with a single statutory trust, and interfered directly with the constitution and privileges of a corporation created by an Act of the province of Canada, and having its corporate existence and corporate rights in the province of Ontario, as well as in the province of Quebec. The professed object and effect

of the Act were not to impose conditions on the dealings of the corporation with its funds within the province of Quebec, but to destroy the old corporation and create a new one, and to alter materially the class of persons interested in the funds of the corporation. It was urged that the Act might be supported as within the authority of the legislature of Quebec under s. 92 (13) 'Property and civil rights in the province.' Lord Watson in delivering the judgment with regard to this argument, pp.. 150-1, said:—

'The Quebec Act of 1875 does not, as has already been pointed out, deal directly with property or contracts affecting property, but with the civil rights of a corporation, and of individuals, present or future, for whose benefit the corporation was created and exists. If these rights and interests were capable of division according to their local position in Ontario and Quebec respectively, the legislature of each province would have power to deal with them so far as situate within the limits of its authority. If, by a single Act of the Dominion Parliament, there had been constituted two separate corporations for the purpose of working, the one a mine within the province of Upper Canada, and the other a mine in the province of Lower Canada, the legislature of Quebec would clearly have had authority to repeal the Act so far as it related to the latter mine and the corporation by which it was worked.

'The Quebec Act, 38 V., c. 64, does not profess to repeal and amend the Act of 1858, only in so far as its provisions may apply to or be operative within the province of Quebec, and its enactments are apparently not framed with a view to any such limitation. The reason is obvious, and it is a reason which appears to their Lordships to be fatal to the validity of the Act. The corporation and the corporate trust, the matters to which its provisions relate, are in reality not divisible according to the limits of provincial authority. In every case where an Act applicable to the two provinces of Quebec and Ontario, can now be validly repealed by one of them, the result must be to leave the Act in full vigour within the other province. But, in the present case, the legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the province of Ontario, as well as the rights and interests of individual corporators in that province. In addition to that, the fund administered by the corporate board, under

the Act of 1858, is held in perpetuity for the benefit of the ministers and members of a church having its local situation in both provinces, and the proportion of the fund and its revenues falling to either province is uncertain and fluctuating, so that it would be impossible for the legislature of Quebec to appropriate a definite share of the corporate funds to their own province without trenching on the rights of the corporation in Ontario.'

It is assumed that his Lordship in the illustration of a single Act of the Dominion Parliament constituting two separate corporations for the purpose of working the one a mine within the province of Upper Canada, and the other a mine within the province of Lower Canada, intended to refer not to the Dominion Parliament, but to the legislature of the old province of Canada, because an Act such as his Lordship suggests of the Dominion Parliament would, it is conceived, plainly be *ultra vires*, and consequently not the subject of repeal in any part by the legislature of Quebec.

Prohibition of the Liquor Traffic.—In *Russell v. The Queen*, 7 A.C., 838-40, as to the argument that the legislation fell within s. 92 (13), Sir Montague Smith, delivering the judgment, said:—

'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*, 7 A.C., 96, 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-s. 13.'

Lord Watson in the *Prohibition Case,* 1896 A.C., 364-5, made some observations as to the possibility of the Ontario Act, 53 V., c. 56, s. 18, falling within this enumeration, but apparently he preferred to refer the enactment to the power conferred by s. 92 (16) 'Generally all matters of a merely local or private nature in the province,' and he said that it could not be logically held to fall within both of these enumerations. His Lordship's remarks are quoted under s. 92 (16) *infra.*

Fisheries.—In the *Fisheries Case,* 1898 A.C., 716, Lord Herschell, delivering the judgment of the Committee, said:—

'But whilst in their Lordships' opinion all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of provincial legislatures is incompetent merely because it may have relation to fisheries. For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it, would be properly treated as falling under the heading "Property and civil rights" within s. 92, and not as in the class "fisheries" within the meaning of s. 91. So, too, the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion Parliament may be conferred therein, appear proper subjects for provincial legislation, either under class 5 of s. 92, "The management and sale of public lands," or under the class "Property and civil rights." Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not in their Lordships' opinion intended to be within the scope of the class "fisheries" as that word is used in s. 92.'

Lord Herschell stated also that ss. 1375 and 1376 and the first sub-section of s. 1377 of the Revised Statutes of Quebec, 1888, afforded good illustrations of legislation such as their Lordships regarded as within the functions of a provincial legislature.

Dominion Railways.—In *Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame de*

Bonsecours, 1899 A.C., 367, their Lordships held that the Canadian Pacific Railway Company, in respect of the removal of obstructions from a ditch upon the company's land, was subject to the provisions of the Municipal Code of Quebec; and upheld a penalty imposed upon the company for refusal to remove the obstructions as required, pursuant to the Municipal Code, by notice of the rural inspector of the parish. The grounds of this decision are stated under s. 91 (29).[1]

Lands conveyed by the Dominion to subsidize a Local Railway.—In the recent case of *McGregor v. Esquimalt and Nanaimo Railway Company*, 1907, A.C., 462, a question was considered as to the effect of legislation of British Columbia with regard to the title to lands which had been transferred by the province to the Dominion, and by the Dominion conveyed to the respondent company.

By statute of British Columbia, 47 V., c. 14, the province granted to the Dominion certain lands situate in Vancouver Island, with the mines and minerals therein, for the purpose of aiding the construction of a railway between Esquimalt and Nanaimo. By statute of the Dominion, 47 V., c. 6, the Governor-in-Council was authorized to grant to the Esquimalt and Nanaimo Railway Company the said lands in aid of the construction of the railway, and on 21st April, 1887, the Dominion pursuant to this authority granted the land to the respondent company.

By statute of British Columbia, 3-4 E. VII., c. 54, it was provided that upon application, accompanied by proof, to the Lieutenant-Governor in Council within twelve months, showing that any settler had, prior to the enactment of the local Act, 47 V., c. 14, occupied or improved land within the area so granted by the Dominion to the respondent company, with a *bona fide* intention of living on the land, a Crown grant of the fee simple in the land should be issued to him, or his legal representative, free of charge, in accordance with the provisions of the Land Act in force at the time when the land was first so occupied or improved by the

[1] *Supra*, pp. 104-6. See also *Madden v. Nelson and Fort Sheppard Railway Company*, 1899 A.C., 626, *supra*, pp. 107-9.

settler. Pursuant to the authority of this latter Act, the government of British Columbia did, in 1904, grant certain lands within the said area to the appellant.

By Dominion Act, 4-5 E. VII., c. 90, the railway of the respondent company was declared to be a work for the general advantage of Canada.

It was urged on behalf of the appellant that the later provincial grant had effect to convey the fee simple, notwithstanding the previous transfer and conveyance as between the governments and as between the Dominion and the respondent company, and the Committee so held.

Sir Henri Taschereau, delivering the judgment of the Committee, p. 468, said:—'On the constitutionality of the Act of 1904, and the power of the British Columbia legislature to enact it, their Lordships see no reason for doubt. The legislature had the exclusive right to amend or repeal, in whole or in part, its own said statute of December, 1833, (47 V., c. 14). And the Act relates, not to public property of the Dominion, as contended for by the respondents, but to property and civil rights in the province, and affects a work and undertaking purely local, (s. 92, sub-s. 10, of the British North America Act). This railway is the property of the respondents, and the said land had ceased to be the property of the Dominion in 1887 by the grant thereof to the respondents. By an Act passed in 1905 by the Dominion Parliament the legislative power over the company has since been transferred to the federal authority, but that Act, of course, has no application to this case.'

Extra-provincial Effect—Query.—Lord Watson, in the *Prohibition Case*, 1896 A.C., 368, referring to the provisions of the Canada Temperance Act, said:—

'The manufacturers of pure native wines, from grapes grown in Canada, have special favour shown 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.'

Lord Macnaghten, however, in *Attorney-General of Manitoba v. Manitoba License-Holders' Association,* 1902 A.C., 80, upheld the provisions of the Manitoba Liquor Act, although he said that,—'Unless the Act becomes a dead letter, it must interfere with the revenue of the Dominion, with licensed trades in the province of Manitoba, and indirectly at least with business operations beyond the limits of the province.' His Lordship added that all objections arising upon these considerations were removed by the judgment of the Committee in the *Prohibition Case.*

It is presumed, therefore, that Lord Macnaghten's observations were not intended to be inconsistent with those of Lord Watson above quoted, and the question, accordingly, is open as to whether a local legislature may prohibit the making of a contract within the province which is intended to be executed outside of the province. It is submitted, however, that such legislation would have an effect in excess of "local or private," words descriptive of qualities apparently essential to the validity of any provincial enactment.[1]

Powers of Parliament—Query.—In *Western Counties Railway Company v. Windsor and Annapolis Railway Company,* 7 A.C., 178, the government of Canada having acquired by virtue of s. 108 of the British North America Act, 1867, the provincial railways in Nova Scotia, subject to an obligation previously contracted by the provincial government to make traffic arrangements as to the Windsor branch with the Windsor and Annapolis Railway Company, on 22nd September, 1871, entered into a contract with the Windsor and Annapolis Railway Company providing for such traffic arrangements and the exclusive use and possession of the branch by the company. Subsequently the Dominion Act, 37 V., c. 16, was passed, which it was contended extinguished all right and interest which the company had under the said agreement, and transferred the possession of the Windsor branch to the Western Counties Railway Company. A question was

[1] As showing to some extent the extra-territorial incapacity of a local legislature, see also *Dobie v. Temporalities Board,* 7 A.C., 151, and *Bank of Toronto v. Lambe,* 12 A.C., 584-6, *supra,* pp. 134-5 and 137; also *supra,* p. 125, note.

raised as to whether the legislative authority to extinguish this interest rested with the Dominion or with the local legislature.

Lord Watson, delivering the judgment of the Committee, p. 191, said:—

'It becomes unnecessary to decide whether, if it had chosen to do so, the Parliament of Canada would have had the power to extinguish the rights of the respondent company under the agreement of the 22nd of September, 1871. Whether that power is given by the provisions of the British North America Act to the Dominion Parliament or to the legislature of Nova Scotia is a question of difficulty and importance; but seeing that it does not arise for decision in the present case, their Lordships express no opinion whatever in regard to it.'

14. 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.

Fire Marshal's Court.—In *Regina v. Coote*, L.R., 4 P.C., 599, an Act of the Quebec legislature constituted officers named fire marshals for Quebec and Montreal respectively, with power to inquire into the cause and origin of fires occurring in those cities; and conferred upon each of them 'all the powers of any judge of sessions, recorder or coroner, to summon before him and examine upon oath all persons whom he deemed capable of giving information, or giving evidence touching or concerning such fire.'

Objection having been taken at the trial that to constitute a court such as that of a fire marshal was beyond the power of the legislature, it was held by the Court of King's Bench that the constitution of the court of fire marshal with the powers given to it was within the competency of the legislature; and, upon appeal to the Judicial Committee of the Privy Council, this opinion was, of course, upheld.

Appeal.—In *Theberge v. Laudry*, 2 A.C., 102, there was an application for special leave to appeal, and the question arose

under the Quebec Controverted Elections Act, 1875. By this it was provided in effect that the Superior Court sitting in review should determine whether a member whose election or return was complained of had been duly elected or declared elected; whether any other person, and who, had been duly elected; whether the election was void, and all other matters arising out of the petition or requiring to be determined. It was further provided that the judgment should not be susceptible of appeal. It was urged that this latter provision did not take away any prerogative right of the Crown, and that it might be satisfied by holding that the intention of the legislature was that there should be no appeal from the Superior Court to the Court of Queen's Bench in the province. Lord Cairns, L.C., p. 106, said:—

'Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative. But, in the opinion of their Lordships, a somewhat different question arises in the present case.'

His Lordship proceeded to state that the Act did not provide for the decision of mere ordinary civil rights, but created an entirely new and up to that time unknown jurisdiction in a particular court for the purpose of taking out, with its own consent, of the Legislative Assembly and vesting in the Court that very peculiar jurisdiction which up to that time had existed in the Legislative Assembly, of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. This jurisdiction was said to be extremely special, one of its incidents or consequences being that it should be exercised in such a way as to become speedily conclusive, and enable the constitution of the Legislative Assembly to be known.

'His Lordship, pp. 107-8, continued:—'Now, the subject-matter, as has been said, of the legislation is extremely

peculiar. It concerns the rights and the privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always, in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that court which the Legislative Assembly had substituted in its place.

'These are considerations which lead their Lordships not in any way to infringe, which they would be far from doing, upon the general principle that the prerogative of the Crown, once established, cannot be taken away, except by express words; but to consider with anxiety whether in the scheme of this legislation it ever was intended to create a tribunal which should have, as one of its incidents, the liability to be reviewed by the Crown under its prerogative. In other words, their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown. In the opinion of their Lordships, adverting to these considerations, the 90th section, which says that the judgment shall not be susceptible of appeal, is an enactment which indicates clearly the intention of the legislature under this Act, —an Act which is assented to on the part of the Crown, and to which the Crown, therefore, is a party—to create this tribunal for the purpose of trying election petitions in a manner which should make its decision final to all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative.

'In the opinion, therefore, of their Lordships, there is not in this case, adverting to the peculiar character of the enact-

ment, the prerogative right to admit an appeal, and therefore the petition must be refused.'

In *Cushing v. Dupuy,* 5 A.C., 409, the proceedings were under the Dominion Insolvency Act (38 V., c. 16), and came before the Judicial Committee on appeal from the Court of Queen's Bench of Quebec. By s. 128 of the Insolvency Act provision was made for appeals in the province of Quebec, and by s. 28 of an amending Act (40 V., c. 41), it was enacted that the judgment of the court to which under s. 128 the appeal could be made should be final. This court in the province of Quebec was the Court of Queen's Bench, and the questions considered were, first, as to whether the Court of Queen's Bench was right in holding that the appeal to Her Majesty in Council given *de jure* by article 1178 of the Code of Civil Procedure from final judgments rendered on appeal by that Court was taken away by the said s. 28; and, secondly, if that were so, whether the power of the Crown, by virtue of its prerogative, to admit the appeal was thereby affected. The first of these questions was determined in the affirmative and the second in the negative. Their Lordships were of opinion that the Parliament of Canada did not infringe the exclusive powers given to the provincial legislatures by enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final and not subject to the appeal as of right to Her Majesty in Council, allowed by the said article, 1178. They were also of opinion that the enactment did not infringe the Queen's prerogative since it only provided that the appeal to Her Majesty given by the Code, framed under the authority of the provincial legislature as part of the civil procedure of the province, should not be applicable to judgments in the new proceedings in insolvency which the Dominion Act created, and that such a provision in no way trenches on the royal prerogative.

Their Lordships were of opinion that the word 'final' in the amending Act was in effect an apt word to exclude appeals as of right to Her Majesty, as well as appeals to the Supreme Court of Canada.

It was unnecessary, in their Lordships' view, to consider what powers might be possessed by the Parliament of Canada to interfere with the royal prerogative since the amending section did not propose to touch it, but they affirmed that upon general principle the rights of the Crown could only be taken away by express words. Their Lordships proceeded to review the cases of *Cuvillier v. Alywin*, 2 Knapp's P.C., 72; *in re Louis Marois*, 15 Moore's P.C., 189, and *Theberge v. Laudry*, 2 A.C., 102, and they concluded, applying the principle of the latter case to the enactment in question, that as the enactment contained no words which purported to derogate from the prerogative of the Queen to allow, as an act of grace, appeals from the Court of Queen's Bench in matters of insolvency, her authority in that respect was unaffected by it.

The question as to the power of the federal legislature of Australia to take away the prerogative right of Her Majesty to allow appeals from the colony, was considered in the very recent case of *Webb v. Outtrim*, 1907 A.C., where, pp. 91-2, Lord Halsbury, delivering the judgment of the Judicial Committee, says:—

'With respect to the objection urged—both as a preliminary objection and one of substance—to the hearing of the appeal at all by this Board, their Lordships are disposed to adopt the reasoning of the Supreme Court in giving leave to appeal. The only basis upon which the objection can be suggested to be founded is the Commonwealth Act, and no direct authority under that Act has been shown. If, as Hodges, J. says, there is no direct authority, it is not reasonable to suppose that the British Parliament ever intended so important an end to be attained by indirect or circuitous methods. "In such an important matter direct authority would be given, or none at all, and none is directly given." The learned Judge continues: "I may further observe that the appeal to the King in Council was, as a matter of history, one of the matters that was prominently before the British legislature at the time it passed the Commonwealth Constitution Act, and the extent to which a citizen's chance of getting a hearing from that august tribunal is affected is shown in ss. 73 and 74. Neither of these sections authorizes the Commonwealth Parliament to take away the

right in such a case as the one I am now considering, nor does any other section directly give such authority. And I think I might content myself by saying those two sections deal with this subject and do not authorize the Commonwealth Parliament to deprive the subject of this right of appeal against a judgment of the state Court, and no other section gives such authority." Their Lordships also concur in what the same learned judge says at the end of his judgment: "If the federal legislature had passed an Act which said that hereafter there shall be no right of appeal to the King in Council from a decision of the Supreme Court of Victoria in any of the following matters, and had then set out a number of matters, including that now under consideration, I should have felt no doubt that such an Act was outside the power of that federal legislature. And in my opinion it is outside their power to do that very thing in a roundabout way."'

Parliament may impose Duties upon Provincial Courts.—In *Valin v. Langlois*, 5 A.C., 115, it was contended, upon an application for special leave, that the Dominion Controverted Elections Act of 1874, conferring upon the provincial courts jurisdiction with respect to elections to the House of Commons, was *ultra vires* as affecting provincial powers of legislation under s. 92 (14). Lord Selborne, delivering the judgment of the Board, pp. 118-9, said:—

'The controversy is solely whether the power which that Parliament possesses of making provision for the mode of determining such questions has been competently or incompetently exercised. The only ground on which it is alleged to have been incompetently exercised is that by the 91st and 92nd clauses of the Act of 1867, which distribute legislative powers between the provincial and the Dominion legislatures, the Dominion Parliament is excluded from the power of legislating on any matters coming within those classes of subjects which are assigned exclusively to the legislatures of the provinces. One of those classes of subjects is defined in these words, by the 14th subsection of the 92nd clause:—"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." The argument, and the sole argument, which has been offered to their Lordships to induce them to come to the conclu-

sion that there is here a serious question to be determined, is that the Act of 1874, the validity of which is challenged, contravenes that particular provision of the 92nd section, which exclusively assigns to the provincial legislatures the power of legislating for the administration of justice in the provinces, including the constitution, maintenance and organization of provincial courts of civil and criminal jurisdiction, and including procedure in civil (not in criminal) matters in those courts. Now, if their Lordships had for the first time, and without any assistance from anything which has taken place in the colony, to apply their minds to that matter, and even if the 41st section were not in the Act, it would not be quite plain to them that the transfer of the jurisdiction to determine upon the right to seats in the Canadian legislature—a thing which had been always done, not by courts of justice, but otherwise—would come within the natural import of those general words:—"The administration of justice in the province, and the constitution, maintenance and organization of provincial courts, and procedure in civil matters in those courts." But one thing at least is clear, that those words do not point expressly or by any necessary implication to the particular subject of election petitions; and when we find in the same Act another clause which deals expressly with those petitions there is not the smallest difficulty in taking the two clauses together and placing upon them both a consistent construction.'

His Lordship proceeded to state that there was nothing in the case to raise a doubt as to the powers of the Dominion Parliament to impose new duties or confer new powers upon existing provincial courts in respect of matters which do not come within the classes of subjects assigned exclusively to the local legislatures. Lord Selborne's view appears to have been that Parliament can confer any jurisdiction upon a provincial court which a local legislature cannot confer, although, doubtless, the constitution of a court is affected by the enlarging of its powers.[1]

Tax upon Exhibits filed in Court.—In *Attorney-General for Quebec v. Reed*, 10 A.C., 141, the question was whether a duty of ten cents imposed by the Act of Quebec, 43-44 V., c. 9, upon every exhibit filed in court in any action pending therein

[1] See Lord Selborne's observations quoted under s. 41, *supra*, pp. 15-6.

could be supported under s. 92 (14). Lord Selborne, L.C., delivering the judgment of the Committee, pp. 144-5, said:—

'One of the things which are to be within the powers of the provincial legislatures—within their exclusive powers—is the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, and including the procedure in civil matters in the courts. Now it is not necessary for their Lordships to determine whether, if a special fund had been created by a provincial Act for the maintenance of the administration of justice in the provincial courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable. That may be an important question which will be considered in any case in which it may arise; but it does not arise in this case. This Act does not relate to the administration of justice in the province; it does not provide in any way, directly or indirectly, for the maintenance of the provincial courts; it does not purport to be made under that power, or for the performance of that duty. The subject of taxation, indeed, is a matter of procedure in the provincial courts, but that is all. The fund to be raised by that taxation is carried to the purposes mentioned in the 2nd sub-section; it is made part of the general consolidated revenue of the province. It, therefore, is precisely within the words "taxation in order to the raising of a revenue for provincial purposes." If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general provincial purposes, and it is not more specially applicable for the administration of justice than any other part of the general provincial revenue. Their Lordships, therefore, think that it cannot be justified under the 14th sub-section.'

Judges, Officers, etc.—In *the Queen's Counsel Case*, 1898 A.C., 247, Lord Watson, delivering the judgment of the Board, said that by the combined effect of s. 92 (1), (4) and (14), it was entirely within the discretion of the provincial legislature to determine by what officers the executive government of the province should be represented in its courts of law or elsewhere, and to define the duties, powers and privileges of these officers.

Lord Watson, pp. 254-5, further said:—

'The enactments of s. 92, sub-s. 14, confer upon the provincial legislature in wide and general terms power to regulate the constitution and organization of all courts of law in the province, civil or criminal. It is no doubt true that with two exceptions, these being the Courts of Probate in Nova Scotia and New Brunswick, the appointment of the judges of the superior, district, and county courts in each province is committed to the Governor-General of Canada by s. 96, subject to the condition that, until the laws of the provinces are made uniform, these judges must be selected from the bar of the province in which the appointment is made. And, by s. 100, the right to fix the salaries, allowances, and pensions of these judges, except in the case of the Courts of Probate in Nova Scotia and New Brunswick, is vested in the Parliament of Canada, upon which there is also imposed the duty of providing the salaries, allowances, and pensions so fixed. But in all other respects the courts of each province, including the judges and the officials of the court, together with those persons who practise before them, are subject to the jurisdiction and control of the provincial legislature; that legislature and no other has the right to prescribe rules for the qualifications and admission of practitioners, whether they be pleaders or solicitors.'

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.

Provincial Criminal Law.—In *Russell v. The Queen*, 7 A.C., 840, Sir Montague Smith, delivering the judgment of the Board, said:—

'It was argued by Mr. Benjamin that if the Act related to criminal law, it was provincial criminal law, and he referred to sub-s. 15 of s. 92, viz:—"The imposition of any punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section." No doubt this argument would be well founded if the principal matter of the Act could be brought within any of these classes of subjects.'

It would seem to follow from this, as already pointed out, that there is a field of criminal legislation competent to a local legislature, but incompetent to the Dominion Parliament.

Hard Labour.—In *Hodge v. The Queen*, 9 A.C., 117, it was urged that the Ontario legislature had no power to impose imprisonment at hard labour for breach of rules or by-laws of the License Commission, and could confer no authority to do so. Sir Barnes Peacock, delivering the judgment of the Committee, p. 133, said:—'If, as their Lordships have decided, the subjects of legislation come within the powers of the provincial legislature, then No. 15 of s. 92 of the British North America Act, which provides for "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," is applicable to the case before us, and is not in conflict with No. 27 of s. 91; under these very general terms, "the imposition of punishment by imprisonment for enforcing any law," it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it—"hard labour"; in other words, that "imprisonment" there means restraint by confinement in a prison, with or without its usual accompaniment, "hard labour."

'The provincial legislature having thus the authority to impose imprisonment with or without hard labour, had also power to delegate similar authority to the municipal body which it created, called the License Commissioners.'

16. Generally all Matters of a merely local or private Nature in the Province.

Private and Local Society.—In *L'Union St. Jacques v. Belisle*, L.R., 6 P.C., 31, the question arose as to the validity of a statute of the legislature of Quebec dealing with the powers of a society known as L'Union St. Jacques de Montreal. This Act, taking notice of a certain state of embarrassment resulting from what it described in substance as improvident regulations of the society, imposed a forced commutation of their existing rights upon two widows, who, at the time the Act was passed, were annuitants of the society under its rules, reserving to them the rights so cut down in the future possible event of the improvement up to a certain point of the affairs of the society.

It was held by the Committee that this legislation was competent to the legislature in the execution of the power conferred by section 92 (16).

Lord Selborne, p. 35, said, referring to this enumeration:—'If there is nothing to control that in the 91st section it would seem manifest that the subject-matter of this Act, the 33 V., c. 58, is a matter of a merely local or private nature in the province, because it relates to a benevolent or benefit society incorporated in the city of Montreal within the province which appears to consist exclusively of members who would be subject *prima facie* to the control of the provincial legislature. . . . . Clearly this matter is private; clearly it is local, so far as locality is to be considered, because it is in the province, and in the city of Montreal.'

Lord Selborne proceeded to state that—'Unless, therefore, the general effect of that head of s. 92 is for this purpose qualified by something in s. 91, it is a matter not only within the competency, but within the exclusive competency of the provincial legislature. Now, s. 91 qualifies it undoubtedly, if it be within any one of the different classes of subjects there specially enumerated; because the last and concluding words of s. 91 are:—"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." But the *onus* is on the respondent to show that this, being of itself of a local or private nature, does also come within one or more of the classes of subjects specially enumerated in the 91st section.'

Local Taxation.—In *Dow v. Black*, L.R., 6 P.C., 282, Sir James Colville, delivering the judgment, having decided that a provincial legislature had power to impose direct taxes for a local purpose upon a particular locality as a matter of direct taxation within the province, stated that even if the legislation did not fall within the 2nd article of s. 92 it would clearly be a law relating to a matter of a merely local or private nature within the meaning

of the 9th article of s. 92, and therefore legislation which the provincial legislature was competent to pass, unless its subject-matter could be distinctly shown to fall within one or other of the classes of subjects specially enumerated in s. 91; and this view his Lordship stated was in accordance with the ruling of the Committee in *L'Union St. Jacques de Montreal v. Belisle* L.R., 6 P.C., 31.

The reference to the 9th article is probably a mistake. Doubtless his Lordship intended instead to refer to the 16th article.

The Liquor Traffic.—In *Russell v. The Queen*, 7 A.C., 840-2, Sir Montague Smith, delivering the judgment of the Board, said:—'It was lastly contended that this Act fell within sub-s. 16 of s. 92—"Generally all matters of a merely local or personal (*sic*) nature in the province."

'It was not, of course, contended for the appellant that the legislature of New Brunswick could have passed the Act in question, which embraces in its enactments all the provinces; nor was it denied, with respect to this last contention, that the Parliament of Canada might have passed an Act of the nature of that under discussion, to take effect at the same time throughout the whole Dominion. Their Lordships understand the contention to be that, at least in the absence of a general law of the Parliament of Canada, the provinces might have passed a local law of a like kind, each for its own province, and that, as the prohibitory and penal parts of the Act in question were to come into force in those counties and cities only in which it was adopted in the manner prescribed, or, as it was said, "by local option," the legislation was in effect, and on its face, upon a matter of a merely local nature. The judgment of Allen, C.J., delivered in the Supreme Court of the province of New Brunswick, in the case of *Barker v. The City of Fredericton*, 3 P. & B. 139, 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 s. 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 pretense for saying that the evil or vice struck at by the Act in question is local, or exists only in one province, and that Parliament, under colour of general legislation, is dealing with a provincial matter only. It is, therefore, unnecessary to discuss the considerations which a state of circumstances of this kind might present. The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion, and the local option, as it is called, no more localizes the subject and scope of the Act than a provision in an Act for the prevention of contagious diseases in cattle, that a public officer should proclaim in what districts it should come 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.'

In *Hodge v. The Queen*, 9 A.C., 117, the Liquor License Act of Ontario, R.S.O., 1877, c. 181, provided by s. 4 that the License Commission might make regulations for determining, among other things, the conditions and qualifications requisite for tavern and shop licenses within the municipality for the sale of spirituous and fermented liquors; for limiting the number of these licenses, and for regulating the taverns and shops to be licensed. By s. 5 the Commission was authorized to impose penalties for infraction of any such resolution. A resolution was passed in pursuance of this authority prohibiting any bowling-alley, billiard or bagatelle table to be used or like games to be played in any licensed tavern or shop during the time prohibited for the sale of liquor, and that persons guilty of infraction of the resolution should be subject to a penalty, and in default of payment to imprisonment with hard labour. The appellant, the holder of a retail license, was convicted of permitting a billiard table to be used within the period prohibited by the resolution.

Sir Barnes Peacock, delivering the judgment of the Committee, pp. 130-1, said:—'Their Lordships proceed now to consider the subject matter and legislative character of ss. 4 and 5 of the Liquor License Act of 1877, c. 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, 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.

'The subjects of legislation in the Ontario Act of 1877, ss. 4 and 5, seem to come within the heads Nos. 8, 15 and 16 of s. 92 of British North America statute, 1867.

'Their Lordships are therefore of opinion that in relation to ss. 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.'

Sir Barnes Peacock, in the same case, p. 133, stated further:—'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.'[1]

In the *Prohibition Case*, 1896 A.C., 364-5, Lord Watson, delivering the judgment, said:—

'The only enactments of s. 92 which appear to their Lordships to have any relation to the authority of provincial legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16, which assign to their exclusive jurisdiction, (1) "Property and civil rights in the province,"

[1] Lord Watson said in the *Prohibition Case*, 1896 A.C., 364, that the Board held in *Hodge v. The Queen* that these regulations were authorized by s. 92 (9), *supra*, p. 141.

and (2) "Generally all matters of a merely local or private nature in the province." A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which would be the subject-matter of the transactions if they were not prohibited, and also the civil rights of persons in the province. It is not impossible that the vice of intemperance may prevail in particular localities within a province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling *prima facie* within No. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province where prohibition was urgently needed.

'It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In s. 92, No. 16, appears to them to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumeration, and although its terms are wide enough to cover, they were obviously not meant to include provincial legislation in relation to the classes of subjects already enumerated.'

In the same case, p. 371, Lord Watson, with reference to questions 3 and 4, which had been submitted, gave the following answers:—

'Question 3.—Has a provincial legislature jurisdiction to prohibit the manufacture of spirituous, fermented or other intoxicating liquors within the province?

'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.

'Question 4.—Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province?

'Answer.—Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament.'

In *Attorney-General of Manitoba v. Manitoba License-Holders' Association*, 1902 A.C., 73, the following question was submitted to the Court of King's Bench of Manitoba by the Lieutenant-Governor in Council and argued upon appeal before the Judicial Committee:—'Had the Legislative Assembly of Manitoba jurisdiction to enact the Liquor Act, and if not in what particular or respect has it exceeded its power?'

The Liquor Act here referred to is the Manitoba statute 63-64 V., c. 22.

Lord Macnaghten, delivering the judgment of the Committee, pp. 77-80, said:—

'The question at issue depends on the meaning and effect of those sections in the British North America Act, 1867, which provide for the distribution of legislative powers between the Dominion and the provinces. The subject has been discussed before this Board very frequently and very fully. Mindful of advice often quoted (see *Citizens Insurance Company v. Parsons*, 1881, 7 A.C., 109), but not perhaps always followed, their Lordships do not propose to travel beyond the particular case before them.

'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 s. 91 and assigned to the legislature of the Dominion, or in those enumerated in s. 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. Reg.*, 7 A.C., 829, 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 par-

ticular 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*, 1896 A.C., 348, 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 the 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, supra*, 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 s. 92. 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 and 16, 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.

' The controversy, therefore, seems to be narrowed to this one point: Is the subject of the Liquor Act a matter " of a merely local nature in the province " of Manitoba, and does the Liquor Act deal with it as such? The judgment of this Board in the case of *Attorney-General for Ontario v. Attorney-General for*

the Dominion, 1896 A.C., 348, has relieved the case from some, if not all, of the difficulties which appear to have presented themselves to the learned judges of the Court of King's Bench. This Board held that a provincial legislature has jurisdiction to restrict the sale within the province of intoxicating liquors so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada, and which may be in force within the province or any district thereof. It held, further, that there might be circumstances (see report to Her Majesty, May 9, 1896) in which a provincial legislature might have jurisdiction to prohibit the manufacture within the province of intoxicating liquors and the importation of such liquors into the province. For the purposes of the present question it is immaterial to inquire what those circumstances may be. The judgment, therefore, as it stands, and the report to Her late Majesty consequent thereon, show that in the opinion of this tribunal matters which are "substantially of local or of private interest" in a province —matters which are of a local or private nature "from a provincial point of view," to use expressions to be found in the judgment—are not excluded from the category of "matters of a merely local or private nature," because legislation dealing with them, however carefully it may be framed, may or must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.

'The Liquor Act proceeds upon a recital that "it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor." That is the declared object of the legislature set out at the commencement of the Act. Towards the end of the Act there occurs this section: "119. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the province of Manitoba, except under a license, or as otherwise specially provided by this Act, and restrict the consumption of liquor within the limits of the province of Manitoba, it shall not affect and is not intended to affect *bona fide* transactions in liquor between a person in the province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly."

'Now that provision is as much part of the Act as any other section contained in it. It must have its full effect in exempting

from the operation of the Act all *bona fide* transactions in liquor which come within its terms. It is not necessary to go through the provisions of the Act. It is enough to say that they are extremely stringent—more stringent probably than anything that is to be found in any legislation of a similar kind. Unless the Act becomes a dead letter, it must interfere with the revenue of the Dominion, with licensed trades in the province of Manitoba, and indirectly at least with business operations beyond the limits of the province. That seems clear. And that was substantially the ground on which the Court of King's Bench declared the Act unconstitutional. But all objections on that score are in their Lordships' opinion removed by the judgment of this Board in the case of *Attorney-General for Ontario v. Attorney-General for the Dominion, supra.* Having attentively considered the very able and elaborate judgments of Killam, C.J., and Bain, J., in which Richards, J., concurred, and the arguments of counsel in support of their view, their Lordships are not satisfied that the legislature of Manitoba has transgressed the limits of its jurisdiction in passing the Liquor Act.'

The general result in this decision follows logically enough from the judgment of the Board in the *Prohibition Case.* But it is to be regretted, having regard to the reasoning of the Committee in that case, that Lord Macnaghten did not explain the grounds upon which the Committee considered it doubtful whether the Dominion Parliament would have authority to interfere with the exclusive jurisdiction of the provinces in relation to the suppression of the liquor traffic if the provincial legislation were to be regarded as referable to matters within the power stated in s. 92 (13) 'Property and civil rights in the province,' rather than in s. 92 (16) 'Generally all matters of a merely local or private nature in the province.' It was held in the *Prohibition Case,* as Lord Macnaghten observes, that the prohibitory legislation in question in that case fell within the enumerations (13) or (16) of s. 92, although, in the opinion of their Lordships, it was not necessary to determine within which of these enumerations the subject was embraced. Lord Watson proceeded to hold, however, that in these circumstances the pro-

hibitory legislation enacted by the Canada Temperance Act in the execution of the general unenumerated powers of the Dominion would override the provincial legislation in any locality where the former was brought into force. It is difficult, therefore, without explanation, which the Judicial Committee alone is competent to give, to ascertain why there should be a difference in the effect of Dominion legislation as to a provincial enactment, whether the latter were justified under s. 92 (13) or (16).

It is true that Lord Watson says in the *Prohibition Case*, p. 365, that in s. 92, article 16 has the same office which the general enactment with respect to matters concerning the peace, order and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in s. 91; that it assigns to the provincial legislatures all matters in a provincial sense local or private omitted from the preceding enumerations, and that it was not meant to include the provincial powers already enumerated. The fact remains, nevertheless, that whatever is included in the 16th enumeration is within the exclusive legislative authority of the provinces; and the concluding paragraph of s. 91 applies, as has been shown, to the first fifteen enumerations of s. 92 in the same manner and to the same extent as it applies to the 16th enumeration. The general character of article 16 does not therefore appear to afford an explanation.

It is to be observed upon the authority of the two last-quoted cases that a matter may be merely local or private for the purposes of s. 92 (16), although it is provincial or public as to the area or interest which it affects.

General Scope and Effect of ss. 91 *and* 92.—Having thus completed a review of the observations of their Lordships explaining certain of the particular powers conferred upon Parliament and the local legislatures by the separate articles of ss. 91 and 92, it will be convenient, before considering the later sections, to refer to or extract certain passages from the judgments of their Lordships in which have been discussed

the general constitution of the Parliament and the local legislatures as affected by ss. 91 and 92, the general scope and effect of the sections, and the principles by which they are to be construed.[1]

In *The Queen v. Burah*, 3 A.C., 903-5, Lord Selborne, referring to the judgment appealed from of the High Court at Calcutta, said that the Indian legislature seemed to be regarded as in effect an agent or delegate acting under a mandate from the imperial Parliament which must in all cases be executed directly by itself. He said that that opinion rested upon a mistaken view of the powers of the Indian legislature and of the nature and principles of legislation. His Lordship proceeded:—

'The Indian legislature has powers expressly limited by the Act of the imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the imperial Parliament at variance with it), it is not for any court of justice to inquire further or to enlarge constructively those conditions and restrictions.'

In *Hodge v. The Queen*, 9 A.C., 131-2, Sir Barnes Peacock, delivering the judgment of the Committee, said:—

'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

[1] See, in addition to the other authorities here quoted, the *Prohibition Case*, 1896 A.C., 348, discussed *supra*, pp. 45-60.

hard labour, it was further contended that the imperial Parliament had conferred no authority on the local legislature to delegate those powers to the license commissioners or any other persons. In other words, that the power conferred by the imperial Parliament on the local legislature should be exercised in full by that body, and by that body alone. The maxim, *delegatus non potest delegare*, was relied on.

'It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

'It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for courts of law, to decide.'

In Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, 1892 A.C., 441-3, Lord Watson, delivering the judgment of the Committee, said:—

'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, so that the Dominion government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by s. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion and as supreme as it was before the passing of the Act. In *Hodge v. The Queen*, 9 A.C., 117, Lord Fitzgerald, delivering the opinion of this Board, said: "When the British North America Act enacted that there should be a legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local legislature is supreme, and has the same authority as the imperial Parliament, or the Parliament of the Dominion." The Act places the constitutions of all provinces within the Dominion on the same level; and what is true with respect to the legislature of Ontario, has equal application to the legislature of New Brunswick.

'It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the government of Canada, and its

status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation in the strictest sense of that word; and, within the limits assigned by s. 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867 to warrant the inference that the imperial legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share.'

There is, it is conceived, an inaccuracy in the statement that the Dominion is vested with such of the powers (executive and legislative), property and revenues as are necessary for the due performance of its constitutional functions, and that the remainder is retained by the provinces for the purpose of provincial government. So far as concerns legislative powers, these are, by the operation of ss. 91 and 92, assigned in general terms to the Dominion, and the provincial powers are limited to those enumerated. Sections 12 and 65 distribute the statutory executive powers existing at the Union. The public property and revenues are also assigned generally to the Dominion by the combined effect of s. 102, and the following sections of that group relating to the distribution of revenues and assets, although as to lands, mines, minerals and royalties, the general provision is, by s. 109, in favour of the provinces, while the Dominion by the preceding section takes only certain enumerated property.

In *L'Union St. Jacques v. Belisle*, L.R., 6 P.C., 35, Lord Selborne, delivering the judgment of the Board, said:—

'The scheme of the 91st and 92nd sections is this. By the 91st section some matters—and their Lordships may do well to assume, for the argument's sake, that they are all matters, except those afterwards dealt with by the 92nd section—their Lordships do not decide it, but for the argument's sake they will assume it; certain matters, being upon that assumption all those which are not mentioned in the 92nd section, are reserved for the exclusive legislation of the Parliament of Canada, called the Dominion Parliament; but beyond controversy there are

certain other matters, not only not reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the provincial legislature in each province.'

In the same case competing considerations were urged as to whether a provincial Act should be upheld as in the execution of s. 92 (16), or whether it was *ultra vires* as falling within s. 91 (21). Lord Selborne, pp. 36-7, said:—

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

In *Valin v. Langlois*, 5 A.C., 118, Lord Selborne said that it was not to be presumed that the legislature of the Dominion had exceeded its powers unless upon grounds really of a serious character.

At pp. 119-20 of the same case, Lord Selborne said:—'If the subject-matter is within the jurisdiction of the Dominion Parliament, it is not within the jurisdiction of the provincial parliament, and that which is excluded by the 91st section from the jurisdiction of the Dominion Parliament is not anything else than matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces.'

In *Citizens and Queen Insurance Companies v. Parsons*, 7 A.C., 107-9, Sir Montague Smith, delivering the judgment of the Committee, having referred to ss. 91 and 92, said:—'The scheme of this legislation, as expressed in the first branch of s. 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 s. 92 had been altogether distinct and different from those in s. 91, no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative power over the 16 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 s. 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 s. 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of s. 92.

'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 s. 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 s. 92, and

no one can doubt, notwithstanding the general language of s. 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "The raising of money by any mode or system of taxation" is enumerated among the classes of subjects in s. 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 s. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in s. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

'The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in s. 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 in s. 91, and whether the power of the provincial legislature is or is not thereby overborne.'

Again in the same case, p. 110, his Lordship said:—

'It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in ss. 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.'

Sir Montague Smith further in the course of the judgment, p. 116, stated:—'The declarations of the Dominion Parliament are not, of course, conclusive upon the construction of the British North America Act; but when the proper construction of the language used in that Act to define the distribution of legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered.'

In *Dobie v. Temporalities Board,* 7 A.C., 148, Lord Watson, delivering the judgment, referred to the comments made by the Board upon the general scheme of ss. 91 and 92 in *Citizens and Queen Insurance Companies v. Parsons,* and he said that their Lordships found no reason to modify in any respect the principles of law upon which they proceeded in deciding that case.

In the judgment of the Committee in *Russell v. The Queen,* 7 A.C., 836, their Lordships stated that the general scheme of distribution of legislative powers, and the general scope and effect of ss. 91 and 92, and their relation to each other had been fully considered and commented on by the Board in the case of *Citizens and Queen Insurance Companies v. Parsons,* and they proceeded to re-instate and apply the particulars of construction enunciated in that case.

In *Bank of Toronto v. Lambe,* 12 A.C., 581, the method of inquiry stated and approved in *Citizens and Queen Insurance Companies v. Parsons* was adopted by the Committee for the purpose of ascertaining whether the legislation there in question fell within s. 91 or s. 92.

In *Attorney-General of Ontario v. Mercer,* 8 A.C., 775, Lord Selborne, L.C., said that the words of the statute must receive

their proper construction whatever that may be, but that if this is doubtful the more consistent and probable construction ought in their Lordships' opinion to be preferred.[1]

In *Hodge v. The Queen*, 9 A.C., 130, Sir Barnes Peacock, delivering the judgment of the Committee referring to the judgment in *Russell v. The Queen, supra*, said:—

'The principle which that case and the case of the *Citizens Insurance Company*, 7 A.C., 96, illustrate is that subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91.'

In *Bank of Toronto v. Lambe*, 12 A.C., 587-8, Lord Hobhouse, delivering the judgment of the Committee, stated:—'Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each state may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the state legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the federation Act must be so construed as to allow no power to the provincial legislatures under s. 92, which may by possibility, and if exercised in some extravagant way interfere with the objects of the Dominion in exercising their powers under s. 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself, except under the control of the whole acting through the Governor-General. And the question they have to answer is

[1]See also the observations of Lord Herschell, L.C., in *Brophy v. Attorney-General of Manitoba*, 1895 A.C., 215-6, *infra*, pp. 203-4.

whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within s. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament.

'It only remains to refer to some of the grounds taken by the learned judges of the lower courts which have been strongly objected to at the bar. Great importance has been attached to French authorities who lay down that the *impôt des patentes*, which is a tax on trades, and which may possibly have afforded hints for the Quebec law, is a direct tax. And it has been suggested that the provincial legislatures possess powers of legislation either inherent in them or dating from a time anterior to the federation Act, and not taken away by that Act. Their Lordships have not thought it necessary to call on the respondent's counsel, and, therefore, possibly have not heard all that may be said in support of such views. But the judgments below are so carefully reasoned, and the citation and discussion of them here has been so full and elaborate, that their Lordships feel justified in expressing their present dissent on these points. They cannot think that the French authorities are useful for anything but illustration, and they adhere to the view which has always been taken by this Committee, that the federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the Parliament.'

In *Brophy v. Attorney-General of Manitoba*, 1895 A.C., 222, Lord Herschell, L.C., delivering the judgment, said:—

'It must be remembered that the provincial legislature is not in all respects supreme within the province. Its legislative power is strictly limited. It can deal only with matters declared to be within its cognizance by the British North America Act as varied by the Manitoba Act. In all other cases legislative authority rests with the Dominion Parliament. In relation to the subjects specified in s. 92 of the British North America Act, and not falling within those set forth in s. 91, the exclusive power of the provincial legislature may be said to be absolute.'

Lord Herschell, in the *Fisheries Case*, 1898 A.C., 715, said, referring to s. 91:—'The earlier part of this section

read in connection with the words beginning "and for greater certainty," appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in s. 91, is not within the legislative competence of the provincial legislatures under s. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a provincial legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of s. 91, and in particular to the word "exclusively." It would authorize for example, the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act.'

The situation as to competing powers of legislation is very concisely stated by Lord Dunedin in the late case of *Grand Trunk Railway Company v. Attorney-General for Canada*, 1907 A.C., 67-8, as follows:—

'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*, 1894 A.C., 189, and *Tennant v. Union Bank of Canada*, 1894 A.C., 31, seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.'

In *Dobie v. Temporalities Board*, 7 A.C., 151-2, Lord

Watson, delivering the judgment of the Committee, said:—'It was argued for the respondents that, assuming the incompetency of either provincial legislature, acting singly, to interfere with the Act of 1858, that statute might be altered or repealed by their joint and harmonious action. The argument is based upon fact, because, in the year 1874, the legislature of Ontario passed an Act (38 V., c. 75), authorizing the union of the four churches, and containing provisions in regard to the Temporalities fund and its board of management, substantially the same with those of the Quebec Act, 38 V., c. 62, already referred to. It is difficult to understand how the maxim *juncta juvant* is applicable here, seeing that the power of the provincial legislature to destroy a law of the old province of Canada is measured by its capacity to reconstruct what it has destroyed. If the legislatures of Ontario and Quebec were allowed jointly to abolish the board of 1858, which is one corporation in and for both provinces, they could only create in its room two corporations, one of which would exist in and for Ontario and be a foreigner in Quebec, and the other of which would be foreign to Ontario, but a domestic institution in Quebec. Then the funds of the Ontario corporation could not be legitimately settled upon objects in the province of Quebec, and as little could the funds of the Quebec corporation be devoted to Ontario, whereas the Temporalities fund falls to be applied either in the province of Quebec or in that of Ontario, and that in such amounts or proportions as the needs of the Presbyterian Church of Canada in connection with the Church of Scotland, and of its ministers and congregations, may from time to time require. The Parliament of Canada is, therefore, the only legislature having power to modify or repeal the provisions of the Act of 1858.'

It does not by any means follow that the maxim *juncta juvant* may not apply as between the Dominion and the provinces since, as has been seen, by the interpretation of the Committee, all legislative power not committed to the local legislatures is with the Dominion Parliament.

In *St. Catherines Milling and Lumber Company v. The Queen*, 14 A.C., 59, Lord Watson, delivering the judgment of the Committee, said:—'There can be no *a priori* probability that the British legislature, in a branch of the statute which professes to deal only with the distribution of legis-

lative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.'

In the *Fisheries Case*, 1898 A.C., 709, Lord Herschell, delivering the judgment of the Committee, said:—'It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it.'

In *Ontario Mining Company v. Seybold*, 1903 A.C., 82, Lord Davey said:—'Their Lordships repeat, for the purposes of the present argument, what was said by Lord Herschell in delivering the judgment of this Board in the *Fisheries Case*, as to the broad distinction between proprietary rights and legislative jurisdiction.'

Referring to the power of the Dominion Parliament to make regulations with respect to the fisheries, and to the fact that such regulations might seriously affect the exercise of proprietary rights, although the extent, character and scope of the regulations are left entirely to the Dominion Parliament, Lord Herschell, in the *Fisheries Case*, 1898 A.C., 713, said:—'The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected.'

In *Union Colliery Company of British Columbia v.*

Bryden, 1899 A.C., 584-5, Lord Watson, delivering the judgment of the Committee, said:—

'In considering the issue to which the case has thus been narrowed, the evidence led by the parties appears to their Lordships to be of no relevancy. It is chiefly directed to the character, whether reasonable or unreasonable, of the legislation which has been impugned by the appellant company. But the question raised directly concerns the legislative authority of the legislature of British Columbia, which depends upon the construction of ss. 91 and 92 of the British North America Act, 1867. These clauses distribute all subjects of legislation between the Parliament of the Dominion and the several legislatures of the provinces. In assigning legislative power to the one or the other of these parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not. There are various considerations discussed in the judgments of the courts below which, in the opinion of their Lordships have as little relevancy to the question which they had to decide as the evidence upon which these considerations are founded.'

Education.

Legislation respecting education.

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1.) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2.) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in *Upper Canada* on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in *Quebec*:

(3.) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4.) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of *Canada* may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

The Manitoba Schools Cases.—In *Brophy v. Attorney-General of Manitoba*, 1895 A.C., 213, the Board held that by the Manitoba Act, 1870, (33 V., c. 3), s. 22 of the latter Act was intended to be substituted as to Manitoba for s. 93 of the British North America Act, 1867; and although, therefore, the discussion in the Manitoba Schools cases proceeded mainly upon consideration of s. 22 of the Manitoba Act, yet the provisions of s. 93 of the British North America Act, 1867, were contrasted, and their effect also considered, so that it seems not inappropriate here to give place to these decisions.

S. 22 of the Manitoba Act, 1870, is as follows:—

Legislation touching schools subject to certain provisions.

'22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:—

'(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union.

'(2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of

the Province, or of any Provincial Authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education.

Power reserved to Parliament.

'(3) In case any such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section.'

In *City of Winnipeg v. Barrett*, 1892 A.C., 451, Lord Macnaghten, delivering the judgment, thus defined the question for consideration:—'In its legal aspect the question lies in a very narrow compass. The duty of this Board is simply to determine as a matter of law whether, according to the true construction of the Manitoba Act, 1870, having regard to the state of things which existed in Manitoba at the time of the Union, the provincial legislature has or has not exceeded its powers in passing the Public Schools Act, 1890.'

His Lordship, having referred to the terms of s. 22, pp. 452-5, proceeded:—

'At the commencement of the argument a doubt was suggested as to the competency of the present appeal in consequence of the so-called appeal to the Governor-General in Council provided by the Act. But their Lordships are satisfied that the provisions of sub-ss. 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.

'Sub-ss. 1, 2 and 3 of s. 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sub-ss. of s. 93 of the British North America Act, 1867. The only important difference is that in the Manitoba Act, in sub-s. 1, the words "by law" are followed by the words "or practice," which do not occur in the corresponding passage in the British North America Act, 1867. These words were no doubt introduced to meet the special case of a country which had not as yet enjoyed the security of laws properly so called. It is not, perhaps, very easy to define precisely the meaning of such

an expression as "having a right or privilege by practice." But the object of the enactment is tolerably clear. Evidently the word "practice" is not to be construed as equivalent to "custom having the force of law." Their Lordships are convinced that it must have been the intention of the legislature to preserve every legal right or privilege, and every benefit or advantage in the nature of a right or privilege with respect to denominational schools which any class of persons practically enjoyed at the time of the Union.

'What, then, was the state of things when Manitoba was admitted to the Union? On this point there is no dispute. It is agreed that there was no law or regulation or ordinance with respect to education in force at the time. There were, therefore, no rights or privileges with respect to denominational schools existing by law. The practice which prevailed in Manitoba before the Union is also a matter on which all parties are agreed. The statement on the subject by Archbishop Taché, the Roman Catholic Archbishop of St. Boniface, who has given evidence in Barrett's case, has been accepted as accurate and complete.

'"There existed," he says, "in the territory now constituting the Province of Manitoba a number of effective schools for children.

'"These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church, and others by various Protestant denominations.

'"The means necessary for the support of the Roman Catholic schools were supplied, to some extent, by school fees, paid by some of the parents of the children who attend the schools, and the rest was paid out of the funds of the Church contributed by its members.

'"During the period referred to Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of Roman Catholics. There were no public schools in the sense of state schools. The members of the Roman Catholic Church supported the schools of their own Church for the benefit of Roman Catholic children, and were not under obligation to, and did not contribute to, the support of any other schools."

'Now, if the state of things which the Archbishop describes as existing before the Union had been a system established by law, what would have been the rights and privileges of the

Roman Catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body which was engaged in a similar work at the time of the Union would have had precisely the same right with respect to their denominational schools. Possibly this right, if it had been defined or recognized by positive enactment, might have had attached to it, as a necessary or appropriate incident, the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their Lordships' opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of the one necessarily implies or involves immunity from taxation for the purpose of the other. It has been objected that if the rights of Roman Catholics and of other religious bodies, in respect of their denominational schools, are to be so strictly measured and limited by the practice which actually prevailed at the time of the Union, they will be reduced to the condition of a "natural right" which "does not want any legislation to protect it." Such a right, it was said, cannot be called a privilege in any proper sense of the word. If that be so, the only result is that the protection which the Act purports to extend to rights and privileges existing "by practice" has no more operation than the protection which it purports to afford to rights and privileges existing "by law." It can hardly be contended that, in order to give a substantial operation and effect to a saving clause expressed in general terms, it is incumbent upon the court to discover privileges which are not apparent of themselves, or to ascribe distinctive and peculiar features to rights which seem to be of such a common type as not to deserve special notice or require special protection.'

His Lordship then referred to the constitution of the province in 1870, and to the Act of the provincial legislature of 1871 establishing a system of denominational education in the common schools, which was maintained until 1890. The Public Schools Act, 1890, (53 V., c. 38), abolished this denominational system. Having referred to the main provisions of the latter Act, his Lordship, pp. 457-9, concluded:—

'Their Lordships have to determine whether that Act prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the Union.

'Notwithstanding the Public Schools Act, 1890, Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the province; they are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their own religious tenets without molestation or interference. No child is compelled to attend a public school. No special advantage other than the advantage of a free education in schools conducted under public management is held out to those who do attend. But then it is said that it is impossible for Roman Catholics, or for members of the Church of England (if their views are correctly represented by the Bishop of Rupert's Land, who has given evidence in Logan's case), to send their children to public schools where the education is not superintended and directed by the authorities of their Church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890. That may be so. But what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault. It is owing to religious convictions, which everybody must respect, and to the teaching of their Church, that Roman Catholics and the members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.

'Their Lordships are sensible of the weight which must attach to the unanimous decision of the Supreme Court. They have anxiously considered the able and elaborate judgments by which that decision has been supported. But they are unable to agree with the opinion which the learned judges of the Supreme Court have expressed as to the rights and privileges of Roman Catholics in Manitoba at the time of the Union. They doubt whether it is permissible to refer to the course of legislation between 1871 and 1890, as a means of throwing light on the previous practice or on the construction of the saving clause in the Manitoba Act. They cannot assent to the view, which seems to be indicated by one of the members of the Supreme Court, that public schools under the Act of 1890 are in reality

Protestant schools. The legislature has declared in so many words that "the public schools shall be entirely unsectarian." and that principle is carried out throughout the Act.

'With the policy of the Act of 1890 their Lordships are not concerned. But they cannot help observing that, if the views of the respondents were to prevail, it would be extremely difficult for the provincial legislature, which has been entrusted with the exclusive power of making laws relating to education, to provide for the educational wants of the more sparsely inhabited districts of a country almost as large as Great Britain, and that the powers of the legislature, which on the face of the Act appear so large, would be limited to the useful but somewhat humble office of making regulations for the sanitary conditions of schoolhouses, imposing rates for the support of denominational schools, enforcing the compulsory attendance of scholars, and matters of that sort.'

In the case of *Brophy v. Attorney-General of Manitoba*, 1895 A.C., 215-6, Lord Herschell, L.C., delivering the judgment, stated that the decision in *City of Winnipeg v. Barrett* had given rise to some misapprehension. His Lordship explained the decision as follows:—

'In *Barrett's Case* the sole question raised was whether the Public Schools Act of 1890 prejudicially affected any right or privilege which the Roman Catholics by law or practice had in the province at the Union. Their Lordships arrived at the conclusion that this question must be answered in the negative. The only right or privilege which the Roman Catholics then possessed, either by law or in practice, was the right or privilege of establishing and maintaining for the use of members of their own Church such schools as they pleased. It appeared to their Lordships that this right or privilege remained untouched, and therefore could not be said to be affected by the legislation of 1890. It was not doubted that the object of the 1st sub-section of s. 22 was to afford protection to denominational schools, or that it was proper to have regard to the intent of the legislature and the surrounding circumstances in interpreting the enactment. But the question which had to be determined was the true construction of the language used. The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact. It is true that the construction put by this Board upon the 1st sub-

section reduced within very narrow limits the protection afforded by that sub-section in respect of denominational schools. It may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed or assented to the wording of that enactment, were under the impression that its scope was wider, and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot properly influence the judgment of those who have judicially to interpret a statute. The question is, not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the legislature, if violence were done to the language in which their legislation has taken shape, but such a course would on the whole be quite as likely to defeat as to further the object which was in view. Whilst, however, it is necessary to resist any temptation to deviate from sound rules of construction in the hope of more completely satisfying the intention of the legislature, it is quite legitimate where more than one construction of a statute is possible, to select that one which will best carry out what appears from the general scope of the legislation and the surrounding circumstances to have been its intention.'

The Roman Catholic minority of Manitoba having appealed to the Governor-General in Council from the Manitoba Education Acts of 1890 (53 V., cc. 37 and 38), questions as to the right of appeal and as to the application of the British North America Act, 1867, and the Manitoba Act, 1870, were referred by the Governor-General in Council to the Supreme Court of Canada, and came on appeal before the Judicial Committee in *Brophy v. Attorney-General of Manitoba, supra.* Lord Herschell, L.C., delivering the judgment, pp. 212-3, said:—

'The learned judges of the Supreme Court were divided in opinion upon each of the questions submitted. They were all, however, by a majority of three judges out of five, answered in the negative.

'The appeal to the Governor-General in Council was founded upon the 22nd section of the Manitoba Act, 1870, and the 93rd section of the British North America Act, 1867. By the former of these statutes (which was confirmed and declared to be valid and effectual by an imperial statute) Manitoba was created a province of the Dominion.

'The 2nd section of the Manitoba Act enacts that, after the prescribed day the British North America Act shall, "except those parts thereof which are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the province of Manitoba in the same way and to the like extent as they apply to the several provinces of Canada, and as if the province of Manitoba had been one of the provinces originally united by the said Act." It cannot be questioned, therefore, that s. 93 of the British North America Act (save such parts of it as are specially applicable to some only of the provinces of which the Dominion was in 1870 composed) is made applicable to the province of Manitoba except in so far as it is varied by the Manitoba Act. The 22nd section of that statute deals with the same subject-matter as s. 93 of the British North America Act. The 2nd sub-section of this latter section may be discarded from consideration, as it is manifestly applicable only to the provinces of Ontario and Quebec. The remaining provisions closely correspond with those of s. 22 of the Manitoba Act. The only difference between the introductory part and the 1st sub-section of the two sections, is that in the Manitoba Act the words "or practice" are added after the word "law" in the 1st sub-section. The 3rd sub-section of s. 22 of the Manitoba Act is identical with the 4th sub-section of s. 93 of the British North America Act. The 2nd and 3rd sub-sections respectively are the same, except that in the 2nd sub-section of the Manitoba Act the words "of the legislature of the province or" are inserted before the words "any provincial authority," and that the 3rd sub-section of the British North America Act commences with the words: "Where in any province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the legislature of the province." In view of this comparison, it appears to their Lordships impossible to come to any other conclusion than that the 22nd section of the Manitoba Act was intended to be a substitute for the 93rd section of the British North America Act. Obviously all that was intended to be identical had been repeated, and in so far as the provisions of the Manitoba Act differ from those of the earlier statute, they must be regarded as indicating the variations from those provisions intended to be introduced in the province of Manitoba.

'In their Lordships' opinion, therefore, it is the 22nd section of the Manitoba Act which has to be construed in the present case, though it is of course legitimate to consider the terms of the earlier Act, and to take advantage of any assistance they may afford in the construction of enactments with which they so closely correspond and which have been substituted for them.'

Having referred to the judgment of the Committee in *City of Winnipeg, v. Barrett, supra,* His Lordship, pp. 216-23, proceeded:—

'At the outset this question presents itself. Are the 2nd and 3rd subsections, as contended by the respondent, and affirmed by some of the judges of the Supreme Court, designed only to enforce the prohibition contained in the 1st sub-section? The arguments against this contention appear to their Lordships conclusive. In the first place that sub-section needs no further provision to enforce it. It imposes a limitation on the legislative powers conferred. Any enactment contravening its provisions is beyond the competency of the provincial legislature, and therefore null and void. It was so decided by this Board in *Barrett's Case.* A doubt was there suggested whether that appeal was competent, in consequence of the provisions of the 2nd sub-section, but their Lordships were satisfied that the provisions of sub-ss. 2 and 3 did not "operate to withdraw such a question as that involved in the case from the jurisdiction of the ordinary tribunals of the country." It is hardly necessary to point out how improbable it is that it should have been intended to give a concurrent remedy by appeal to the Governor-General in Council. The inconveniences and difficulties likely to arise, if this double remedy were open, are obvious. If, for example, the Supreme Court of Canada, and this Committee on appeal, declared an enactment of the legislature of Manitoba relating to education to be *intra vires,* and the Governor-General in Council on an appeal to him considered it *ultra vires,* what would happen? If the provincial legislature declined to yield to his view, as would almost certainly and most naturally be the case, recourse could only be had to the Parliament of the Dominion. But the Parliament of Canada is only empowered to legislate as far as the circumstances of the case require "for the due execution of the provisions" of the 22nd section. If it were to legislate in such a case as has been supposed, its legislation would necessarily be declared *ultra vires* by the courts which had decided that the

provisions of the section had not been violated by the legislature of the province. If on the other hand the Governor-General declared a provincial law to be *intra vires*, it would be an ineffectual declaration. It could only be made effectual by the action of the courts, which would have for themselves to determine the question which he decided, and if they arrived at a different conclusion and pronounced the enactment *ultra vires* it would be none the less null and void because the Governor-General in Council had declared it *intra vires*. These considerations are of themselves most cogent to show that the 2nd sub-section ought not to be construed as giving to parties aggrieved an appeal to the Governor-General in Council concurrently with the right to resort to the courts in case the provisions of the 1st sub-section are contravened, unless no other construction of the sub-sections be reasonably possible. The nature of the remedy, too, which the 3rd sub-section provides, for enforcing the decision of the Governor-General, strongly confirms this view. That remedy is either a provincial law or a law passed by the Parliament of Canada. What would be the utility of passing a law for the purpose merely of annulling an enactment which the ordinary tribunals would without legislation declare to be null, and to which they would refuse to give effect? Such legislation would indeed be futile.

'So far the matter has been dealt with apart from an examination of the terms of the 2nd sub-section itself. The considerations adverted to would seem to justify any possible construction of that sub-section which would avoid the consequences pointed out. But when its language is examined, so far from presenting any difficulties, it greatly strengthens the conclusion suggested by the other parts of the section. The 1st sub-section is confined to a right or privilege of a "class of persons" with respect to denominational education "at the Union"; the 2nd sub-section applies to laws affecting a right or privilege "of the Protestant or Roman Catholic minority" in relation to education. If the object of the 2nd sub-section had been that contended for by the respondent, the natural and obvious mode of expressing such intention would have been to authorize an appeal from any Act of the provincial legislature affecting "any such right or privilege as aforesaid." The limiting words "at the Union" are, however, omitted, for the expression "any class of persons" there is substituted "the Protestant or Roman Catholic minority of the Queen's subjects," and instead of the words "with respect to denominational schools" the wider term "in relation to education" is used.

'The 1st sub-section invalidates a law affecting prejudicially the right or privilege of "any class" of persons; the 2nd sub-section gives an appeal only where the right or privilege affected is that of the "Protestant or Roman Catholic minority." Any class of the majority is clearly within the purview of the 1st sub-section, but it seems equally clear that no class of the Protestant or Catholic majority would have a *locus standi* to appeal under the 2nd sub-section because its rights or privileges had been affected. Moreover, to bring a case within that sub-section it would be essential to show that a right or privilege had been "affected." Could this be said to be the case because a void law had been passed which purported to do something but was wholly ineffectual? To prohibit a particular enactment and render it *ultra vires* surely prevents its affecting any rights.

'It would do violence to sound canons of construction if the same meaning were to be attributed to the very different language employed in the two sub-sections.

'In their Lordships' opinion the 2nd sub-section is a substantive enactment, and is not designed merely as a means of enforcing the provision which precedes it. The question then arises, does the sub-section extend to rights and privileges acquired by legislation subsequent to the Union? It extends in terms to "any" right or privilege of the minority affected by an Act passed by the legislature, and would therefore seem to embrace all rights and privileges existing at the time when such Act was passed. Their Lordships see no justification for putting a limitation on language thus unlimited. There is nothing in the surrounding circumstances, or in the apparent intention of the legislature, to warrant any such limitation. Quite the contrary. It was urged that it would be strange if an appeal lay to the Governor-General in Council against an Act passed by the provincial legislature because it abrogated rights conferred by previous legislation, whilst if there had been no previous legislation, the Acts complained of would not only have been *intra vires* but could not have afforded ground for any appeal. There is no doubt force in this argument, but it admits, their Lordships think, of an answer.

'Those who were stipulating for the provisions of s. 22 as a condition of the Union, and those who gave their legislative assent to the Act by which it was brought about, had in view the perils then apprehended. The immediate adoption by the legislature of an educational system obnoxious either to Catholics or Protestants would not be contemplated as possible.

As has been already stated, the Roman Catholics and Protestants in the province were about equal in number. It was impossible at that time for either party to obtain legislative sanction to a scheme of education obnoxious to the other. The establishment of a system of public education in which both parties would concur was probably then in immediate prospect. The legislature of Manitoba first met on the 15th of March, 1871. On the 3rd of May following the Education Act of 1871 received the royal assent. But the future was uncertain. Either Roman Catholics or Protestants might become the preponderating power in the legislature, and it might under such conditions be impossible for the minority to prevent the creation at the public cost of schools which, though acceptable to the majority, could only be taken advantage of by the minority on the terms of sacrificing their cherished convictions. The change to a Roman Catholic system of public schools would have been regarded with as much distaste by the Protestants of the province as the change to an unsectarian system was by the Catholics.

'Whether this explanation be the correct one or not, their Lordships do not think that the difficulty suggested is a sufficient warrant for departing from the plain meaning of the words of the enactment, or for refusing to adopt the construction which apart from this objection would seem to be the right one.

'Their Lordships being of opinion that the enactment which governs the present case is the 22nd section of the Manitoba Act, it is unnecessary to refer at any length to the arguments derived from the provisions of s. 93 of the British North America Act. But in so far as they throw light on the matter they do not in their Lordships' opinion weaken, but rather strengthen the views derived from a study of the later enactment. It is admitted that the 3rd and 4th sub-sections of s. 93 (the latter of which is, as has been observed, identical with sub-s. 3 of s. 22 of the Manitoba Act) were not intended to have effect merely when a provincial legislature had exceeded the limit imposed on its powers by sub-s. 1, for sub-s. 3 gives an appeal to the Governor-General not only where a system of separate or dissentient schools existed in a province at the time of the Union, but also where in any province such a system was "thereafter established by the legislature of the province." It is manifest that this relates to a state of things created by post-union legislation. It was said

it refers only to acts or decisions of a "provincial authority," and not to acts of a provincial legislature. It is unnecessary to determine this point, but their Lordships must express their dissent from the argument that the insertion of the words "of the legislature of the province" in the Manitoba Act shows that in the British North America Act it could not have been intended to comprehend the legislatures under the words "any provincial authority." Whether they be so comprehended or not has no bearing on the point immediately under discussion.

'It was argued that the omission from the 2nd sub-s. of s. 22 of the Manitoba Act of any reference to a system of separate or dissentient schools "thereafter established by the legislature of the province" was unfavourable to the contention of the appellants. This argument met with some favour in the Court below. If the words with which the 3rd sub-section of s. 93 commences had been found in sub-s. 2 of s. 22 of the Manitoba Act, the omission of the following words would no doubt have been important. But the reason for the difference between the sub-sections is manifest. At the time the Dominion Act was passed a system of denominational schools adapted to the demands of the minority existed in some provinces, in others it might thereafter be established by legislation, whilst in Manitoba in 1870 no such system was in operation, and it could only come into existence by being "thereafter established." The words which preface the right of appeal in the Act creating the Dominion would therefore have been quite inappropriate in the Act by which Manitoba became a province of the Dominion. But the terms of the critical sub-section of that Act are, as has been shown, quite general, and not made subject to any condition or limitation.

'Before leaving this part of the case, it may be well to notice the argument urged by the respondent that the construction which their Lordships have put upon the 2nd and 3rd sub-sections of s. 22 of the Manitoba Act is inconsistent with the power conferred upon the legislature of the province to "exclusively make laws in relation to education." The argument is fallacious. The power conferred is not absolute, but limited. It is exercisable only "subject and according to the following provisions." The sub-sections which follow, therefore, whatever be their true construction, define the conditions under which alone the provincial legislature may legislate in relation to education, and indicate the limitations imposed on, and the exceptions from, their power of exclusive legislation. Their

right to legislate is not indeed, properly speaking, exclusive, for in the case specified in sub-s. 3 the Parliament of Canada is authorized to legislate on the same subject. There is, therefore, no such inconsistency as was suggested.

'The learned Chief Justice of the Supreme Court was much pressed by the consideration that there is an inherent right in a legislature to repeal its own legislative acts and that "every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted." He returns to this point more than once in the course of his judgment, and lays down as a maxim of constitutional construction that an inherent right to do so cannot be deemed to be withheld from a legislative body having its origin in a written constitution, unless the constitution in express words takes away the right, and he states it as his opinion that in construing the Manitoba Act the Court ought to proceed on this principle, and to hold the legislature of that province to have absolute powers over its own legislation, untrammelled by any appeal to federal authority, unless it could find some restriction of its rights in that respect in express terms in the constitutional Act.

'Their Lordships are unable to concur in the view that there is any presumption which ought to influence the mind one way or the other. It must be remembered that the provincial legislature is not in all respects supreme within the province. Its legislative power is strictly limited. It can deal only with matters declared to be within its cognizance by the British North America Act as varied by the Manitoba Act. In all other cases legislative authority rests with the Dominion Parliament. In relation to the subjects specified in s. 92 of the British North America Act, and not falling within those set forth in s. 91, the exclusive power of the provincial legislature may be said to be absolute. But this is not so as regards education, which is separately dealt with and has its own code both in the British North America Act and in the Manitoba Act. It may be said to be anomalous that such a restriction as that in question should be imposed on the free action of a legislature, but is it more anomalous than to grant to a minority who are aggrieved by legislation an appeal from the legislature to the executive authority? And yet this right is expressly and beyond all controversy conferred. If, upon the natural construction of the language used, it should appear that an appeal was permitted under circumstances involving a fetter

upon the power of a provincial legislature to repeal its own enactments, their Lordships see no justification for a leaning against that construction, nor do they think it makes any difference whether the fetter is imposed by express words or by necessary implication.

'In truth, however, to determine that an appeal lies to the Governor-General in Council in such a case as the present does not involve the proposition that the provincial legislature was unable to repeal the laws which it had passed. The validity of the repealing Act is not now in question, nor that it was effectual. If the decision be favourable to the appellants the consequence, as will be pointed out presently, will by no means necessarily be the repeal of the Acts of 1890 or the re-enactment of the prior legislation.

'Bearing in mind the circumstances which existed in 1870 it does not appear to their Lordships an extravagant notion that in creating a legislature for the province with limited powers it should have been thought expedient, in case either Catholics or Protestants became preponderant, and rights which had come into existence under different circumstances were interfered with, to give the Dominion Parliament power to legislate upon matters of education so far as was necessary to protect the Protestant or Catholic minority as the case might be.'

His Lordship proceeded to examine in detail the provisions of the Manitoba Schools Act of 1871, and its amendments, and, pp. 226-7, continued:—

'The sole question to be determined is whether a right or privilege which the Roman Catholic minority previously enjoyed has been affected by the legislation of 1890. Their Lordships are unable to see how this question can receive any but an affirmative answer. Contrast the position of the Roman Catholics prior and subsequent to the Acts from which they appeal. Before these passed into law there existed denominational schools, of which the control and management were in the hands of Roman Catholics, who could select the books to be used and determine the character of the religious teaching. These schools received their proportionate share of the money contributed for school purposes out of the general taxation of the province, and the money raised for these purposes by local assessment was, so far as it fell upon Catholics, applied only towards the support of Catholic schools. What is the position of the Roman Catholic minority under the Acts of 1890?

Schools of their own denomination, conducted according to their views, will receive no aid from the state. They must depend entirely for their support upon the contributions of the Roman Catholic community, while the taxes out of which state aid is granted to the schools provided for by the statute fall alike on Catholics and Protestants. Moreover, while the Catholic inhabitants remain liable to local assessment for school purposes, the proceeds of that assessment are no longer destined to any extent for the support of Catholic schools, but afford the means of maintaining schools which they regard as no more suitable for the education of Catholic children than if they were distinctively Protestant in their character.

'In view of this comparison it does not seem possible to say that the rights and privileges of the Roman Catholic minority in relation to education which existed prior to 1890 have not been affected.'

His Lordship, pp. 228-9, concluded:—

'For the reasons which have been given, their Lordships are of opinion that the 2nd sub-section of s. 22 of the Manitoba Act is the governing enactment, and that the appeal to the Governor-General in Council was admissible by virtue of that enactment, on the grounds set forth in the memorials and petitions, inasmuch as the Acts of 1890 affected rights or privileges of the Roman Catholic minority in relation to education within the meaning of that sub-section. The further question is submitted whether the Governor-General in Council has power to make the declarations or remedial orders asked for in the memorials or petitions, or has any other jurisdiction in the premises. Their Lordships have decided that the Governor-General in Council has jurisdiction, and that the appeal is well founded, but the particular course to be pursued must be determined by the authorities to whom it has been committed by the statute. It is not for this tribunal to intimate the precise steps to be taken. Their general character is sufficiently defined by the 3rd sub-section of s. 22 of the Manitoba Act. It is certainly not essential that the statutes repealed by the Act of 1890 should be re-enacted, or that the precise provisions of these statutes should again be made law. The system of education embodied in the Acts of 1890 no doubt commends itself to, and adequately supplies the wants of the great majority of the inhabitants of the province. All legitimate ground of complaint would be removed if that system were supplemented by provisions which would remove the grievance upon which the

appeal is founded, and were modified so far as might be necessary to give effect to these provisions.'

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick.

Legislation for uniformity of Laws in three Provinces.

94. 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, Nova Scotia,* and *New Brunswick,* and of the Procedure of all or any of the Courts in those Three Provinces, 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.

Property and Civil Rights.—In *Citizens and Queen Insurance Companies v. Parsons,* 7 A.C., 110, Sir Montague Smith, referring to s. 94, said:—

'The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada, and not the English law, which prevails in the other provinces. The words "property and civil rights" are obviously used in the same sense in this section as in No. 13 of s. 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity.'

Agriculture and Immigration.

Concurrent powers of Legislation respecting Agriculture, &c.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province and to Immigration into the Province; and it is hereby declared that the Parliament of *Canada* may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of *Canada.*

VII.—JUDICATURE.

Appointment of Judges.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in *Nova Scotia* and *New Brunswick*.[1]

Selection of Judges in Ontario, &c.

97. Until the Laws relative to Property and Civil Rights in *Ontario, Nova Scotia,* and *New Brunswick,* and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec.

98. The Judges of the Courts of *Quebec* shall be selected from the Bar of that Province.

Tenure of office of Judges of Superior Courts.

99. The Judges of the Superior Courts shall hold office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

Salaries, &c., of Judges.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in *Nova Scotia,* and *New Brunswick*), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of *Canada*.[1]

General Court of Appeal, &c.

101. The Parliament of *Canada* may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for *Canada,* and for the Establishment of any additional Courts for the better Administration of the Laws of *Canada*.

Creation of a new Court.—In *Valin v. Langlois,* 5 A.C., 115, upon an application for special leave to appeal, it was urged that the Dominion Controverted Elections Act of 1874, which conferred upon the provincial courts jurisdiction with respect to elections to the Dominion House of Commons, was invalid. But it was considered by their Lordships (even assuming that the effect of the statute was not in truth and substance to create a new court) to be within the authority of Parliament under s. 41, and not excluded by s. 92 (14), to confer this jurisdiction upon existing provincial courts. Their Lordships were further of opinion, however, that the effect of the statute was to create a new court. Lord Selborne,

[1]See *Buckley v. Edwards,* 1892 A.C., 387.

pp. 120-1, said:—'When their Lordships go on to look at the provisions which follow in the Act, it is clear not only that a new jurisdiction is conferred upon those courts, but that everything necessary for the exercise of that new jurisdiction is provided for, even the power to take evidence; it is said that a single judge in rotation, and not the entire court, is to exercise that jurisdiction; and in the 48th section: "That on the trial of an election petition, and in other proceedings under this Act, the judge shall, subject to the provisions of this Act, have the same powers of jurisdiction and authority as a judge of one of the superior courts of law or equity for the province in which such election is held, sitting in term or proceeding at the trial of an ordinary civil suit, and the court held by him in such trial shall be a court of record." Words could not be more plain than those to create this as a new court of record, and not the old court with some superadded jurisdiction to be exercised as if it had been part of its old jurisdiction. And all that is said as to the employment of the same officers, or of any other machinery of the court for certain purposes defined by reference to the existing procedure of the courts,—shows that the Dominion legislature was throughout dealing with this as a new jurisdiction created by itself, although in many respects adopting, as it was convenient that it should adopt, existing machinery.'

The Committee did not expressly attribute the power of so creating a court for the trial of Dominion elections to s. 101. That section was not referred to by Lord Selborne, and it is consistent with the decision that the Committee intended to uphold the legislation as an execution of the powers conferred by s. 41; but it is apprehended that s. 101 aptly defines the power.

His Majesty's Prerogative of Appeal.—The question as to the powers of the Parliament of Canada to interfere with the prerogative right of appeal to His Majesty is referred to in the decisions quoted *supra* under s. 92 (14) of *Theberge v. Laudry*, 2 A.C., 102, and *Cushing v. Dupuy*, 5 A.C., 409. The late case touching the powers of the federal legislature of Australia of *Webb v. Outtrim*, 1907 A.C., 81, is also there quoted.

VIII.—Revenues; Debts; Assets; Taxation.

Creation of Consolidated revenue fund.

102. All Duties and Revenues over which the respective Legislatures of *Canada*, *Nova Scotia*, and *New Brunswick*, before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of *Canada* in the Manner and subject to the Charges in this Act provided.

Duties and Revenues Excepted.—In *Attorney-General of Ontario v. Mercer*, 8 A.C., 775, Lord Selborne, L.C., delivering the judgment of the Committee, said:—'The words of exception in s. 102 refer to revenues of two kinds: (1) such portions of the pre-existing "duties and revenues" as were by the Act "reserved to the respective legislatures of the provinces"; and (2) such duties and revenues as might be "raised by them, in accordance with the special powers conferred on them by this Act"; . . . the latter being the produce of that power of "direct taxation within the provinces, in order to the raising of a revenue for provincial purposes," which is conferred upon provincial legislatures by s. 92 of the Act.'

In *St. Catherines Milling and Lumber Company v. The Queen*, 14 A.C., 56-7, Lord Watson, delivering the judgment of the Committee, said, referring to s. 102:—'It enacts that all "duties and revenues" over which the respective legislatures of the united provinces had and have power of appropriation, "except such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred upon them by this Act," shall form one consolidated fund, to be appropriated for the public service of Canada. The extent to which duties and revenues arising within the limits of Ontario, and over which the legislature of the old province of Canada possessed the power of appropriation before the passing of the Act, have been transferred to the Dominion by this clause, can only be ascertained by reference to the two exceptions which it makes in favour of the new provincial legislatures.

'The second of these exceptions has really no bearing on the present case, because it comprises nothing beyond the

revenues which provincial legislatures are empowered to raise by means of direct taxation for provincial purposes, in terms of s. 92 (2). The first of them, which appears to comprehend the whole sources of revenue reserved to the provinces by s. 109, is of material consequence. S. 109 provides that "all lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick, at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same." In connection with this clause it may be observed that by s. 117 it is declared that the provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject-matter of the first exception, and the property which is directly appropriated to the provinces; but it hardly admits of doubt that the interests in land, mines, minerals and royalties, which by s. 109 are declared to belong to the provinces include, if they are not identical with, the "duties and revenues" first excepted in s. 102.'

Expenses of Collection, &c.

103. The Consolidated Revenue Fund of *Canada* shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor-General in Council until the Parliament otherwise provides.

Interest of Provincial public debts.

104. The annual Interest of the Public Debts of the several Provinces of *Canada, Nova Scotia,* and *New Brunswick* at the Union shall form the Second Charge on the Consolidated Revenue Fund of *Canada.*

Salary of Governor General.

105. Unless altered by the Parliament of *Canada,* the salary of the Governor General shall be Ten thousand Pounds Sterling Money of the United Kingdom of *Great Britain* and *Ireland,* payable out of the Consolidated Revenue Fund of *Canada,* and the same shall form the Third Charge thereon.

Appropriation from

106. Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of *Canada,*

time to time. the same shall be appropriated by the Parliament of *Canada* for the Public Service.

Transfer of stocks, &c. **107.** All Stocks, Cash, Banker's Balances, and Securities for Money belonging to each Province at the Time of the Union, except as in this Act mentioned, shall be the Property of *Canada*, and shall be taken in Reduction of the amount of the respective Debts of the Provinces at the Union.

Transfer of property in schedule. **108.** The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of *Canada*.

The third schedule may be here conveniently introduced. It is as follows:—

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and Public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the Use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

Crown Lands reserved for Indians.—In *St. Catherines Milling and Lumber Company v. The Queen*, 14 A.C., 56, Lord Watson, delivering the judgment of the Committee, said:—

'S. 108 enacts that the public works and undertakings enumerated in schedule 3 shall be the property of Canada. As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion,

or required for the purpose of national defence, and of "lands set apart for general public purposes." It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use.'

Public Harbours.—In the *Fisheries Case*, 1898 A.C., 711-2, Lord Herschell, delivering the judgment of the Committee, said:—

'With regard to public harbours, their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the 3rd schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term "harbour" on which public works had been executed became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court, in arriving at the same conclusion, founded their opinion on a previous decision in the same court in the case of *Holman v. Green*, 6 S.C.R., 707, where it was held that the foreshore between high and low water-mark on the margin of the harbour became the property of the Dominion as part of the harbour.

'Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description "public harbour." They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman v. Green*, that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion.

'Their Lordships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring

ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it.'

R.S.O. 1887, c. 24, s. 47, provides that the Lieutenant-Governor in Council may authorize sales or appropriations of 'land covered with water in the harbours, rivers and other navigable waters in Ontario under such conditions as it has been or it may be deemed requisite to impose, but not so as to interfere with the use of any harbour as a harbour or with the navigation of any harbour, river or other navigable water.'

Lord Herschell, in the last quoted case, p. 714, expressed the view that the legislature of Ontario had authority to enact this section except in so far as it relates to lands in the harbours and canals, if any of the latter be included in the words 'other navigable waters of Ontario.'

In *Attorney-General for British Columbia v. Canadian Pacific Railway Company,* 1906 A.C., 204, there was a question in controversy as to the right of the respondent to appropriate for its railway and works certain foreshore in the city of Vancouver at the ends of the streets running down to the water, and to exclude the public from access by those streets to the sea. The company justified under powers granted to it by the Parliament of Canada.

Sir Arthur Wilson, delivering the judgment of the Committee, pp. 208-10, said:—'The railway company justifies what it has done under s. 18 (a) of the Act of the Dominion Parliament which incorporated it (44 V., c. 1), which says:—

'"The company shall have the right to take, use and hold the beach and land below high-water mark in any stream, lake, navigable water, gulf or sea in so far as the same shall be vested in the Crown and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works, and as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways."

'The map or plan required by the last words of the section was duly deposited.

'The right of the Dominion Parliament so to legislate with

respect to provincial Crown lands situated as these are was based in argument upon two distinct grounds.

'The first ground was this: S. 108, with the third schedule of the British North America Act, 1867, (imperial Act 30-31 V., c. 3), includes public harbours amongst the property in each province which is to be the property of Canada. This certainly empowers the Dominion Parliament to legislate for any land which forms part of a public harbour.

'In a case heard by this Board, *Attorney-General for the Dominion of Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia*, 1898 A.C., 712, it was laid down that:—

'"It does not follow that, because the foreshore on the margin of a harbour is Crown property it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which in their Lordships' opinion, it is equally clear that it did not form part of it."

'In accordance with that ruling the question whether the foreshore at the place in question formed part of the harbour was in the present case tried as a question of fact, and evidence was given bearing upon it directed to show that before 1871, when British Columbia joined the Dominion, the foreshore at the point to which the action relates was used for harbour purposes, such as the landing of goods and the like. That evidence was somewhat scanty, but it was perhaps as good as could reasonably be expected with respect to a time so far back, and a time when the harbour was in so early a stage of its commercial development. The evidence satisfied the learned trial judge, and the full Court agreed with him. Their Lordships see no reason to dissent from the conclusion thus arrived at. And on this ground, if there were no other, the power of the Dominion Parliament to legislate for this foreshore would be clearly established.'

Rivers and Lake Improvements.—In the *Fisheries Case*, 1898, A.C., 709-11, Lord Herschell, delivering the judgment of the Committee, said:—

'It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown, or what public rights exist in respect of them. Whether a lake or river be vested in the Crown as represented by the Dominion or as re-

presented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they may be modified by legislation, are precisely the same. The answer, therefore, to such questions as those adverted to would not assist in determining whether in any particular case the property is vested in the Dominion or in the province. It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada.

'With these preliminary observations their Lordships proceed to consider the questions submitted to them. The first of these is whether the beds of all lakes, rivers, public harbours, and other waters, or any and which of them situate within the territorial limits of the several provinces, and not granted before Confederation, became under the British North America Act the property of the Dominion.

'It is necessary to deal with the several subject-matters referred to separately, though the answer as to each of them depends mainly on the construction of the 3rd schedule to the British North America Act. By the 108th section of that Act it is provided that the public works and property of each province enumerated in the schedule shall be the property of Canada. That schedule is headed, "Provincial Public Works and Property to be the Property of Canada," and contains an enumeration of various subjects, numbered 1 to 10. The fifth of these is "Rivers and lake improvements." The word "rivers" obviously applies to nothing which was not vested in the province. It is contended on behalf of the Dominion that under the words quoted the whole of the rivers so vested were transferred from the province to the Dominion. It is contended, on the other hand, that nothing more was transferred than the improvements of the provincial rivers, that is to say, only public

works which had been effected and not the entire beds of the rivers. If the words used had been "River and lake improvements," or if the word "lake" had been in the plural, "lakes," there could have been no doubt that the improvements only were transferred. Cogent arguments were adduced in support of each of the rival constructions. Upon the whole their Lordships, after careful consideration, have arrived at the conclusion that the Court below was right, and that the improvements only were transferred to the Dominion. There can be no doubt that the subjects comprised in the schedule are for the most part works or constructions which have resulted from the expenditure of public money, though there are exceptions. It is to be observed that rivers and lake improvements are coupled together as one item. If the intention had been to transfer the entire bed of the rivers and only artificial works on lakes, one would not have expected to find them thus coupled together. Lake improvements might in that case more naturally have been found as a separate item or been coupled with canals. Moreover, it is impossible not to be impressed by the inconvenience which would arise if the entire rivers were transferred, and only the improvements of lakes. How would it be possible in that case to define the limits of the Dominion and provincial rights respectively? Rivers flow into and out of lakes; it would often be difficult to determine where the river ended and the lake began. Reasons were adduced why the rivers should have been vested in the Dominion; but every one of these reasons seems equally applicable to lakes. The construction of the words as applicable to the improvements of rivers only is not an impossible one. It does no violence to the language employed. Their Lordships feel justified, therefore, in putting upon the language used the construction which seems to them to be more probably in accordance with the intention of the legislature.'

Railways.—In *Western Counties Railway Company v. Windsor and Annapolis Railway Company*, 7 A.C., 178, the facts, so far as material to the present purpose, were that the Windsor branch railway, in the province of Nova Scotia running from Windsor Junction to Windsor, connected with Halifax by the trunk line, had been constructed as a public railway of the province previously to Confederation. By a contract between the Commissioner of Railways for Nova Scotia and Messrs. Punchard, Barry & Clark,

made under authority of the Nova Scotia statute 28 V., c. 23, by which these gentlemen became bound to construct a railway from Windsor to Annapolis, it was agreed *inter alia* that before the said line from Windsor to Annapolis was opened a traffic arrangement should be made between the provincial government and Messrs. Punchard, Barry & Clark 'for the mutual use and enjoyment of their respective lines of railway between Halifax and Windsor and Windsor and Annapolis, including running powers, or for the joint operation thereof, on equitable terms to be settled by two arbitrators to be chosen by the parties in case of difference.' This agreement was made in November, 1866. By Act of the legislature of Nova Scotia, 30 V., c. 36, passed in May, 1867, Messrs. Punchard, Barry and Clark were constituted a body corporate under the name of the Windsor and Annapolis Railway Company, and the said agreement of November, 1866, between them and the Commissioner of Railways was, by the same Act, adopted and confirmed.

The Windsor branch railway became the property of the Dominion on 1st July, 1867, by force of s. 108 of the British North America Act, 1867, read in connection with the third schedule of the Act. On 22nd September, 1871, the government of Canada, as then owner of the railway and in pursuance of the obligation to make a traffic arrangement evidenced by the agreement of November, 1866, entered into an agreement with the Windsor and Annapolis Railway Company, giving that company exclusive use and possession of the Windsor branch, with running powers over the trunk line. This agreement was to continue for twenty-one years, with certain rights of renewal.

Lord Watson, delivering the judgment of the Committee, p. 187, said:—'The 108th section of the British North America Act, 1867, which must be read in connection with the third schedule of the Act, had the effect of transferring, upon the 1st of July, 1867, to the Dominion of Canada, all railways which were the property of the province of Nova Scotia. Their Lordships are of opinion that it had not the effect of vesting in Canada

any other or larger interest in these railways than that which belonged to the province at the time of the statutory transfer. Accordingly, the Dominion took the property of the Windsor branch railway, subject to the same obligation by which the right of the provincial government was affected, viz., to enter into a traffic arrangement with the respondent company in terms of the agreement confirmed by the provincial statute of the 7th of May, 1867; and it was in pursuance of that obligation that the Dominion government entered into the agreement of the 22nd of September, 1871.'

Imperial Reserves.—In *Attorney-General of British Columbia v. Attorney-General of Canada,* (the *Deadman's Island Case*), 1906 A.C., 552, a question arose as to whether a small island called Deadman's Island, lying near the entrance to Burrard Inlet, in the harbour of Vancouver, was held by the Crown in the right of the Dominion, or of British Columbia.

The island had admittedly been reserved by the imperial Crown previously to the Union, and it was included with other lands in a despatch of 27th March, 1884, whereby the imperial government through the colonial office, after consultation with the admiralty and war offices, transferred reserved lands mentioned in the schedule to the Dominion government.

Lord Dunedin, delivering the judgment of the Committee, p. 556, said:—'Viewed as a question of fact, their Lordships have come to the conclusion, without difficulty, that the land in question was originally, and subsequently was maintained, as a military reserve; that accordingly it remained imperial property at the time of the British North America Act, and fell neither to the colony in virtue of s. 117, nor to the Dominion in virtue of s. 108, but that it was transferred to the Dominion by the imperial government in virtue of a despatch.'

Property in Lands, Mines, &c.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of *Canada, Nova Scotia,* and *New Brunswick* at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of *Ontario, Quebec, Nova Scotia,* and *New Brunswick* in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Lands Escheated to the Crown.—In *Attorney-General of Ontario v. Mercer*, 8 A.C., 767, the question to be determined was whether lands in Ontario escheated to the Crown for defect of heirs 'belong' (in the sense in which the verb is used in the British North America Act, 1867,) to Ontario or to the Dominion. Lord Selborne, L.C., delivering the judgment of the Committee, pp. 775-6, said:—'There is only one clause in the Act by which any sources of revenue appear to be distinctly reserved to the provinces, viz., the 109th section (*here quoted*). The provincial legislatures are not, in terms, here mentioned; but the words, "shall belong to the several provinces," are obviously equivalent to those used in s. 126, "are by this Act reserved to the respective governments, or legislatures of the provinces." That they do not apply to all lands held as private property at the time of the Union seems clear from the corresponding language of s. 125.—"No lands or property *belonging to* Canada, or any province, shall be liable to taxation," where public property only must be intended. They evidently mean lands, etc., which were, at the time of the Union, in some sense and to some extent *publici juris*; and in this respect they receive illustrations from another section, the 117th (which their Lordships do not regard as otherwise very material), "The several provinces shall retain all their respective public property, not otherwise disposed of by this Act, subject to the right of Canada to assume any *lands or public property* required for fortifications, or for the defence of the country."

The Lord Chancellor, pp. 776-9, continued:—'It was not disputed in the argument for the Dominion at the bar, that all territorial revenues arising within each province from "lands" (in which term must be comprehended all estates in land), which at the time of the Union belonged to the Crown, were reserved to the respective provinces by s. 109; and it was admitted that no distinction could, in that respect, be made between Crown lands then ungranted and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the Union, and that the words were not sufficient to reserve any lands afterwards escheated, which at the time of the Union were in private hands, and did not then belong to the Crown.

'If the word "lands" had stood alone, it might have been difficult to resist the force of this argument. It would have been difficult to say that the right of the lord paramount to future

escheats was "land belonging to him," at a time when the fee-simple was still in the freeholder. If capable of being described as an interest in land, it was certainly not a present proprietary right to the land itself. The word "lands," however, does not here stand alone. The real question is as to the effect of the words "lands, mines, minerals and royalties," taken together. In the Court of Appeal of the province of Quebec, it has been held that these words are sufficient to pass subsequent escheats; and for this purpose stress was laid by some, at least, of the learned judges of that Court (the others not dissenting), on the particular word "royalties" in this context. If "lands and royalties" only had been mentioned (without "mines" and "minerals") it would have been clear that the right of escheats (whenever they might fall) incident at the time of the Union to the tenure of all socage lands held from the Crown was a "royalty" then belonging to the Crown within the province, so as to be reserved to the province by this section, and excepted from s. 102. After full consideration, their Lordships agree with the Quebec Court in thinking that the mention of "mines" and "minerals" in this context is not enough to deprive the word "royalties" of what would, otherwise, have been its proper force. It is true (as was observed in some of the opinions of the majority of the judges in the Supreme Court of Canada) that this word "royalties" in mining grants or leases (whether granted by the Crown or by a subject) has often a special sense, signifying that part of the reddendum which is variable, and depends upon the quantity of minerals gotten. It is also true that in Crown grants of land in British North America the practice has generally been to reserve to the Crown, not only royal mines, properly so called, but minerals generally; and that mining grants or leases had, before the Union, been made by the Crown both in Nova Scotia and in New Brunswick; and that, in two Acts of the province of Nova Scotia (one as to coal mines, and the other as to mines and minerals generally) the word "royalties" had been used in its special sense, as applicable to the variable reddenda in mining grants or leases. Another Nova Scotia Act of 1849, surrendering to the provincial legislature the territorial and casual revenues of the Crown arising within the province, was also referred to by Mr. Justice Gwynne. But the terms of that Act were very similar to those now under consideration; and if "royalties," in the context which we have here to consider, do not necessarily and solely mean reddenda in mining grants or leases, neither may they in that statute.

'It appears, however, to their Lordships to be a fallacy to assume that, because the word "royalties" in this context would not be inofficious or insensible if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense as to (at all events) all the subjects with which it is here found associated—lands as well as mines and minerals. Even as to mines and minerals, it here necessarily signifies rights belonging to the Crown *jure coronæ*. The general subject of the whole section is of a high political nature; it is the attribution of royal territorial rights for purposes of revenue and government, to the provinces in which they are situate or arise. It is a sound maxim of law, that every word ought, *prima facie*, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context. In its primary and natural sense, "royalties" is merely the English translation or equivalent of "regalitates," "jura regalia," "jura regia," (see, *in voce* "Royalties," *Cowell's Interpreter, Wharton's Law Lexicon, Tomlin's* and *Jacobs' Law Dictionaries*). "Regalia" and "regalitates," according to Duncange, are "jura regia"; and Spelman (*Gloss. Arch.*) says, "Regalia dicuntur jura omnia ad fiscum spectantia." The subject was discussed with much fulness of learning in *Dyke v. Walford*, 5 Moore, P.C. 434, where a Crown grant of *jura regalia*, belonging to the County Palatine of Lancaster, was held to pass the right to *bona vacantia*. "That it is a *jus*" (said Mr. Ellis, in his able argument, ibid., p. 480) "is indisputable; it must also be *regale*; for the Crown holds it generally through England by royal prerogative, and it goes to the successor of the Crown, not to the heir or personal representative of the Sovereign. It stands on the same footing as the right to escheats, to the land between high and low water mark, to felons' goods, to treasure trove, and other analogous rights." With this statement of the law their Lordships agree, and they consider it to have been, in substance, affirmed by the judgment of Her Majesty in Council in that case.

'Their Lordships are not now called upon to decide whether the word "royalties" in s. 109 of the British North America Act of 1867, extends to other royal rights besides those connected with "lands," "mines" and "minerals." The question is, whether it ought to be restrained to rights connected with mines and minerals only, to the exclusion of royalties,

such as escheats, in respect of lands. Their Lordships find nothing in the subject or the context, or in any other part of the Act, to justify such a restriction of its sense. The larger interpretation (which they regard as, in itself, the more proper and natural) also seems to be that most consistent with the nature and general objects of this particular enactment, which certainly includes all other ordinary territorial revenues of the Crown arising within the respective provinces.

'The conclusion at which their Lordships have arrived is, that the escheat in question belongs to the province of Ontario.'

Lands Reserved for Indians.—In *St. Catherines Milling and Lumber Company v. The Queen*, 14 A.C., pp. 55-6, Lord Watson, delivering the judgment of the Committee, said: 'By an imperial statute passed in the year 1840 (3-4 V., c. 35), the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the province of Canada, and it was, *inter alia*, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united provinces, should be paid into the consolidated fund of the new province. There was no transfer to the province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the province, the title still remaining in the Crown. That continued to be the right of the province until the passing of the British North America Act, 1867. Had the Indian inhabitants of the area in question released their interest in it to the Crown at any time between 1840 and the date of that Act, it does not seem to admit of doubt, and it was not disputed by the learned counsel for the Dominion, that all revenues derived from its being taken up for settlement, mining, lumbering and other purposes would have been the property of the province of Canada. The case maintained for the appellants is that the Act of 1867 transferred to the Dominion all interest in Indian lands which previously belonged to the province.

'The Act of 1867, which created the federal government, repealed the Act of 1840, and restored the Upper and Lower

Canadas to the condition of separate provinces, under the titles of Ontario and Quebec, due provision being made (s. 142) for the division between them of the property and assets of the united province, with the exception of certain items specified in the fourth schedule, which are still held by them jointly. The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective provinces included in the Union, on the one hand, and the Dominion, on the other. The conflicting claims to the ceded territory maintained by the Dominion and the province of Ontario are wholly dependent upon these statutory provisions. In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.'

His Lordship having referred to ss. 102 and 108, pp. 57-9, continued:—

'The enactments of s. 109 are, in the opinion of their Lordships, sufficient to give to each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the Union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under s. 108, or might assume for the purposes specified in s. 117. Its legal effect is to exclude from the "duties and revenues" appropriated to the Dominion all the ordinary territorial revenues of the Crown arising within the provinces. That construction of the statute was accepted by this Board in deciding *Attorney-General of Ontario v. Mercer*, 8 A.C., 767, where the controversy related to land granted in fee simple to a subject before 1867, which became escheat to the Crown in the year 1871. The Lord Chancellor (Earl Selborne), in delivering judgment in that case, said (8 A.C., 776): "It was not disputed, in the argument for the Dominion at the bar, that all territorial revenues arising within each province from 'lands' (in which term must be comprehended all estates in land) which at the time of the Union belonged to the Crown, were reserved to the respective provinces by s. 109; and it

was admitted that no distinction could in that respect be made between lands then ungranted and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the Union, and that the words were not sufficient to reserve any lands afterwards escheated which at the time of the Union were in private hands, and did not then belong to the Crown." Their Lordships indicated an opinion to the effect that the escheat would not, in the special circumstances of that case, have passed to the province as "lands"; but they held that it fell within the class of rights reserved to the provinces as "royalties" by s. 109.

'Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario v. Mercer, supra*, might have been an authority for holding that the province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the Union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the Union land vested in the Crown, subject to "an interest other than that of the province in the same," within the meaning of s. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.'

In *Ontario Mining Company v. Seybold*, 1903 A.C., 79, Lord Davey, delivering the judgment of the Board, said:—

'The lands in question are comprised in the territory within the province of Ontario, which was surrendered by the Indians by the treaty of October 3, 1873, known as the North-west Angle Treaty. It was decided by this Board in the *St. Catherines Milling Company's Case*, 14 A.C., 46, that prior to that surrender the province of Ontario had a proprietary interest in the land, under the provisions of s. 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land, subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty. In delivering the judgment of the Board, Lord Watson observed that in construing the enactments of the British North

America Act, 1867, " it must always be kept in view that wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use or its proceeds has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown." Their Lordships think that it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.'

British Columbia Railway Belt—Precious Metals.—In *Attorney-General of British Columbia v. Attorney-General of Canada,* (the *Precious Metals Case*) 14 A.C., 295, the question was as to whether the transfer of lands, which British Columbia had by article 11 of her terms of union with the Dominion agreed to make, carried with it the precious metals.

Article 11 of the terms of union with British Columbia is as follows:—

'11. The government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union.

'And the government of British Columbia agree to convey to the Dominion government, in trust, to be appropriated in such manner as the Dominion government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion government from the public lands in the Northwest Territories and the province of Manitoba: Provided that the quantity of land which may be held under pre-exemption right, or by Crown grant, within the

limits of the tract of land in British Columbia to be so conveyed to the Dominion government shall be made good to the Dominion from contiguous public lands; and, provided further, that until the commencement within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion government agree to pay to British Columbia, from the date of the Union, the sum of $100,000 per annum, in half-yearly payments in advance.'

Lord Watson, delivering the judgment of the Committee, pp. 301-305, said:—'Whether the precious metals are or are not to be held as included in the grant to the Dominion government, must depend upon the meaning to be attributed to the words "public lands" in the 11th article of union. The Act 47 V., c. 14, s. 2, which was passed in fulfilment of the obligation imposed upon the province by that article, and the agreement of 1883, defines the area of the lands, but it throws no additional light upon the nature and extent of the interest which was intended to pass to the Dominion. The obligation is to "convey" the lands, and the Act purports to "grant" them, neither expression being strictly appropriate, though sufficiently intelligible for all practical purposes. The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the province before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear that the only "conveyance" contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands and to appropriate their revenues. It was neither intended that the lands should be taken out of the province, nor that the Dominion government should occupy the position of a freeholder within the province. The object of the Dominion government was to recoup the cost of constructing the railway by selling the land to settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position

as if it had been settled by the provincial government in the ordinary course of its administration. That was apparently the consideration which led to the insertion, in the agreement of 1883, of the condition that the government of Canada should offer the land for sale, on liberal terms, with all convenient speed.

'According to the law of England, gold and silver mines until they have been aptly severed from the title of the Crown, and vested in a subject, are not regarded as *partes soli*, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land, and the baser metals which it contains, stands upon a different title from that to which its right to the precious metals must be ascribed. In the *Mines Case*, 1 Plowd. 336, 336*a*, all the justices and barons agreed that in the case of the baser metals, no prerogative is given to the Crown; whereas "all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore." In British Columbia the right to public lands and the right to precious metals in all provincial lands, whether public or private, still rest upon titles as distinct as if the Crown had never parted with its beneficial interests; and the Crown assigned these beneficial interests to the government of the province, in order that they might be appropriated to the same state purposes to which they would have been applicable if they had remained in the possession of the Crown. Although the provincial government has now the disposal of all revenues derived from prerogative rights connected with land or minerals in British Columbia, these revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appears to their Lordships that a conveyance by the province of "public lands" which is, in substance, an assignment of its right to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.

'The grounds upon which the majority of the learned judges of the Supreme Court decided in favour of the Dominion are briefly and forcibly stated in the judgment delivered by Sir William Ritchie, C.J. They were of opinion that the rule of construction which excepts the precious metals from a conveyance of land by the Crown to a subject has no application to the

provisions of the 11th article of union, which they regarded as a statutory compact between two constitutional governments. The learned Chief Justice said: "This was a statutory arrangement between the government of the Dominion and the government of British Columbia in settlement of a constitutional question between the two governments, or rather giving effect to and carrying out the constitutional compact under which British Columbia became part and parcel of the Dominion of Canada, and, as a part of that arrangement, the government of British Columbia relinquished to the Dominion of Canada, as represented by the Governor-General, all right to certain public lands belonging to the Crown, or to the province of British Columbia, as represented by the Lieutenant-Governor."

'If the 11th article of union had been an independent treaty between the two governments, which obviously contemplated the cession by the province of all its interests in the land forming the railway belt, royal as well as territorial, to the Dominion government, the conclusion of the Court below would have been inevitable. But their Lordships are unable to regard its provisions in that light. The 11th article does not appear to them to constitute a separate and independent compact. It is part of a general statutory arrangement, of which the leading enactment is, that, on its admission to the federal union, British Columbia shall retain all the rights and interests assigned to it by the provisions of the British North America Act, 1867, which govern the distribution of provincial property and revenues between the province and the Dominion; the 11th article being nothing more than an exception from these provisions. The article in question does not profess to deal with *jura regia;* it merely embodies the terms of a commercial transaction, by which the one government undertook to make a railway, and the other to give a subsidy, by assigning part of its territorial revenues.

'Their Lordships do not think it admits of doubt, and it was not disputed at the bar, that s. 109 of the British North America Act must now be read as if British Columbia was one of the provinces therein enumerated. With that alteration, it enacts that "all lands, mines, minerals and royalties," which belonged to British Columbia at the time of the Union, shall for the future belong to that province and not to the Dominion. In order to construe the exception from that enactment, which is created by the 11th article of union, it is necessary to ascertain what is comprehended in each of the words of the enumera-

tion, and particularly in the word "royalties." The scope and meaning of that term, as it occurs in s. 109, underwent careful consideration in the case of *Attorney-General of Ontario v. Mercer*, 8 A.C., 767, which was appealed to this Board by the Dominion government in name of the defendant Mercer. In that case their Lordships were of opinion that the mention of "mines and minerals" in the context was not enough to deprive the word "royalties" of what would otherwise have been its proper force. The Earl of Selborne, in delivering the judgment of the Board, said:—"It appears, however, to their Lordships to be a fallacy to assume that because the word "royalties" in this context would not be regarded as inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense as to (at all events) all the subjects with which it is here found associated, lands as well as mines and minerals—even as to mines and minerals it here necessarily signifies rights belonging to the Crown *jure coronæ*."

'It is not necessary for the purposes of this appeal to consider whether the expression "royalties" as used in s. 109 includes *jura regalia* other than those connected with lands, mines and minerals. *Attorney-General of Ontario v. Mercer*, 8 A.C., 767, is an authority to the effect that, within the meaning of the clause, the word "royalties" comprehends, at least, all revenues arising from the prerogative rights of the Crown in connection with "lands, mines and minerals." The exception created by the 11th article of union, from the rights specially assigned to the province by s. 109 is of "lands" merely. The expression "lands" in that article admittedly carries with it the baser metals, that is to say "mines" and "minerals" in the sense of s. 109. Mines and minerals in that sense are incidents of land, and, as such, have been invariably granted, in accordance with the uniform course of provincial legislation, to settlers who purchase land in British Columbia. But *jura regalia* are not accessories of land; and their Lordships are of opinion that the rights to which the Dominion government became entitled under the 11th article did not, to any extent, derogate from the provincial right to "royalties" connected with mines and minerals under s. 109 of the British North America Act.'

Trusts existing—Interest other than that of the Province.—In the *Robinson Treaties Case* the facts were that in

1850 the Ojibeway Indians, by two treaties with the government of the old province of Canada, ceded certain lands in the districts of Lake Huron and Lake Superior formerly held as Indian reserves in consideration of specified money payments and annuities, and the further agreement that if the territory ceded should in the future produce an amount which would enable the government of the province without incurring loss to increase these annuities they should be increased; but not so that the annual payment to any individual should exceed one pound provincial currency, or such further sum as might be ordered by Her Majesty.

The effect of these treaties was, as held by the Judicial Committee, that whilst the title to the lands ceded continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of the lands and to appropriate their proceeds, passed to the government of the province, which also became liable to fulfil the promises and agreements made on its behalf by making due payment to the Indians of the stipulated annuities.

At Confederation the beneficial interest in the territories ceded became vested, under s. 109 of the British North America Act, 1867, in the province of Ontario. In 1873 the Indians preferred a claim against the Dominion government for an increase of their respective annuities upon the ground that the proceeds of the surrendered lands had become large enough to enable the stipulated increase to be paid without involving loss. The government of the Dominion recognizing this claim increased the annuities, and claimed indemnity from Ontario upon the ground that the treaty stipulation giving the Indians a right to the increase of annuity either constituted a trust burdening the surrender of the lands and their proceeds within the meaning of s. 109, or created an interest in the same other than that of the old province within the meaning of that section; and, the beneficial interest in the territories ceded having passed to Ontario, it was sought to make Ontario solely liable.

Lord Watson, delivering the judgment of the Board, pp. 210-1, said:—'The expressions "subject to any trusts existing in respect thereof," and "subject to any interest other than that of the province," appear to their Lordships to be intended to refer to different classes of right. Their Lordships are not prepared to hold that the word "trust" was meant by the legislature to be strictly limited to such proper trusts as a court of equity would undertake to administer; but, in their opinion, it must at least have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate or its proceeds, to make payment, out of one or other of these, of the debt due to the creditor to whom that duty ought to be fulfilled. On the other hand, "an interest other than that of the province in the same" appears to them to denote some right or interest in a third party, independent of and capable of being vindicated in competition with the beneficial interest of the old province. Their Lordships have been unable to discover any reasonable grounds for holding that, by the terms of the treaties any independent interest of that kind was conferred upon the Indian communities; and, in the argument addressed to them for the appellants, the claim against Ontario was chiefly, if not wholly, based upon the provisions of s. 109 with respect to trusts.'

Lord Watson is reported to have said during the argument, referring to s. 109:—'If the Crown right was subject to a burden upon the land, the interest is to pass to the province under that burden. There was to be no change in the position of the Crown. I think the whole effect of this clause is to appropriate to the province of Ontario all the interest in lands within that province as vested in the Crown, subject to all the conditions under which they were vested in the Crown. . . . The policy of these sections of the Act, 109 and 112 and 111 and 142, when read together, appears to me to be generally this, beyond all dispute. . . . . The intention obviously was to provide that with regard to all those debts and liabilities of the old province of Canada, which were simply debts and liabilities charged generally upon the revenues of the provinces, the creditors were to be paid by the Dominion, and to a certain extent, in excess of a particular sum, the Dominion was to be recouped by the two new provinces in the proportions which might be determined under the provisions of s. 142. On the other hand to this extent it is made plain—at least I hold it to be made very plain under s. 109—that any debt

or liability which was made a proper charge upon any property or assets passing to the province under s. 109, was to remain that charge, and was not to be satisfied by the Dominion government under s. 111.'[1]

His Lordship further in his judgment, pp. 211-2, said:—'Their Lordships entirely agree with the following observations made by King J., one of the minority in the Supreme Court: "Practically it does not now, and it never did, make any difference to the Indians whether they were declared to have an interest in the proceeds of the land or not. Their assurance would be equal in either case." Even at the present time, and in view of the change of circumstances introduced by the Act of 1867, their Lordships think it must still be matter of absolute indifference to the Indians whether they have to look for payment to the Dominion, to which the administration and control of their affairs is entrusted by s. 91 (24) of the Act of 1867, or to the province of Ontario. But it is clear that, for the purposes of the present question, the construction of the treaties must be dealt with on the same footing as if it had arisen between the Indians and the old province of Canada; and it must be kept in view that, whilst the Indians had no interest in making such a stipulation, an agreement by the province to make a particular debt a charge upon a particular portion of its annual revenues, or an agreement to hold such portion of its revenue in trust for the future payment of that debt, might have occasioned considerable inconvenience to the government of the province. Why, in these circumstances, a liberal construction should be resorted to for the purpose of raising an equitable right in the Indians which is of no pecuniary advantage to them, and to which the province did not, according to the ordinary and natural construction of the instruments, consent, and cannot with any degree of probability be presumed to have consented, their Lordships are at a loss to understand. The so-called equity appears to have been conjured up for the doubtful purpose of construing the provisions of s. 109 with an amount of liberality which the ordinary canons of construction do not admit of.'

And Lord Watson, p. 213, stated in conclusion:—'Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their

[1] *Lefroy on Legislative Power in Canada*. 612, note.

annuities, whether original or augmented, beyond a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities.'

Assets connected with Provincial debts.

110. All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

Canada to be liable for Provincial debts.

111. *Canada* shall be liable for the Debts and Liabilities of each Province existing at the Union.

Debts of Ontario and Quebec.

112. *Ontario* and *Quebec* conjointly shall be liable to *Canada* for the Amount (if any) by which the Debt of the Province of *Canada* exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with Interest at the Rate of Five *per Centum per Annum* thereon.

Assets of Ontario and Quebec.

113. The Assets enumerated in the Fourth Schedule to this Act belonging at the Union to the Province of *Canada* shall be the Property of *Ontario* and *Quebec* conjointly.

The fourth schedule may be here conveniently introduced. It is as follows:—

Assets to be the Property of Ontario and Quebec conjointly.

Upper Canada Building Fund.
Lunatic Asylums.
Normal School.
Court Houses, in Aylmer, Montreal, Kamouraska. } Lower Canada.
Law Society, Upper Canada.
Montreal Turnpike Trust.
University Permanent Fund.
Royal Institution.
Consolidated Municipal Loan Fund, Upper Canada.

Consolidated Municipal Loan Fund, Lower Canada.
Agricultural Society, Upper Canada.
Lower Canada Legislative Grant.
Quebec Fire Loan.
Temiscouata Advance Account.
Quebec Turnpike Trust.
Education—East.
Building and Jury Fund, Lower Canada.
Municipalities Fund.
Lower Canada Superior Education Income Fund.

Debt of Nova Scotia.

114. *Nova Scotia* shall be liable to *Canada* for the Amount (if any) by which its Public Debt exceeds at the Union Eight million Dollars, and shall be charged with Interest at the Rate of Five *per Centum per Annum* thereon.

Debt of New Brunswick.

115. *New Brunswick* shall be liable to *Canada* for the Amount (if any) by which its Public Debt exceeds at the Union Seven million Dollars, and shall be charged with Interest at the Rate of Five *per Centum per Annum* thereon.

Payment of interest to Nova Scotia and New Brunswick.

116. In case the Public Debts of *Nova Scotia* and *New Brunswick* do not at the Union amount to Eight million and Seven million Dollars respectively, they shall respectively receive by half-yearly Payments in advance from the Government of *Canada* Interest at Five *per Centum per Annum* on the Difference between the actual Amounts of their respective Debts and such stipulated Amounts.

Provincial public property.

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of *Canada* to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

The Assuming of Provincial Lands for Purposes of Defence.—In *L'Union St. Jacques v. Belisle*, L.R., 6 P.C., 37, Lord Selborne, referring to s. 91 (7) 'Militia, military and naval service, and defence' as the source of authority, attributed to the Dominion Parliament the power to take any part of the lands in a province for the purpose of military defence. The public lands of a province may, however, apparently be assumed by the Dominion under s. 117, and probably by executive act.

As to the method of taking over such lands by the Dominion, it is to be observed that in the *Deadman's Island Case*, 1906 A.C., 556, Lord Dunedin speaks of one of His Majesty's military reserves having been competently transferred to Canada by a despatch.

May the Dominion not likewise appropriately assume for the defence of the country the public lands of a province by a despatch to the province?

Lord Watson in the *St. Catherines Milling Case*, 14 A.C., 57-58, mentions lands which the Dominion might assume for the purposes specified in s. 117, together with the lands acquired by the Dominion under s. 108, as excepted from the operation of s. 109—the section which constitutes the title of the provinces to their Crown lands.

Grants to Provinces.

118. The following Sums shall be paid yearly by *Canada* to the several Provinces for the Support of their Governments and Legislatures:

	Dollars.
Ontario	Eighty thousand.
Quebec	Seventy thousand.
Nova Scotia	Sixty thousand.
New Brunswick	Fifty thousand.
	Two hundred and sixty thousand;

and an annual Grant in aid of each Province shall be made, equal to Eighty Cents *per* Head of the Population as ascertained by the Census of One thousand eight hundred and sixty-one, and in the Case of *Nova Scotia* and *New Brunswick*, by each subsequent Decennial Census until the Population of each of those two Provinces amounts to Four hundred thousand Souls, at which Rate such Grant shall thereafter remain. Such Grants shall be in full Settlement of all future Demands on *Canada*, and shall be paid half-yearly in advance to each Province; but the Government of *Canada* shall deduct from such Grants, as against any Province, all Sums chargeable as Interest on the Public Debt of that Province in excess of the several Amounts stipulated in this Act.

The British North America Act, 1907.—By the imperial Act 7 E. VII., c. 11, entitled 'An Act to make further provision with respect to the sums to be paid by Canada to the several

Provinces of the Dominion,' assented to 9th August, 1907, upon the recital that an address has been presented to His Majesty by the Senate and House of Commons of Canada in the terms set forth in the schedule to the Act,[1] it is enacted as follows:—

Payments to be made by Canada to provinces.

1. (1) The following grants shall be made yearly by Canada to every province, which at the commencement of this Act is a province of the Dominion, for its local purposes and the support of its Government and Legislature:—

(*a*) A fixed grant—

where the population of the province is under one hundred and fifty thousand, of one hundred thousand dollars;

where the population of the province is one hundred and fifty thousand, but does not exceed two hundred thousand, of one hundred and fifty thousand dollars;

where the population of the province is two hundred thousand, but does not exceed four hundred thousand, of one hundred and eighty thousand dollars;

where the population of the province is four hundred thousand, but does not exceed eight hundred thousand, of one hundred and ninety thousand dollars;

where the population of the province is eight hundred thousand, but does not exceed one million five hundred thousand, of two hundred and twenty thousand dollars;

where the population of the province exceeds one million five hundred thousand, of two hundred and forty thousand dollars; and

(*b*) Subject to the special provisions of this Act as to the provinces of British Columbia and Prince Edward Island, a grant at the rate of eighty cents per head of the population of the province up to the number of two million five hundred thousand, and at the rate of sixty cents per head of so much of the population as exceeds that number.

(2) An additional grant of one hundred thousand dollars shall be made yearly to the province of British Columbia for a period of ten years from the commencement of this Act.

[1] The schedule is not printed here as it does not seem to affect the construction of the Act.

(3) The population of a province shall be ascertained from time to time in the case of the provinces of Manitoba, Saskatchewan, and Alberta, respectively, by the last quinquennial census or statutory estimate of population made under the Acts establishing those provinces or any other Act of the Parliament of Canada making provision for the purpose, and in the case of any other province by the last decennial census for the time being.

(4) The grants payable under this Act shall be paid half-yearly in advance to each province.

(5) The grants payable under this Act shall be substituted for the grants or subsidies (in this Act referred to as existing grants) payable for the like purposes at the commencement of this Act to the several provinces of the Dominion under the provisions of section one hundred and eighteen of the British North America Act, 1867, or of an Order in Council establishing a province, or of any Act of the Parliament of Canada containing directions for the payment of any such grant or subsidy, and those provisions shall cease to have effect.

30 and 31 Vict., c. 3.

(6) The Government of Canada shall have the same power of deducting sums charged against a province on account of the interest on public debt in the case of the grant payable under this Act to the province as they have in the case of the existing grant.

(7) Nothing in this Act shall affect the obligation of the Government of Canada to pay to any province any grant which is payable to that province, other than the existing grant for which the grant under this Act is substituted.

(8) In the case of the provinces of British Columbia and Prince Edward Island, the amount paid on account of the grant payable per head of the population to the provinces under this Act shall not at any time be less than the amount of the corresponding grant payable at the commencement of this Act; and if it is found on any decennial census that the population of the province has decreased since the last decennial census, the amount paid on account of the grant shall not be decreased below the amount then payable, notwithstanding the decrease of the population.

Short title and interpretation.

2. This Act may be cited as the British North America Act, 1907, and shall take effect as from the first day of July, nineteen hundred and seven.

S. 118 is therefore by the effect of s. 1, sub-s. 5, repealed, and replaced by the provisions of the Act of 1907.

Further grant to New Brunswick.

119. *New Brunswick* shall receive by half-yearly Payments in advance from *Canada* for the Period of Ten years from the Union an additional Allowance of Sixty-three thousand Dollars *per Annum*; but as long as the Public Debt of that Province remains under Seven million Dollars, a Deduction equal to the Interest at Five *per Centum per Annum* on such Deficiency shall be made from that Allowance of Sixty-three thousand Dollars.

Form of payments.

120. All Payments to be made under this Act, or in discharge of Liabilities created under any Act of the Provinces of *Canada, Nova Scotia,* and *New Brunswick* respectively, and assumed by *Canada,* shall, until the Parliament of *Canada* otherwise directs, be made in such Form and Manner as may from Time to Time be ordered by the Governor General in Council.

Canadian manufactures, &c.

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.

Continuance of customs and excise laws.

122. The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of *Canada.*

Exportation and Importation as between two Provinces.

123. Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation.

Lumber Dues in New Brunswick.

124. Nothing in this Act shall affect the Right of *New Brunswick* to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of *New Brunswick,* or in any Act amending that Act before or after the Union, and not increasing the Amount of such Dues; but the Lumber of any of the Provinces other than *New Brunswick* shall not be subject to such Dues.

Exemption of Public Lands, &c.

125. No lands or Property belonging to *Canada* or any Province shall be liable to Taxation.

Provincial Consolidated revenue fund.

126. Such Portions of the Duties and Revenues over which the respective Legislatures of *Canada, Nova Scotia,* and *New Brunswick* had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

Revenues other than Territorial.—In *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, 1892 A.C., 437, the question was argued as to whether the government of New Brunswick had a preference over other depositors in the winding up of the bank. It was urged in argument for the liquidators that the Lieutenant-Governor did not immediately represent the Sovereign; that he was a sort of subordinate administrator under the Governor-General by whom he was appointed, and consequently that the claim of the provincial government ought not to be regarded as a Crown debt to which the royal prerogative would attach. In support of the opposite contention, counsel for the Receiver-General referred to ss. 109 and 126. Lord Watson, delivering the judgment, pp. 443-4, said:—

'The point raised in this appeal, as to the vesting or non-vesting of the public property and revenues of each province in the Sovereign as supreme head of the state, appears to their Lordships to be practically settled by previous decisions of this Board.

'The whole revenues reserved to the provinces for the purposes of provincial government are specified in ss. 109 and 126 of the Act. The first of these clauses deals with "all lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union," which it declares "shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise." If the Act had operated such a severance between the Crown and the provinces, as the appellants suggest, the declaration that these territorial revenues should "belong" to the provinces would hardly have been consistent with their remaining vested in the Crown. Yet, in

Attorney-General of Ontario v. Mercer, 8 A.C., 767; *St. Catherine's Milling and Lumber Company v. The Queen*, 14 A.C., 46; and *Attorney-General of British Columbia v. Attorney-General of Canada*, 14 A.C., 295, their Lordships expressly held that all the subjects described in s. 109 and all revenues derived from these subjects, continued to be vested in Her Majesty as the sovereign head of each province. S. 126, which embraces provincial revenues other than those arising from territorial sources and includes all duties and revenues raised by the provinces in accordance with the provisions of the Act, is expressed in language which favours the right of the Crown, because it describes the interest of the provinces as a right of appropriation to the public service. And, seeing that the successive decisions of this Board, in the case of territorial revenues are based upon the general recognition of Her Majesty's continued sovereignty under the Act of 1867, it appears to their Lordships that, so far as regards vesting in the Crown, the same consequences must follow in the case of provincial revenues which are not territorial.'

IX.—Miscellaneous Provisions.

General.

As to Legislative Councillors of Provinces becoming senators.

127. If any Person being at the passing of this Act a Member of the Legislative Council of *Canada*, *Nova Scotia*, or *New Brunswick*, to whom a Place in the Senate is offered, does not within Thirty Days thereafter, by Writing under his Hand addressed to the Governor General of the Province of *Canada* or to the Lieutenant Governor of *Nova Scotia* or *New Brunswick* (as the Case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative Council of *Nova Scotia* or *New Brunswick*, accepts a Place in the Senate shall thereby vacate his Seat in such Legislative Council.

Oath of Allegiance, &c.

128. Every Member of the Senate or House of Commons of *Canada* shall before taking his Seat therein take and subscribe before the Governor General or some Person authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall before taking his Seat therein take and subscribe before the Lieutenant Governor of the Province or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of *Canada* and every Member of the Legislative

Council of *Quebec* shall also, before taking his Seat therein, take and subscribe before the Governor General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.

The fifth schedule may here be conveniently reproduced. It is as follows:—

OATH OF ALLEGIANCE.

I, *A. B.*, do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

Note.—The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from Time to Time, with proper Terms of Reference thereto.

DECLARATION OF QUALIFICATION.

I, *A. B.*, do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [*or as the Case may be*], and that I am legally or equitably seised as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [*or* seised or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture (*as the Case may be*),] in the Province of Nova Scotia [*or as the Case may be,*] of the Value of Four thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges and Incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a Title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [*or as the Case may be*], and that my Real and Personal Property are together worth Four thousand Dollars over and above my Debts and Liabilities.

Continuance of existing Laws, Courts, Officers, &c.

129. 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 Bri-*

> *tain* 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.

Powers of Repeal.—In *Dobie v. Temporalities Board*, 7 A.C., 147, Lord Watson, delivering the judgment, said that the powers conferred by this section upon the present provincial legislatures to repeal and alter statutes of the legislatures of the old provinces are made precisely co-extensive with the powers of direct legislation with which the legislatures are invested by the other clauses of the British North America Act, 1867.

In the *Prohibition Case*, 1896 A.C., 366-7, Lord Watson, delivering the judgment of the Committee, said:—

'The repeal of a provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion; and if the existence of such repugnancy should become matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the provincial legislature, but must be submitted to the judicial tribunals of the country. In their Lordships' opinion the express repeal of the old provincial Act of 1864 by the Canada Temperance Act of 1886 was not within the authority of the Parliament of Canada. It is true that the Upper Canada Act of 1864 was continued in force within Ontario by s. 129 of the British North America Act "until repealed, abolished or altered by the Parliament of Canada, or by the provincial legislature," according to the authority of that parliament "or of that legislature." It appears to their Lordships that neither the Parliament of Canada nor the provincial legislatures have authority to repeal statutes which they could not directly enact. Their Lordships had occasion in *Dobie v. Temporalities Board* (7 A.C., 136) to consider the power of repeal competent to the legislature of a province. In that case the legislature of Quebec had repealed a statute continued in force after the Union by s. 129 which had this peculiarity, that its provisions applied both to Quebec and to Ontario, and were incapable of being severed so as to make them applicable to one of these provinces only. Their Lordships held (7 A.C., 147) that the powers conferred "upon the provincial legisla-

tures of Ontario and Quebec to repeal and alter the statutes of the old parliament of the province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867"; and that it was beyond the authority of the legislature of Quebec to repeal statutory enactments which affected both Quebec and Ontario. The same principle ought, in the opinion of their Lordships, to be applied to the present case. The old Temperance Act of 1864 was passed for Upper Canada, or in other words ,for the province of Ontario; and its provisions, being confined to that province only, could not have been directly enacted by the Parliament of Canada. 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. In like manner, the express repeal, in the Canada Temperance Act of 1886, of liquor prohibitions adopted by a municipality in the province of Ontario under the sanction of provincial legislation, does not appear to their Lordships to be within the authority of the Dominion Parliament.'

Lord Watson was, however, speaking under the mistake in fact, that the Temperance Act of 1864 of the old province of Canada was limited in its application to Upper Canada, and that its provisions being, therefore, confined to the province of Ontario could not have been directly enacted by the Parliament of Canada. It is doubtful whether his Lordship would have intended the observations above quoted to apply to the case of repeal in terms by the Parliament of Canada of a statute passed by one of the provinces before Confederation with relation to a matter which, under the Act of Union, falls within the exclusive authority of Parliament.

Transfer of officers to Canada.

130. Until the Parliament of *Canada* otherwise provides, all Officers of the several Provinces having Duties to Discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of *Canada*, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties as if the Union had not been made.

Appointment of new officers.

131. Until the Parliament of *Canada* otherwise provides, the Governor General in Council may from Time to Time appoint such Officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act.

Treaty obligations.

132. The Parliament and Government of *Canada* shall have all Powers necessary or proper for performing the Obligations of *Canada* or of any Province thereof, as Part of the *British* Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

Use of English and French Languages.

133. Either the *English* or the *French* Language may be used by any Person in the Debates of the Houses of the Parliament of *Canada* and of the Houses of the Legislature of *Quebec*; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of *Canada* established under this Act, and in or from all or any of the Courts of *Quebec*.

The Acts of the Parliament of *Canada* and of the Legislature of *Quebec* shall be printed and published in both those Languages.

Ontario and Quebec.

Appointment of executive officers for Ontario and Quebec.

134. Until the Legislature of *Ontario* or of *Quebec* otherwise provides, the Lieutenant Governors of *Ontario* and *Quebec* may each appoint under the Great Seal of the Province the following Officers, to hold Office during Pleasure, that is to say,—the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the Case of *Quebec* the Solicitor General; and may, by Order of the Lieutenant Governor in Council, from Time to Time prescribe the Duties of those Officers and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof; and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof.

Powers, duties, &c., of Executive officers.

135. 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, Secretary and Registrar of the Province of *Canada*, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any Law, Statute or Ordinance of *Upper Canada*, *Lower Canada*, or *Canada*, and not repugnant to this Act, 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.

Great Seals.

136. Until altered by the Lieutenant Governor in Council, the Great Seals of *Ontario* and *Quebec* respectively shall be the same, or of the same Design, as those used in the Provinces of *Upper Canada* and *Lower Canada* respectively before their Union as the Province of *Canada*.

Construction of temporary Acts.

137. The Words "and from thence to the End of the then next ensuing Session of the Legislature," or Words to the same Effect, used in any temporary Act of the Province of *Canada* not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of *Canada*, if the Subject Matter of the Act is within the Powers of the same as defined by this Act, or to the next Sessions of the Legislatures of *Ontario* and *Quebec* respectively, if the Subject Matter of the Act is within the Powers of the same as defined by this Act.

As to Errors in names.

138. From and after the Union the Use of the Words "*Upper Canada*" instead of "*Ontario*," or "*Lower Canada*" instead of "*Quebec*" in any Deed, Writ, Process, Pleading, Document, Matter, or Thing, shall not invalidate the same.

As to issue of Proclamations before Union, to commence after Union.

139. Any Proclamation under the Great Seal of the Province of *Canada* issued before the Union to take effect at a Time which is subsequent to the Union, whether relating to that Province, or to *Upper Canada*, or to *Lower Canada*, and the several Matters and Things therein proclaimed shall be and continue of like Force and Effect as if the Union had not been made.

As to issue of Proclamations after Union.

140. Any Proclamation which is authorized by any Act of the Legislature of the Province of *Canada* to be issued under the Great Seal of the Province of *Canada*, whether relating to that Province, or to *Upper Canada*, or to *Lower Canada*, and which is not issued before the Union, may be issued by the Lieutenant Governor of *Ontario* or of *Quebec*, as its Subject Matter requires, under the Great Seal thereof; and from and after the Issue of such Proclamation the same and the several Matters and Things therein proclaimed shall be and continue of the like Force and Effect in *Ontario* or *Quebec*, as if the Union had not been made.

Penitentiary.

141. The Penitentiary of the Province of *Canada* shall, until the Parliament of *Canada* otherwise provides, be and continue the Penitentiary of *Ontario* and of *Quebec*.

Arbitration respecting debts, &c

142. The Division and Adjustment of the Debts, Credits, Liabilities, Properties, and Assets of *Upper Canada* and *Lower Canada* shall be referred to the Arbitrament of Three Arbitrators, One chosen by the Government of *Ontario*, One by the Government of *Quebec*, and One by the Government of *Canada*; and the Selection of the Arbitrators shall not be made until the Parliament of *Canada* and the Legislatures of *Ontario* and *Quebec* have met; and the Arbitrator chosen by the Government of *Canada* shall not be a Resident either in *Ontario* or in *Quebec*.[1]

Division of records.

143. The Governor General in Council may from Time to Time order that such and so many of the Records, Books, and Documents of the Province of *Canada* as he thinks fit shall be appropriated and delivered either to *Ontario* or to *Quebec*, and the same shall thenceforth be the Property of that Province; and any Copy thereof or Extract therefrom, duly certified by the Officer having charge of the Original thereof, shall be admitted as Evidence.

Constitution of townships in Quebec.

144. The Lieutenant Governor of *Quebec* may from Time to Time, by Proclamation under the Great Seal of the Province, to take effect from a day to be appointed therein, constitute Townships in those Parts of the Province of *Quebec* in which Townships are not then already constituted, and fix the Metes and Bounds thereof.

[1] For a report of the proceedings before the Judicial Committee relating to this abritration see *Cartwright's Cases*, vol. IV., 712.

X.—Intercolonial Railway.

Duty of Government and Parliament of Canada to make Railway herein described.

145. Inasmuch as the Provinces of *Canada, Nova Scotia,* and *New Brunswick* have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of *British North America,* and to the Assent thereto of *Nova Scotia* and *New Brunswick,* and have consequently agreed that Provision should be made for its immediate Construction by the Government of *Canada*: Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of *Canada* to provide for the Commencement within Six Months after the Union, of a Railway connecting the River *St. Lawrence* with the City of *Halifax* in *Nova Scotia,* and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed.

XI.—Admission of other Colonies.

Power to admit Newfoundland, &c., into the Union.

146. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of *Canada,* and from the Houses of the respective Legislatures of the Colonies or Provinces of *Newfoundland, Prince Edward Island,* and *British Columbia,* to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of *Canada,* to admit *Rupert's Land* and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of *Great Britain* and *Ireland.*

Additional provisions regarding the administration of Rupert's Land are made by the Rupert's Land Act., 1868, 31-32 V., c. 105 (imp.). These include authority for the surrender of the territory to Her Majesty by the Hudson's Bay Company, and a general definition of the legislative powers which may be exercised by the Parliament of Canada with respect to the territory upon its admission into the Dominion. The Act is printed at length in the Appendix.

As to Representation of Newfoundland and Prince Edward Island in Senate.

147. In case of the Admission of *Newfoundland* and *Prince Edward Island*, or either of them, each shall be entitled to a Representation in the Senate of *Canada* of Four Members, and (notwithstanding anything in this Act) in case of the Admission of *Newfoundland* the normal Number of Senators shall be Seventy-six and their maximum Number shall be Eighty-two; but *Prince Edward Island* when admitted shall be deemed to be comprised in the third of Three Divisions into which *Canada* is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the Admission of *Prince Edward Island*, whether *Newfoundland* is admitted or not, the Representation of *Nova Scotia* and *New Brunswick* in the Senate shall, as Vacancies occur, be reduced from Twelve to Ten Members respectively, and the Representation of each of those Provinces shall not be increased at any Time beyond Ten, except under the Provisions of this Act for the Appointment of Three or Six additional Senators under the Direction of the Queen.

(Schedules I. and II. not printed. Schedule I. enumerates the Electoral districts of Ontario for the purposes of s. 40. *Schedule II. names twelve Electoral districts under the caption, 'Electoral Districts of Quebec specially fixed.')*

(Schedules III., IV. and V. are printed under ss. 108, 113 *and* 128 *respectively, which refer to them.)*

There are the following amending Acts:—34-35 V., c. 28; 38-39 V., c. 38; 49-50 V., c. 35, and 7 E. VII., c. 11.

34-35 V., c. 28.

An Act respecting the establishment of Provinces in the Dominion of Canada.

[29*th June*, 1871.]

WHEREAS doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in territories admitted, or which may hereafter be admitted into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited for all purposes as "The "British North America Act, 1871."

Parliament of Canada may establish new Provinces and provide for the constitution, &c., thereof.

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

Alteration of limits of Provinces.

3. The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

Parliament of Canada may legislate for any territory not included in a Province.

4. The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

Peace, Order and Good Government.—In *Riel v. Regina*, 10 A.C., 675, the petitioner was tried and convicted of treason under the procedure enacted by the Northwest Territories Act, 1880, (43 V., c. 25). S. 76 conferred upon the stipendiary magistrates in the Territories jurisdiction to hear and determine criminal offences, including treason, with the intervention of a jury of six. It was urged before the Board, upon application for special leave to appeal, that the Dominion Parliament had no power to deprive the petitioner of a right which he claimed to have under English law to trial before a judge with a jury of twelve. Lord Halsbury, L.C., delivering the judgment of the Judicial Committee, pp. 678-9, said:—

'It appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order and good government cannot, as

matters of law, be provisions for peace, order and good government in the territories to which the statute relates, and further that, if a court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government, that they would be entitled to regard any statute directed to those objects, but which a court should think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact.

'Their Lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure, as it is known and practised in this country, have been authorized in Her Majesty's Indian Empire. Forms of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequence.'

Confirmation of Acts of Parliament of Canada, 32 & 33 Vict., (Canadian), cap. 3, 33 Vict., (Canadian) cap. 3.

5. The following Acts passed by the said Parliament of Canada, and intituled respectively: "An Act for the "temporary government of Rupert's Land and the North "Western Territory when united with Canada," (32-33 V., c. 3) and "An Act to amend and continue the Act "thirty-two and thirty-three Victoria, chapter three, and "to establish and provide for the government of the "Province of Manitoba," (33 V., c. ") shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.

Limitation of powers of Parliament of Canada to legislate for an established Province.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

38-39 V., c. 38.

The title, preamble and s. 1 of 38-39 V., c. 38, have been already printed under s. 18 of the original Act, which is thereby repealed and for which a new section is thereby substituted.

The remaining provisions of this statute (ss. 2 and 3) are as follows:—

Confirmation of Act of Parliament of Canada 31 & 32 Vict., c. 24.

2. The Act of the Parliament of Canada passed in the thirty-first year of the reign of Her present Majesty, chapter twenty-four, intituled: "An Act to provide for oaths to witnesses being administered in certain cases for the purposes of either House of Parliament" shall be deemed to be valid, and to have been valid as from the date at which the royal assent was given thereto by the Governor General of the Dominion of Canada.

Short title.

3. This Act may be cited as the Parliament of Canada Act, 1875.

49-50 V., c. 35.

An Act respecting the Representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any Province.

[*25th June*, 1886.]

WHEREAS it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House of Commons of Canada, or either of them, of any territory which for the time being forms part of the Dominion of Canada, but is not included in any province:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Provision by Parliament of Canada for representation of territories.

1. The Parliament of Canada may, from time to time, make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any Province thereof.

Effect of Acts of Parliament of Canada.

2. Any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in this Act shall, if not disallowed by the Queen, be, and shall be deemed to have been, valid and effectual from the date at which it received the assent, in Her Majesty's name, of the Governor-General of Canada.

It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect, notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of Members of the House of Commons specified in the last-mentioned Act is increased by the number of Senators or of Members, as the case may be, provided by any such Act of the Parliament of Canada for the representation of any provinces or territories of Canada.

34 & 35 Vict., c. 28.

30 & 31 Vict., c. 3.

Short title and construction.

3. This Act may be cited as the British North America Act, 1886.

30 & 31 Vict., c. 3. 34 & 35 Vict., c. 28.

This Act and the British North America Act, 1867, and the British North America Act, 1871, shall be construed together, and may be cited together as the British North America Acts, 1867 to 1886.

The remaining amendment, 7 E. VII., c. 11, is printed under s. 118 of the original Act which it supersedes.

28-29 V., c. 63.

An Act to remove Doubts as to the Validity of Colonial Laws.

(29 *June*, 1865.)

WHEREAS doubts have been entertained respecting the Validity of divers Laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the Powers of such Legislatures, and it is expedient that such Doubts should be removed:

Be it hereby enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:—

Definitions. "Colony."

1. The Term "Colony" shall in this Act include all of Her Majesty's Possessions abroad in which there shall exist a Legislature, as herein-after defined, except the Channel Islands, the *Isle of Man*, and such Territories as may for the Time being be vested in Her Majesty under or by virtue of any Act of Parliament for the Government of *India*:

"Legislature." "Colonial Legislature."

The Terms "Legislature" and "Colonial Legislature" shall severally signify the Authority, other than the Imperial Parliament or Her Majesty in Council, competent to make Laws for any Colony:

"Representative Legislature."

The Term "Representative Legislature" shall signify any Colonial Legislature which shall comprise a Legislative Body of which One Half are elected by Inhabitants of the Colony:

"Colonial Law"

The Term "Colonial Law" shall include Laws made for any Colony either by such Legislature as aforesaid or by Her Majesty in Council:

Act of Parliament, &c., when to extend to Colony.

An Act of Parliament, or any Provision thereof, shall, in construing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary intendment of any Act of Parliament:

"Governor."

The Term "Governor" shall mean the Officer lawfully administering the Government of any Colony:

"Letters Patent."

The Term "Letters Patent" shall mean Letters Patent under the Great Seal of the United Kingdom of *Great Britain* and *Ireland*.

Colonial Law when void for repugnancy.

2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Colonial Law when not void for repugnancy.

3 No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of *England*, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order or Regulation as aforesaid.

Colonial Law not void for Inconsistency with Instructions.

4. No Colonial Law, passed with the Concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any Instructions with reference to such Law or the Subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any Instrument other than the Letters Patent or Instrument authorizing such Governor to concur in passing or to assent to Laws for the Peace, Order, and Good Government of such Colony, even though such Instructions may be referred to in such Letters Patent or last-mentioned Instrument.

Colonial Legislature may establish, &c., Courts of Law.

Representative Legislature may alter Constitution.

5. Every Colonial Legislature shall have, and be deemed at all Times to have had, full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

Certified copies of Laws to be Evidence that they

6. The Certificate of the Clerk or other proper Officer of a Legislative Body in any Colony to the Effect that the Document to which it is attached is a true Copy of any Colonial Law assented to by the Governor of such Colony,

are properly passed.

or of any Bill reserved for the Signification of Her Majesty's Pleasure by the said Governor, shall be *primâ facie* Evidence that the Document so certified is a true Copy of such Law or Bill, and as the case may be, that such Law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and presented to the Governor; and any Proclamation purporting to be published by Authority of the Governor in any Newspaper in the Colony to which such Law or Bill shall relate, and signifying Her Majesty's Disallowance of any such Colonial Law, or Her Majesty's Assent to any such reserved Bill as aforesaid, shall be *primâ facie* Evidence of such Disallowance or Assent.

Proclamation to be Evidence of Assent and Disallowance.

'And Whereas Doubts are entertained respecting the Validity of certain Acts enacted or reputed to be enacted by the Legislature of *South Australia*:' Be it further enacted as follows:—

Certain Acts of Legislature of South Australia to be valid.

7. All Laws or reputed Laws enacted or purporting to have been enacted by the said Legislature, or by Persons or Bodies of Persons for the Time being acting as such Legislature, which have received the Assent of Her Majesty in Council, or which have received the Assent of the Governor of the said Colony in the Name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the Date of such Assent for all Purposes whatever: provided that nothing herein contained shall be deemed to give Effect to any Law or reputed Law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful Disallowance or Repeal of any Law.

RUPERT'S LAND ACT, 1868.

31-32 V., c. 105.

An Act for enabling Her Majesty to accept a Surrender upon Terms of the Lands, Privileges, and Rights of "The Governor and Company of Adventurers of *England* trading into *Hudson's Bay*," and for admitting the same into the Dominion of Canada.

[31*st July*, 1868.]

Recital of Charter of Hudson's Bay Company, 22 Car. 2.

WHEREAS by certain Letters Patent granted by His late Majesty King *Charles* the Second in the Twenty-second Year of His Reign certain Persons therein named were incorporated by the Name of "The Governor

and Company of Adventurers of *England* trading into *Hudson's Bay,*" and certain Lands and Territories, Rights of Government, and other Rights, Privileges, Liberties, Franchises, Powers, and Authorities, were thereby granted or purported to be granted to the said Governor and Company in His Majesty's Dominions in *North America*:

And whereas by the *British North America* Act, 1867, it was (amongst other things) enacted that it should be lawful for Her Majesty, by and with the Advice of Her Majesty's most Honourable Privy Council, on Address from the Houses of the Parliament of *Canada* to admit *Rupert's Land* and the North-Western Territory, or either of them, into the Union on such Terms and Conditions as are in the Address expressed and as Her Majesty thinks fit to approve, subject to the Provisions of the said Act:

Recital of Agreement of surrender.

And whereas for the Purpose of carrying into effect the Provisions of the said *British North America* Act, 1867, and of admitting *Rupert's Land* into the said Dominion as aforesaid upon such Terms as Her Majesty thinks fit to approve, it is expedient that the said Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers, and Authorities, so far as the same have been lawfully granted to the said Company, should be surrendered to Her Majesty, Her Heirs and Successors, upon such Terms and Conditions as may be agreed upon by and between Her Majesty and the said Governor and Company as hereinafter mentioned:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:—

Short title.

1. This Act may be cited as "*Rupert's Land* Act, 1868."

Definition of 'Rupert's Land."

2. For the purposes of this Act the Term "*Rupert's Land,*" shall include the whole of the Lands and Territories held or claimed to be held by the said Governor and Company.

Power to Her Majesty to accept Surrender of Lands, &c., of the Company upon certain Terms.

3. It shall be competent for the said Governor and Company to surrender to Her Majesty, and for Her Majesty by any Instrument under Her Sign Manual and Signet to accept a Surrender of all or any of the Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers, and Authorities whatsoever granted or purported to be granted by the said Letters Patent to the said Gover-

nor and Company within *Rupert's Land*, upon such Terms and Conditions as shall be agreed upon by and between Her Majesty and the said Governor and Company; provided, however, that such Surrender shall not be accepted by Her Majesty until the Terms and Conditions upon which *Rupert's Land* shall be admitted into the said Dominion of *Canada* shall have been approved of by Her Majesty, and embodied in an Address to Her Majesty from both the Houses of the Parliament of *Canada* in pursuance of the One hundred and forty-sixth Section of the *British North America* Act, 1867; and that the said Surrender and Acceptance thereof shall be null and void unless within a Month from the Date of Such Acceptance Her Majesty does by Order in Council under the Provisions of the said last-recited Act admit *Rupert's Land* into the said Dominion; provided further, that no Charge shall be imposed by such Terms upon the Consolidated Fund of the United Kingdom.

Extinguishment of all Rights of the Company.

4. Upon the Acceptance by Her Majesty of such Surrender all rights of Government and Proprietary Rights, and all other Privileges, Liberties, Franchises, Powers, and Authorities whatsoever, granted or purported to be granted by the said Letters Patent to the said Governor and Company within *Rupert's Land*, and which shall have been so surrendered, shall be absolutely extinguished; provided that nothing herein contained shall prevent the said Governor and Company from continuing to carry on in *Rupert's Land* or elsewhere Trade and Commerce.

Power to Her Majesty by Order in Council to admit Rupert's Land into and form Part of the Dominion of Canada.

5. It shall be competent to Her Majesty by any such Order or Orders in Council as aforesaid, on Address from the Houses of the Parliament of *Canada*, to declare that *Rupert's Land* shall, from a date to be therein mentioned, be admitted into and become Part of the Dominion of *Canada*; and thereupon it shall be lawful for the Parliament of *Canada* from the date aforesaid to make, ordain, and establish within the Land and Territory so admitted as aforesaid all such Laws, Institutions, and Ordinances, and to constitute such Courts and Officers, as may be necessary for the Peace, Order, and good Government of Her Majesty's Subjects and others therein: Provided that, until otherwise enacted by the said Parliament of *Canada*, all the Powers, Authorities, and Jurisdiction of the several Courts of Justice now established in *Rupert's Land*, and of the several Officers thereof, and of all Magistrates and Justices now acting within the said Limits, shall continue in full Force and Effect therein.

Jurisdiction of present Courts and Officers continued.

INDEX