

In the Privy Council.

Nos. 8, 9, and 10 of 1898.

Fisheries Case

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

No. 8.

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA *Appellant,*

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF NOVA SCOTIA *Respondent*

No. 9.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO *Appellant,*

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA *Respondent.*

No. 10.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF NOVA SCOTIA *Appellants,*

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA *Respondent.*

CASES.

ARGUMENT.

JUDGMENT AND QUEEN'S ORDER.

CHARLES RUSSELL & CO.,
37 Norfolk Street, Strand, London, W.C.,
Agents for the Dominion of Canada.

S. V. BLAKE,
17 Victoria Street, London, S.W.,
Agent for the Province of Ontario.

HILL, SON & RICKARDS,
40 Old Broad Street, London, E.C.,
Agents for the Provinces of Quebec and Nova Scotia.

Great Britain

M

²
In the Privy Council.

⁴ Nos. 8, 9, and 10 of 1898.

ON APPEAL

³ FROM THE SUPREME COURT OF CANADA.

No. 8.

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA *Appellant,*

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF NOVA SCOTIA *Respondents.*

No. 9.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO *Appellant,*

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA *Respondent.*

No. 10.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF NOVA SCOTIA *Appellants,*

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA *Respondent.*

CASES.

ARGUMENT.

JUDGMENT AND QUEEN'S ORDER.

CHARLES RUSSELL & CO.,
37 Norfolk Street, Strand, London, W.C.,
Agents for the Dominion of Canada.

S. V. BLAKE,
17 Victoria Street, London, S.W.,
Agent for the Province of Ontario.

HILL, SON & RICKARDS,
40 Old Broad Street, London, E.C.,
Agents for the Provinces of Quebec and Nova Scotia.

London:

PRINTED BY THE WESTMINSTER PRESS (C. MARIES, LTD.), 411a HARROW ROAD, W.

—
1899.

TABLE OF CONTENTS.

	PAGE
Case for The Dominion of Canada (Appellant)	I
Case for The Province of Ontario (Respondent)	9
Case for The Province of Quebec and The Province of Nova Scotia (Respondents)	21
Case for The Province of Ontario (Appellant)	29
Case for The Dominion of Canada (Respondent)	39
Case for The Province of Quebec and The Province of Nova Scotia (Appellants)	45
Case for The Dominion of Canada (Respondent)	51
ARGUMENTS—	
<i>First Day.</i> —Argument of Mr. C. ROBINSON, Q.C., for The Dominion... ..	52
Argument of Mr. HALDANE, Q.C., for The Dominion	139
Argument of Hon. EDWARD BLAKE, Q.C., for Ontario	153
<i>Second Day.</i> —Argument of Hon. EDWARD BLAKE, Q.C., continued	160
Argument of Mr. LONGLEY, Q.C., for Nova Scotia	226
<i>Third Day.</i> —Argument of Mr. CANNON, Q.C., for Quebec	244
Argument of Mr. C. ROBINSON, Q.C., for The Dominion	250
Argument of Hon. EDWARD BLAKE, Q.C., for Ontario	279
JUDGMENT of the Lords of the Judicial Committee of the Privy Council... ..	286
QUEEN'S ORDER	296

In the Privy Council.

No. 8 of 1897.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN THE ATTORNEY-GENERAL FOR THE
DOMINION OF CANADA . . . *Appellant,*
AND
THE ATTORNEY-GENERAL FOR THE
PROVINCE OF ONTARIO . . .
AND
THE ATTORNEY-GENERAL FOR THE
PROVINCE OF QUEBEC . . .
AND
THE ATTORNEY-GENERAL FOR THE
PROVINCE OF NOVA SCOTIA . *Respondents.*

In the Matter of certain Questions referred to the Supreme Court of
Canada by HIS EXCELLENCY THE GOVERNOR-GENERAL
in Council.

Case of the Appellant.

1. This is an appeal by special leave from so much of the judgment of the Supreme Court of Canada given on the 13th day of October, 1896, as answered adversely to the claim of the Dominion certain questions referred by the Governor-General in Council to the Supreme Court of Canada for hearing and consideration pursuant to the Revised Statutes of Canada, chap. 35, as amended by the Canadian Statute 54 and 55 Vic., chap. 25.

2. The questions referred are as follows:—

(1) Did 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, become under the British North America Act the property of the Dominion or the property of the Province in which the same respectively are situate, and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, etc., and the other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, etc., and other rivers, or between waters directly and immediately connected with the sea coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more Provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

(2) Is the Act of the Dominion Parliament, Revised Statutes of Canada, chap. 92, intituled "An Act respecting certain works constructed in or over navigable waters," an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part?

(3) If not, in case the bed and banks of a lake or navigable river belong to a Province, and the Province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse, or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

(4) In case the bed of a public harbour or any portion of the bed of a public harbour at the time of Confederation had not been granted by the Crown, has the Province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the

harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

(5) Had riparian proprietors before Confederation an exclusive right of fishing in non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

(6) Has the Dominion Parliament jurisdiction to authorise the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

(7) Has the Dominion Parliament exclusive jurisdiction to authorise the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

(8) Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the Provinces respectively under the British North America Act, if any such are so assigned?

(9) If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a Provincial Legislature jurisdiction for the purpose of Provincial revenue or otherwise to require the Dominion lessee, licensee, or other grantee to take out a Provincial licence also?

(10) Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, or any and which of such several sections, or any and what parts thereof respectively?

(11) Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, so far as these respectively relate to fishing in waters the beds of which do not belong to the Dominion, and are not Indian lands?

(12) If not, has the Dominion Parliament any jurisdiction in respect of Fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the Provinces and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement, and preservation of Fisheries, as for example, forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers, and the like?

(13) Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chap. 24, intituled "An Act Respecting the Sale and Management of Public Lands"; and sections 5 to 13, both inclusive, and sections 19 to 21, both inclusive, of the Ontario Act of 1892, intituled "An Act for the Protection of the Provincial Fisheries," or any and which of such several sections, or any and what parts thereof respectively?

(14) Had the Legislature of Quebec jurisdiction to enact sections 1375 to 1378 inclusive of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

(15) Had a Province jurisdiction to legislate in regard to providing fishways in dams, slides, and other constructions, and otherwise to regulate and protect Fisheries within the Province, subject to and so far as may consist with any laws passed by the Dominion Parliament within its constitutional competence?

(16) Has the Dominion Parliament power to declare what shall be deemed an interference with navigation, and require its sanction to any work or erection in or filling up of navigable waters?

(17) Had riparian proprietors, before Confederation, an exclusive right of fishing in navigable

non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to him by the Crown?

3. At the hearing of the case before the Supreme Court of Canada, composed of the Chief Justice, Sir Henry Strong, and Justices Taschereau, Gwynne, King, and Girouard, Counsel appeared for the Dominion and for the several Provinces of Ontario, Quebec, Nova Scotia, and British Columbia.

4. The judges who heard the case were unable to agree in opinion, and delivered separate written opinions as to the answers which ought to be given to the said questions.

The written opinions of the judges will be found in the Record at pages 85 to 129.

5. The opinions of the majority of the judges were to the effect that the beds of all ungranted waters situate within the territorial limits of a Province were the property of such Province and not of the Dominion, with the exception only of public harbours, as to which the decision in *Holman v. Green*, 6 S. C. R. 707, was binding; that the Provincial Governments alone had power to grant leases and licences as to fishing in such waters; that the jurisdiction of the Dominion as to Fisheries was limited to passing general laws, which, without derogating from the property in the beds of such waters, or from the rights incident to the ownership thereof, might provide in the interest of the owners and the public for the regulation, protection, improvement, and preservation of Fisheries; and that the Provincial Legislatures had jurisdiction to make regulations as to Fisheries within their respective Provinces so far as such regulations were not inconsistent with and were not superseded by Dominion legislation.

6. With reference to the Statutes referred to in questions 2, 10, 11, 13, and 14 the majority of the judges were of opinion that the Revised Statutes of Canada, chap. 92, "An Act Respecting Certain Works Constructed in or over Navigable Waters," was *intra vires*, and that the Dominion Parliament had power to declare what should be deemed an interference with navigation

and require its sanction to any work or erection in, or filling up of navigable waters; but that as regards the Revised Statutes of Canada, chap. 95, "An Act Respecting Fisheries and Fishing," section 4, when enforced outside Dominion waters, and sections 14 (1), 21 (1) (2) (3), and 22 were *ultra vires*; that section 47 of the Revised Statutes of Ontario, chap. 24, "An Act Respecting the Sale and Management of Public Lands," sections 5 to 13 and 19 to 21 of 55 Vic., chap. 10, "An Act for the Protection of the Provincial Fisheries," and sections 1375 to 1378 of the Revised Statutes of Quebec were *intra vires*, provided that and so long as they did not conflict with Dominion legislation.

7. The Attorney-General for the Dominion, the Attorney-General for Ontario, and the Attorneys-General for Nova Scotia and Quebec respectively obtained special leave to appeal against so much of the said judgment as answered the said questions adversely to their respective submissions and contentions.

8. It is submitted on behalf of the Dominion that the beds of all waters referred to in question 1 are the property of the Dominion; that the Dominion has exclusive jurisdiction to give by lease or licence the right of fishing in all non-navigable and navigable waters; that all the provisions of the Revised Statutes of Canada, chap. 95, are *intra vires*; and that section 47 of the Revised Statutes of Ontario, chap. 24, and sections 5 to 13 and 19 to 21 of the Ontario Act of 1892, and sections 1375 to 1378 of the Revised Statutes of Quebec are *ultra vires*, and that the answers of the majority of the judges to questions 1, 6, 7, 8, 10, 11, 13, 14, and 15 are, so far as they are adverse to the claim of the Dominion, wrong in law, and that all the questions should be answered favourably to the jurisdiction claimed on behalf of the Dominion, and that this appeal should be allowed for the following amongst other

REASONS.

1. Because the Dominion, being the exclusive legislative authority for Trade and Com-

merce, Defence, Navigation, and Shipping, and Sea Coast and Inland Fisheries, and the executive power being in the absence of express enactment to the contrary co-extensive with the legislative power, the British North America Act must be construed as vesting the beds of all waters not granted before Confederation exclusively in the Crown in right of the Dominion.

2. Because the Common Law as to the ownership of waters which though non-tidal are in fact navigable, is not applicable to the great lakes and rivers of Canada, or to waters separating two or more Provinces of the Dominion or the Dominion from foreign territory.
3. Because the rights of the Crown in all navigable waters are amongst the Regalia or prerogative rights which are in the Dominion under section 102.
4. Because rivers being specifically mentioned in the 3rd schedule to the British North America Act become the property of the Dominion under section 108.
5. Because there is excepted from the operation of section 109 the interest of the Dominion in so much of the Regalia as is immediately connected with the subject of legislation exclusively assigned to the Dominion by section 91.
6. Because legislative authority over property and civil rights, so far as the same are connected with Fisheries, is in the Dominion by virtue of section 91 (12) and not in the Provinces.
7. Because the taxation of Dominion lessees and licensees by a Province is individual taxation and *ultra vires* of Provincial authority and inconsistent with the powers of the Dominion

to grant such leases and licences and an interference with the power of the Dominion.

8. Because on a proper construction of sections 91, 92, 102, 108, 109, and 117, and of the 3rd schedule, the answers appealed from are wrong in law and should be reversed.

R. B. HALDANE.

H. W. LOEHNIS.

Case for the Respondent,

THE ATTORNEY-GENERAL FOR ONTARIO.

1. Pursuant to the Revised Statutes of Canada, chap. 135, as amended by the Statute of Canada, 54 and 55 Vic., chap. 25, the Governor-General, by Orders in Council of the 23rd of February, 1894, and the 23rd of February, 1895, referred to the Supreme Court of Canada for hearing and consideration seventeen questions, all relating to the legislative jurisdiction and to the proprietary rights, and to the competence of certain legislative and executive acts of Canada and the Provinces respectively, touching waters, lands covered with water, foreshores, fish, fisheries, navigation, works in or over navigable waters, and cognate subjects.

2. The said questions were as follows :—

(1) Did 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 become under the British North America Act the property of the Dominion? or the property of the Province in which the same respectively are situate? and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, etc., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, etc., and other rivers, or between waters directly and immediately connected with the sea coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more Provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

(2) Is the Act of the Dominion Parliament, Revised Statutes of Canada, chap. 92, intituled "An Act Respecting Certain Works Constructed in or over Navigable Waters," an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part?

(3) If not, in case the bed and banks of a lake or navigable river belong to a Province, and the Province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse, or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

(4) In case the bed of a public harbour or any portion of the bed of a public harbour at the time of Confederation had not been granted by the Crown, has the Province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of a harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

(5) Had riparian proprietors before Confederation an exclusive right of fishing in non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

(6) Has the Dominion Parliament jurisdiction to authorise the giving by lease, licence or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

(7) Has the Dominion Parliament exclusive jurisdiction to authorise the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

(8) Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters,

the beds and banks of which are assigned to the Provinces respectively under the British North America Act, if any such are so assigned?

(9) If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a Provincial Legislature jurisdiction for the purpose of Provincial Revenue or otherwise to require the Dominion lessee, licensee, or other grantee to take out a Provincial licence also?

(10) Has the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled "An Act Respecting Fisheries and Fishing," or any other of the provisions of the said Act, or any and which of such several sections or any and what parts thereof respectively?

(11) Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled "An Act Respecting Fisheries and Fishing," or any other of the provisions of the said Act, so far as these respectively relate to fishing in waters the beds of which do not belong to the Dominion and are not Indian lands?

(12) If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the Provinces and others, but (subject to such property and rights) providing, in the interests of the owners and the public, for the regulation, protection, improvement and preservation of fisheries, as, for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers, and the like?

(13) Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chap. 24, intituled, "An Act Respecting the Sale and Management of Public

Lands," and sections 5 to 13, both inclusive, and sections 19 and 21, both inclusive of the Ontario Act of 1892, intituled "An Act for the Protection of the Provincial Fisheries," or any and which of such several sections, or any and what parts thereof respectively?

(14) Had the Legislature of Quebec jurisdiction to enact sections 1375 to 1378, inclusive, of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

(15) Has a Province jurisdiction to legislate in regard to providing fishways in dams, slides, and other constructions, and otherwise to regulate and protect fisheries within the Province, subject to, and so far as may consist with any laws passed by the Dominion Parliament within its constitutional competence?

(16) Has the Dominion Parliament power to declare what shall be deemed an interference with navigation and require its sanction to any work or erection in, or filling up of navigable waters?

(17) Had riparian proprietors before Confederation an exclusive right of fishing in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

3. The hearing took place on the 9th and 10th days of October, 1895, before Strong, C.J., and Taschereau, Gwynne, King, and Girouard, J.J.

4. The decisions, given on the 13th October, 1896, were in favour of the Provinces except on certain points relating to Public Harbours and to works in or over Navigable Waters.

5. This appeal is brought by the Attorney-General for Canada against such of the decisions as are adverse to Canada; and an appeal has been brought by the Attorney-General for Ontario, against such of the decisions as are adverse to Ontario.

6. It is convenient to treat together as far as possible the special points arising as to "Public Har-

bours," which are included in the first, fourth, and tenth questions, and the first branch of the thirteenth question ; and also to treat together the points arising as to works in or over Navigable Waters, which are touched by the second, third, and sixteenth questions ; and to that end and for the avoidance of repetition they are all dealt with in the case of the Attorney-General for Ontario in his appeal ; and, so far as necessary, reference is made thereto as supplementary to this case.

7. The decisions in favour of Ontario are broadly speaking those affecting legislative and proprietary rights in respect of :—

- (1) the beds of waters,
- (2) the waters over the beds, and
- (3) the fish in such waters ;

and the Attorney-General for Ontario submits that such favourable decisions should be affirmed and this appeal dismissed on the following grounds, some of which have a general application, and are also specially applicable to the first question.

8. Legislative jurisdiction and proprietary right are dealt with by the British North America Act on quite different principles.

While a residuum of legislative jurisdiction, not comprised in the enumerations of sections 91 and 92, is vested in Canada, the residua of Provincial property and proprietary rights, not transferred to Canada under section 108 and the enumerations of the 3rd schedule, are retained to and remain vested in the several Provinces, under the provisions, and subject only to the qualifications, of sections 109 and 117.

9. The limits of legislative jurisdiction and of proprietary right are not identical ; nor can any transfer to Canada of proprietary right in any subject be inferred from the creation in Canada of a legislative jurisdiction over that subject. On the contrary, whenever it is intended to transfer to Canada a proprietary right it is expressly given, and is not left to implication from the grant of legislative jurisdiction.

10. It follows that the proprietary rights conferred

on Canada depend on and are limited by the enumerations of the 3rd schedule.

11. The beds of lakes, rivers, public harbours, and other waters within the territorial limits of Ontario were at the time of the Union "lands" belonging to the Province of Canada within the meaning of section 109, and "public property" of the Province of Canada within the meaning of section 117.

12. The whole system of private and public proprietary titles, rights, and interests of the country in these matters has long been finally settled, on the sound view that the lands covered by the immense extent of *de facto* navigable inland waters within the limits of the old Province of Canada do not pass to the private riparian proprietor by such grants as would in the case of an English river above tide carry the bed *ad medium filum aquae*; but remain vested in the Crown in right of the Province, unless granted by the Crown by description in terms extending beyond the water's edge.

This view, which has always been held by the Courts, and recognised by the Legislature, cannot now be questioned. Reference is made to the factum of Ontario in the Supreme Court.

13. Similarly it has always been held, and must be now maintained, that there exist over such inland waters as are described in the last paragraph public rights of navigation and fishing analogous to those which exist over British navigable waters.

14. No distinction favourable to Canada exists between the beds of the various classes of inland waters situate in Ontario and the beds of tidal waters in the Maritime Provinces.

15. No distinction favourable to Canada exists between the beds of waters wherein are situate inter-provincial or international boundary lines, and the beds of other waters. There is no more reason for the Crown land adjacent to a political boundary being transferred to Canada when it is wet than there would be if it were dry.

16. The waters over the beds belong to the Province to which the beds belong. The legislative jurisdiction vested in Canada over shipping and navigation does not imply a transfer of this property.

17. The fish swimming in the waters over the beds belong to the Province to which those waters belong. The legislative jurisdiction vested in Canada over sea coast and inland fisheries does not imply a transfer of this property.

18. Any implication of executive powers complementary to and co-extensive with the legislative jurisdiction does not warrant the suggestion of a transfer of proprietary right. Executive powers can be conferred by legislation notwithstanding the existence, and indeed are usually conferred just because of the existence of proprietary rights not vested in the Government.

19. The rivers are not made the property of Canada under section 108, and the enumeration "Rivers and Lake Improvements" in the 3rd schedule. This phrase on the face of the Act means the public works or improvements made by and the property of the Province in or on the bank of any lake or river.

The Quebec Resolutions and the joint addresses of the Provincial Parliaments read "River and Lake Improvements," and the French version (of equal interpretative authority with the English) also shows that not rivers any more than lakes, but in both cases improvements in rivers and lakes were the subject of the enumeration proposed to and accepted by the Imperial Parliament; and these papers thus confirm the common sense interpretation above suggested.

20. As to the fifth question, the riparian proprietor in Upper Canada, now Ontario, grantee of a certain portion of the bed of a non-navigable water, had, as is the case in England, as incidental and accessory to the ownership of the soil covered with water, the exclusive common law right to use the water for fishing.

21. (1) As to the sixth and seventh questions, the Parliament of Canada has no jurisdiction, still less has

it an exclusive jurisdiction, to give by lease, licence, or otherwise, to lessees, licensees, or grantees, the right of fishing in any such water. No proprietary right is vested in Canada. The suggested action is an interference with "property and civil rights," competent only to the Province.

(2) The thirteenth enumeration of section 91, "Sea Coast and Inland Fisheries," does not vest any such right in Canada, or divest the Province of its legislative jurisdiction over this subject as part of "property and civil rights." The thirteenth enumeration gives only jurisdiction to pass general laws for the regulation and conservation of fisheries; which laws, if competent, may partially and incidentally operate in restriction of the absolute enjoyment of their rights by proprietors. But this is a very different thing from divesting proprietors of their property in order to grant it to others; or requiring them to pay for the use of their own property.

22. As to the eighth question :—

(a) As to non-navigable waters :—

The reasoning applicable to such waters, the beds of which had been before Confederation granted to private persons, applies also to such waters if the beds had not been so granted. These waters and the incidental rights of fishing therein being, as already shown, the property of the Province, so remained; and Canada has no more right to interfere, in the manner suggested, with these than with private waters. The Province is the proprietor; and is entitled to exercise and to alienate its proprietary rights without interference by Canada, save in so far as general regulation with a view to the conservation and improvement of the Fisheries may incidentally affect the enjoyment, by precautions which *ex hypothesi* will in the end enlarge and perpetuate such enjoyment. The subject is within "property and civil rights."

(b) As to navigable waters :—

As already indicated the Crown before Confederation had in right of the Province the property in

the bed and banks, subject to a common right of fishing by the inhabitants of the Province, so long as the Provincial Legislature did not interfere. After Confederation this condition continued; and it was and is competent to the Legislature to authorise the grant of a several right of fishery in such waters, or to provide for licences to fish on payment of money, and thus to make the Provincial property profitable to the Province. This is a territorial right; and the profits naturally belong to the Province, which is the proprietor.

The suggestions in (a) as to the extent of the legislative jurisdiction of Canada apply to this branch also.

23. (1) As to the ninth question, the suggested answers to preceding questions conclude this; but even if they should be answered in favour of Canada, yet the Province has for the purpose of Provincial Revenue or otherwise a right to require the Dominion lessee, licensee, or grantee to take out a Provincial licence also.

(2) As to licences for revenue this right would fall under enumerations 2 and 9 of section 92.

(3) Apart from licences expressly for revenue the Province would have the right to require the taking of a licence in furtherance of its revenue interests, as a means of protection to its property, and for convenience and certainty in dealing with invasions of its rights by private persons.

24. (1) As to the tenth and eleventh questions, the Parliament of Canada had not, for the reasons above given, jurisdiction to pass, as affecting any waters the beds of which do not belong to Canada or are not Indian lands, section 4 of the Revised Statute of Canada, chap. 95, "An Act Respecting Fisheries and Fishing," or any other provisions of the said Act, save those dealing for purposes of general regulation and conservancy with the mode of capture, close seasons, and the protection of spawn and of spawning grounds.

(2) Section 4 purports to authorise the Minister of Marine, wherever the exclusive right of fishing does not already exist by law, to issue fishing leases and licences

for fisheries and fishing wherever situated or carried on. But the right of fishing in the navigable waters of Ontario is, as already shown, a common public right of all the inhabitants of Ontario, coming within "property and civil rights" and subject to the disposition of the Legislature of Ontario; and this property cannot be taken by the Parliament of Canada.

(3) There are other provisions which fall within the same principle; for example, parts of section 8, sub-section 5; section 8, sub-section 6; section 17, sub-section 5; section 21, and section 22; while section 14, sub-section 1; and section 21, sub-section 3; are ancillary to section 4 and fall with it.

(4) The answer to the eleventh question is *a fortiori* in the negative; since it states expressly the elements of the existence of a right in the Province or its grantees, and the non-existence of a right in Canada, to the land under the water in which the fish are caught.

25. As to the twelfth question: for the reasons already stated the Parliament of Canada has not any jurisdiction in respect of fisheries save that described in the question.

26. As to the first branch of the thirteenth question, reference is made to the case in the other appeal.

As to the second branch, on the power of the Legislature of Ontario to enact certain sections of their Act of 1892 for the protection of the Provincial Fisheries, it is submitted as follows:—

(1) These sections are, by the express limitations contained in the first and second sections, applicable only to subjects in respect of which the Legislature has authority to legislate. Therefore, in case it should be held, under the answers to previous questions or otherwise, that the Legislature has not authority to legislate as to any particular subject, it must be also held that the Act does not purport to legislate thereon.

(2) The previous reasons are referred to as establishing the right of property of Ontario in the fish of

Ontario. It is then competent to the Legislature (not interfering with the lawful action of the Parliament of Canada under its Fishery powers) to protect or secure the interests of the Province as proprietor, and the interests of private owners in respect of fish.

(3) Provisions restrictive of the destruction or the taking of fish in excessive numbers or by improper methods fall within this jurisdiction. They impair no power of Canada, and leave it free to legislate effectively within its domain, while they tend to secure the Provincial property, revenues, and profits, and the proprietary interests of individuals.

(4) Fish uncaught may (as is conceded by the absence of objection to section 18) be made by the Legislature a subject of private property. It follows that provision may be made (as is done by the ancillary section 19) for the security of this as of any other property or civil right. It also follows that, without creating a property in fish uncaught, the Legislature may limit or affect the action of individuals as to fishing both in the waters of the Province and in those of private proprietors.

(5) As to section 20 it is lawful to authorise public Commissioners to take the fish of individuals by any means for public purposes, notwithstanding Provincial restrictions on others as to the taking of fish.

27. As to the fourteenth question, this appears to affect Quebec exclusively.

28. As to the fifteenth question, on the Provincial legislative power to provide for fishways and otherwise to regulate and protect fisheries, subject to and so far as consistent with valid Canadian laws: it is submitted that the Legislature has this jurisdiction on the reasonings already advanced, and on the general principles laid down by the Judicial Committee in decided cases, such as the *Ontario Insolvency Case*.

29. As to the seventeenth question, whether riparian proprietors had before Confederation an exclusive right of fishing in navigable non-tidal lakes,

rivers, streams, and waters, the beds of which had been granted to them by the Crown : it is submitted that upon the reasoning already stated they had such right.

30. Generally the Respondent relies also upon the reasonings contained in the favourable judgments of the judges of the Supreme Court in this matter, and the judgments in *The Queen v. Robertson* and other cognate cases.

EDWARD BLAKE.

Case of the Respondents,

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC
AND THE ATTORNEY-GENERAL FOR THE PROVINCE OF
NOVA SCOTIA.

1. This is an appeal from an opinion or judgment of the Supreme Court of Canada upon a reference to that Court by his Excellency the Governor-General of Canada for hearing and consideration of the seventeen questions of law hereinafter set out.

2. The said questions were heard and considered before a Court consisting of five judges, namely :—the Chief Justice (Sir Henry Strong), and Taschereau, Gwynne, King, and Girouard, J.J., who, in the case of nearly all the said questions, were unable to agree as to the answers to be given thereto, and on the 13th October, 1896, severally certified their opinions upon the said questions, and their reasons for such opinions.

3. The said questions, with the substance of the opinions of the learned judges thereon respectively, were as follows :—

Question 1—Did 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, become under the British North America Act the property of the Dominion, or the property of the Province in which the same respectively are situate, and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, etc., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, etc., and other rivers, or between waters directly and immediately connected with the sea

coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more Provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

All the learned judges, with the exception of Gwynne, J., were of opinion that the beds of the waters referred to, with the exception of public harbours, became the property of the respective Provinces. The question of the property in the beds of public harbours does not directly arise upon the present appeal.

4. Question 2—Is the Act of the Dominion Parliament, Revised Statutes of Canada, chap. 92, intituled “An Act Respecting Certain Works Constructed in or over Navigable Waters,” an Act which the Dominion Parliament had jurisdiction to pass, either in whole or in part?

Question 3—If not, in case the bed and banks of a lake or navigable river belong to a Province, and the Province makes a grant of land extending into the lake or river, for the purpose of there being built thereon a wharf, warehouse, or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

Question 4—In case the bed of a public harbour or any portion of the bed of a public harbour, at the time of Confederation, had not been granted by the Crown, has the Province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

The present appeal does not relate to any of the last three preceding questions.

5. Question 5—Had riparian proprietors before Confederation an exclusive right of fishing in non-

navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown ?

All the learned judges answered this question in the affirmative, with the exception of Taschereau, J., who held that the Court could not, upon that reference, be called upon to answer such question.

6. Question 6—Has the Dominion Parliament jurisdiction to authorise the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them ?

Question 7—Has the Dominion Parliament exclusive jurisdiction to authorise the giving by lease, licence, or otherwise to lessees, licensees, or other grantees the right of fishing in such waters as mentioned in the last question, or any and which of them ?

Question 8—Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the Provinces respectively under the British North America Act, if any such are so assigned ?

Question 9—If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a Provincial Legislature jurisdiction, for the purpose of Provincial Revenue or otherwise, to require the Dominion lessee, licensee, or other grantee to take out a Provincial licence also ?

All the learned judges, with the exception of Gwynne, J., answered these four questions in the negative.

7. Question 10—Has the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled "An Act Respecting Fisheries and Fishing," or any other of the provisions of the said Act, or any and which of such several sections, or any and what parts thereof respectively ?

Question 11—Had the Dominion Parliament

jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled "An Act Respecting Fisheries and Fishing," or any other of the provisions of the said Act, so far as these respectively relate to fishing in waters the beds of which do not belong to the Dominion, and are not Indian lands?

As to these two questions the Chief Justice and King, J., as also Girouard, J., were of opinion that some parts of the Statute referred to were in any case beyond the competence of the Dominion Parliament; Gwynne, J., on the other hand, considered the Statute to have been well enacted; Taschereau, J., limited himself to stating that section 4 was not *ultra vires*, and that no other portions of the Act had been indicated to the Court as *ultra vires*. The first-named judges referred to the case of *The Queen v. Robertson*, 6 Canadian Supreme Court Reports, as defining the rights of the Dominion Government in the matter of fisheries.

8. Question 12—If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the Provinces and others, but (subject to such property and rights) providing in the interests of the owners and the public for the regulation, protection, improvement, and preservation of fisheries, as, for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner or with improper engines, prohibiting obstructions in ascending rivers, and the like?

Taschereau, J., held that an answer to this question was not required. The Chief Justice, King, J., and Girouard, J., answered in the negative, and Gwynne, J., in the affirmative.

9. Question 13—Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chap. 24, intituled "An Act Respecting the Sale and Management of Public

Lands," and sections 5 to 13, both inclusive, and sections 19 to 21, both inclusive, of the Ontario Act of 1892, intituled "An Act for the Protection of the Provincial Fisheries," or any and which of such several sections, or any and what parts thereof respectively?

Question 14—Had the Legislature of Quebec jurisdiction to enact sections 1375 to 1378, inclusive, of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

Question 15—Has a Province jurisdiction to legislate in regard to providing fishways in dams, slides, and other constructions, and otherwise to regulate and protect fisheries within the Province, subject to and so far as may consist with any laws passed by the Dominion Parliament within its constitutional competence?

Gwynne, J., answered these questions in the negative. The four other judges answered them substantially in the affirmative.

10. Question 16—Has the Dominion Parliament power to declare what shall be deemed an interference with navigation, and require its sanction to any work, or erection in, or filling up of navigable waters?

The present appeal does not relate to this question.

11. Question 17—Had riparian proprietors before Confederation an exclusive right of fishing in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

Gwynne, J., appears not to have answered this question, and Taschereau, J., thought it could not properly be put to the Court. The other three judges answered in the affirmative.

These Respondents submit that the opinion or judgment of the Supreme Court was right and should be affirmed, for the reasons stated in the judgments of the majority of the learned judges, and for the following

REASONS.

As to Question 1 :—

1. Because the beds of the waters referred to became under section 109 of the British North America Act the property of the respective Provinces.
2. Because the beds of the waters referred to were the public property of the Provinces and were retained by them under section 117 of the British North America Act.
3. Because the beds of the waters referred to at the time of Confederation within the territorial limits of the several Provinces which had not been granted by the Crown, were vested in the Crown as representing the Provinces, and under the British North America Act were vested in the respective Provinces thereby constituted.
4. Because except in the case of public harbours no distinction is made under the British North America Act between any of the various classes of waters referred to.

As to Questions 5 and 17 :—

5. Because under the old English law which prevailed in Nova Scotia, and under the old French law which prevailed in Quebec, the grantees from the Crown of lands covered by water had an exclusive right of fishing in such waters.
6. Because the exclusive rights of such grantees had been recognised by Provincial legislation previously to the passing of the British North America Act, and was intentionally not interfered with by that Act.
7. Because the decision in the case of *The Queen v. Robertson*, 6 Can., S. C. R. 52, in effect decided this question in the affirmative, and was right and should be upheld.

As to Questions 6, 7, 8, and 9 :—

8. Because the Dominion Parliament cannot interfere with or affect such an exclusive right of fishing in the absence of any statutory powers in that behalf, and the British North America Act confers no such powers.
9. Because the exclusive power to legislate as regards property in a Province is by section 92, sub-section 13, of the British North America Act, conferred on the Provincial Legislature.
10. Because any waters, beds, or banks which were assigned to the Provinces under the aforesaid Act were so assigned with all the ordinary incidents of ownership, including such exclusive right of fishing as above referred to.
11. Because in the case of navigable waters the right of fishing is public, and cannot be interfered with by the Dominion Parliament in the absence of statutory authority in that behalf.
12. Because the exclusive power to legislate as regards direct taxation within a Province is by section 92, sub-section 13, of the British North America Act, conferred on the Provincial Legislature.

As to Questions 10, 11, and 12 :—

13. Because the Dominion Parliament could only pass such a law in relation to waters (if any) the beds of which belong to the Dominion or are lands reserved for the Indians, and upon the true construction of section 4 of chap. 95 of the Revised Statutes of Canada its operation is not limited to such lands.
14. Because the decision in the case of *The Queen v. Robertson* above referred to decided that the Dominion Parliament had no such jurisdiction.

As to questions 13, 14, and 15 :—

15. Because the Provincial Legislature, under the

authority conferred upon it by section 92 of the British North America Act, has power to make laws respecting property in the Province, and to legislate respecting all matters of a local and private nature in the Province, whether rights of fishing or other rights.

16. Because the case of *The Queen v. Robertson* before referred to (which should be upheld) decides that provisions for leasing lands reserved for fishing purposes are entirely within the competence of the Provincial Legislature.

J. C. LEWIS COWARD.

In the Privy Council.

No. 9 of 1897.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN THE ATTORNEY-GENERAL FOR THE
PROVINCE OF ONTARIO . . . *Appellant,*
AND
THE ATTORNEY-GENERAL FOR THE
DOMINION OF CANADA . . . *Respondent.*

In the Matter of certain Questions referred to the Supreme Court of
Canada by HIS EXCELLENCY THE GOVERNOR-GENERAL
OF CANADA in Council.

Case for the Appellant,

THE ATTORNEY-GENERAL FOR ONTARIO,

1. Pursuant to the Revised Statute of Canada, chap. 135 as amended by the Statute of Canada, 54 and 55 Vic., chap. 25, the Governor-General by Orders in Council of the 23rd day of February, 1894, and the 23rd day of February, 1895, referred to the Supreme Court of Canada for hearing and consideration seventeen questions all relating to the legislative jurisdiction and to the proprietary rights, and to the competence of certain legislative and executive Acts, of Canada and the Provinces respectively, touching waters, lands covered with water, foreshores, fish, fisheries, navigation, works in or over navigable waters, and cognate subjects.

2. The hearing took place on the 9th and 10th days of October, 1895, before Strong, C.J., and Taschereau, Gwynne, King, and Girouard, J.J.

3. The decisions, given on 13th October, 1896, were in favour of the Provinces except on certain points relating to Public Harbours and to works in or over Navigable Waters.

4. The Attorney-General for Canada has brought an appeal against such of the decisions as are adverse to Canada; and this appeal is brought by the Attorney-General for Ontario against such of the decisions as are adverse to Ontario.

5. It is convenient in this case to treat, as far as possible, together the special points arising as to "Public Harbours," which are included in the first, fourth, and tenth questions, and the first branch of the thirteenth question; and also to treat together the points arising as to works in or over navigable waters which are included in the second, third, and sixteenth questions.

The other questions and points, and the general considerations which affect them and which also affect the points above mentioned, are dealt with in the case of the Attorney-General for Ontario as respondent in the other appeal; and for the avoidance of repetition reference is made thereto, as supplementary to this case.

6. The points to be specially dealt with in this case are embraced in the following questions:—

PUBLIC HARBOURS.

(1) Did 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, become under the British North America Act the property of the Dominion? or the property of the Province in which the same respectively are situate? and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, etc., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Riche-

lieu, the Ottawa, etc., and other rivers, or between waters directly and immediately connected with the sea coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more Provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

(4) In case the bed of a *public harbour* or any portion of the bed of a public harbour at the time of Confederation had not been granted by the Crown, has the Province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

(10) Has the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act or any and which of such several sections, or any and what parts thereof respectively? (*So far as this relates to Public Harbours.*)

(13) Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statute of Ontario, chap. 24, intituled "An Act respecting the sale and management of Public Lands," . . . or any and what parts thereof . . . ?

WORKS IN OR OVER NAVIGABLE WATERS.

(2) Is the Act of the Dominion Parliament, Revised Statutes of Canada, chap. 92, intituled "An Act respecting certain works constructed in or over Navigable Waters," an Act which the Do-

minion Parliament had jurisdiction to pass either in whole or in part?

(3) If not, in case the bed and banks of a lake or navigable river belong to a Province, and the Province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse, or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

(16) Has the Dominion Parliament power to declare what shall be deemed an interference with navigation, and to require its sanction to any work or erection in, or filling up of navigable waters?

7. The Attorney-General for Ontario submits that his appeal should be allowed and the decisions on these questions so far as they are adverse to Ontario should be reversed; and that answers should be given favourable to Ontario on the following grounds.

PUBLIC HARBOURS.

8. The general considerations on this question have been dealt with in the case of the Attorney-General for Ontario as respondent in the other appeal. For the reasons there given, any proprietary rights of Canada in Public Harbours must depend exclusively on the interpretation to be placed on the phrase "Public Harbours," being the second enumeration of schedule 3 of the B. N. A. Act.

9. The Supreme Court held itself concluded by its former decision in *Holman v. Green*; but the Chief Justice (who had taken part in that decision) and other Judges expressed dissatisfaction therewith, and regret that it was not in their power to review it. In effect, the Court if free to act on its present opinion would have decided in favour of Ontario; and it is submitted that this later view is correct and should be affirmed.

10. Two questions arise:—

(A) What descriptions of harbours are "Public

Harbours" within the meaning of clause 108 and schedule 3?

(B) Does that interest or right in such harbours which was transferred to Canada under the clause and schedule include the beds?

(A) MEANING OF "PUBLIC HARBOURS."

11. (1) It is submitted that only public harbours which were "public works and property of the Province" were dealt with by the clause; the limitary words of which are in effect repeated at the head of the schedule, thus "Provincial Public Works and Property."

(2) There were in Ontario many public harbours, the property of individuals and corporations, which are not included in the description.

(3) There were in Ontario many natural havens, convenient and capable of being used without improvement for harbour purposes; some of which were unimproved; others of which had been to some small extent improved by private persons or by municipal authorities—in some cases at their own charge exclusively, in others with the aid of subsidies or of dredging by the Government. It is submitted that such havens were not included in the description; though any piers therein, if constructed by and the property of the Province, might pass by another and distinct enumeration in the schedule.

(4) There were however several harbours, interests in which were vested in the Crown in right of the Province, as evidenced by Provincial Statutes and otherwise; and some interest in these would pass under the description.

(5.) In this connection reference is made for details to the factum of Ontario in the Supreme Court.

(B) INTEREST OR RIGHT TRANSFERRED.

12. (1) It is submitted that the transfer of "Provincial Public Works and Property" called in the schedule "Public Harbours" did not include the ownership of the beds of Harbours vested in the Crown, further

than the soil of so much of the Harbour as had been the subject or site of the expenditure of public money by the Government of the Province, and thus had become a "provincial public work and property"; and that the ownership of the beds save as aforesaid remained in the Crown in right of the Province, subject to the public right of navigation and to any other public right.

(2) The whole tenor of the clause and of the schedule indicates that it had to do with "Public Works"; with property on which for the purpose of public works public money had been expended; and with the public work created by such expenditure; and it would be an unwarrantable extension of the language to apply it to the unimproved and untouched soil, often of enormous area, under that part of the navigable waters comprised within the limits of a harbour, or to such soil close to and at the edge of the waters of the harbour, generally not of navigable depth.

(3) There is no need of any proprietary right of Canada in the bed of harbours any more than of other navigable waters in order to the effective maintenance of its legislative powers with regard to navigation.

(4) If the legislative jurisdiction of Canada extend to the establishment of new harbours with proper accessories, this may include the power to assert and effectuate the common and public right in this connection to which the Crown lands may be subject, and the power to acquire lands necessary for the effective exercise of the jurisdiction. But it does not involve the transfer by the B. N. A. Act of the ownership of the Provincial Crown Lands, whether covered by water or not.

(5) The franchise of a port, which is the only place where a subject is permitted to unlade customable goods, is part of the Royal Prerogative. But this does not in any way affect the property of the soil, which cannot be taken away from the private owner by prerogative; thus every port is a harbour, but not every harbour a port.

(6) These views are in accordance with the course of Canadian legislation as exemplified in the Act of Canada respecting public harbours of 1894, chap. 47.

13. The fourth and thirteenth questions, though touching "Public Harbours," may be more conveniently dealt with after discussing the second and third questions.

14. On the tenth question, the general considerations as to the validity of the Canadian Act respecting Fisheries and Fishing have been dealt with in the case of the Attorney-General for Ontario in the other appeal, to which reference is made.

The only point untouched is whether any special consideration affects "Public Harbours" within the meaning of the schedule. This depends on the ownership of the beds; and if, as is contended, the beds remain with the Province, then, with regard to harbours as well as to the other waters, the question must be answered in the negative.

WORKS IN AND OVER NAVIGABLE WATERS.

15. (1) The answer to the second question, as to the validity of Revised Statute of Canada, chap. 92, respecting works in and over navigable waters, largely depends upon the point whether the Statute wrongfully invades the proprietary rights of owners of land covered with navigable waters; and infringes on "Property and Civil Rights," and "the Administration of Justice."

(2) An erection by the owner on the bed of a navigable water, causing no actual or probable injury to the public right of navigation, is not, so far as the public is concerned, illegal.

The right of navigation is simply a right of way, which is not to be interfered with; but subject to this restriction, which is to be enforced by the Courts, the owner of the bed may make erections thereon in or over the water.

Whether such an erection is within this rule a nuisance and so illegal, is purely a question of fact, to be ascertained by law; and the enquiry for the jury is whether the structure is a nuisance to the navigation, not whether it is beneficial to the public.

(3) Then does the Statute in question wrongfully invade the rights of the Province or of the owners?

It may be valid only if so limited in its operation as not to transcend the powers given by the enumeration "Navigation and Shipping." But it is submitted that it does transcend those powers, which are only of the same general and regulative character ascribed by the Judicial Committee to the enumeration "Trade and Commerce," and to other like enumerations.

(4) The Statute professes to deal with any individual case, and to affect the rights of the owner in any such case by an exercise of the discretion of the Governor in Council; to whom it gives also a power to destroy works.

(5) The owner having a power to construct, provided in the result he does not injure navigation, the question of fact whether he is within his right or not must be left to the Courts. It comes within "Property and Civil Rights" and "the Administration of Justice," and cannot be in this way interfered with by the Parliament of Canada.

(6) It is also submitted that the Act impliedly authorises the Governor in Council to license an interference, however serious or even destructive, with the public right of navigation; and that the powers of the Canadian Parliament do not thus far extend.

16. The third question arises only in case the second is answered in the negative.

In that event it is submitted that, on the principles already indicated in this and the other case, the Provincial grantee of land extending into a lake or river has the right to make erections thereon, subject to the work not interfering with navigation.

17. The fourth question is similar to the third, applying it to certain public harbours; and it is submitted that, if the bed of the harbour be held to belong to the Province, then the Province can, on the principles already indicated, validly grant, for the purpose of making the erections referred to, on the conditions set out.

18. (1) The first branch of the thirteenth question

is substantially disposed of in favour of Ontario by the considerations already opened in this and the other case.

(2) The 47th section of the Revised Statute of Ontario, chap. 24, is as follows:—

“ It has been heretofore and it shall be hereafter lawful for the Lieutenant-Governor in Council to authorise 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.”

(3) This was in effect a re-enactment of the Act of the late Province of Canada of 1860, 23 Vic., chap. 2, section 35, which is as follows :—

“ Whereas doubts have been entertained as to the power vested in the Crown to dispose of and grant water lots in the harbours, rivers, and other navigable waters in Upper Canada, and it is desirable to set at rest any question which might arise in reference thereto, it is declared and enacted that it has been heretofore and that it shall be hereafter lawful for the Governor in Council to authorise sales or appropriations of such water lots, under such conditions as it has been or it may be deemed requisite to impose.”

This addition in the Revised Statute of Ontario (viz., “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”) was intended to show that as to future grants the Legislature assumed to deal only so far as the subject remains within their jurisdiction, the right to legislate in reference to navigation being beyond their control.

(4) This limitation makes clear what would have been otherwise implied ; and the answer to this question thus depends on the proprietary rights of Ontario already argued.

19. (1) The sixteenth question should, it is submitted, be answered in the negative ; because as already argued "Property and Civil Rights" and "the Administration of Justice" would be unconstitutionally interfered with by the suggested legislation.

(2) The owner of land covered with water is not entitled to commit the nuisance of interfering with navigation. This is, as heretofore suggested, a question of fact to be tried. Subject to this restriction the owner may do what he likes with his own.

(3) But to allow the Parliament of Canada from time to time to declare arbitrarily what is to be deemed an interference with navigation, and thus from time to time to limit the rights and affect the property of the owner, is to allow it the power to destroy the rights and property of the owner.

This is beyond any fair or reasonable interpretation of "Navigation and Shipping," and is an unwarrantable infringement on "Property and Civil Rights" and "the Administration of Justice."

(4) Like considerations apply to the question whether the Parliament of Canada can require its sanction to be obtained to the erection of any work in navigable waters.

20. Generally the Appellant relies also upon the reasonings contained in the favourable opinions of the judges of the Supreme Court in this matter, and in the judgments in other cognate cases.

EDWARD BLAKE.

Case of the Respondent.

1. This is an appeal by special leave from so much of the judgment of the Supreme Court of Canada, given on the 13th day of October, 1896, as answered favourably to the jurisdiction claimed by the Dominion and adversely to that claimed by the Provinces certain questions referred by the Governor-General in Council to the Supreme Court of Canada for hearing and consideration pursuant to the Revised Statutes of Canada, chap. 35, as amended by the Canadian Statute 54 and 55 Vic., chap. 25.

2. The questions referred are as follows :—

(1) Did 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, become under the British North America Act the property of the Dominion, or the property of the Province in which the same respectively are situate ; and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, etc., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, etc., and other rivers, or between waters directly and immediately connected with the sea coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more Provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation ?

(2) Is the Act of the Dominion Parliament, Revised Statutes of Canada, chap. 92, intituled "An Act Respecting Certain Works Constructed

in or over Navigable Waters," an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part?

(3) If not, in case the bed and banks of a lake or navigable river belong to a Province, and the Province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse, or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

(4) In case the bed of a public harbour or any portion of the bed of a public harbour at the time of Confederation had not been granted by the Crown, has the Province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

(5) Had riparian proprietors before Confederation an exclusive right of fishing in non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

(6) Has the Dominion Parliament jurisdiction to authorise the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

(7) Has the Dominion Parliament exclusive jurisdiction to authorise the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

(8) Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the

Provinces respectively under the British North America Act, if any such are so assigned?

(9) If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a Provincial Legislature jurisdiction for the purpose of Provincial revenue or otherwise, to require the Dominion lessee, licensee, or other grantee to take out a Provincial licence also?

(10) Has the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled "An Act Respecting Fisheries and Fishing," or any other of the provisions of the said Act, or any and which of such several sections, or any and what parts thereof respectively?

(11) Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled "An Act Respecting Fisheries and Fishing," or any other provisions of the said Act, so far as these respectively relate to fishing in waters, the beds of which do not belong to the Dominion, and are not Indian lands?

(12) If not, has the Dominion Parliament any jurisdiction in respect of Fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the Provinces and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement, and preservation of Fisheries, as, for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner or with improper engines, prohibiting obstructions in ascending rivers, and the like?

(13) Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chap. 24, intituled "An Act Respecting the Sale and Management of Public Lands," and sections 5 to 13, both inclusive, and

sections 19 to 21, both inclusive, of the Ontario Act of 1892, intituled "An Act for the Protection of the Provincial Fisheries," or any and which of such several sections, or any and what parts thereof respectively?

(14) Had the Legislature of Quebec jurisdiction to enact sections 1375 to 1378, inclusive, of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

(15) Has a Province jurisdiction to legislate in regard to providing fishways in dams, slides, and other constructions, and otherwise to regulate and protect Fisheries within the Province, subject to and so far as may consist with any laws passed by the Dominion Parliament within its constitutional competence?

(16) Has the Dominion Parliament power to declare what shall be deemed an interference with navigation, and require its sanction to any work or erection in or filling up of navigable waters?

(17) Had riparian proprietors before Confederation an exclusive right of fishing in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

3. At the hearing of the case before the Supreme Court of Canada, composed of the Chief Justice, Sir Henry Strong, and Justices Taschereau, Gwynne, King, and Girouard, Counsel appeared for the Dominion and for the several Provinces of Ontario, Quebec, Nova Scotia, and British Columbia.

4. The judges who heard the case were unable to agree in opinion, and delivered separate written opinions as to the answers which ought to be given to the said questions.

The written opinions of the judges will be found in the Record at pages 85 to 129.

5. The majority of the judges were of opinion that most of the questions should be answered in favour of the claims of the Provinces, but were unanimous in holding adversely to the claims of the Provinces.

(a) That the beds of public harbours not granted before Confederation were the property of the Dominion, and that the Dominion had exclusive jurisdiction over public harbours. The judges held themselves bound by a previous decision of the Supreme Court in the case of *Holman v. Green*, 6 S. C. R., 707.

(b) That the Revised Statutes of Canada, chap. 92, were *intra vires*.

(c) That the Dominion Parliament had power to declare what should be deemed an interference with navigation, and require its sanction to any work or erection in or filling up of navigable waters.

(d) That the Revised Statutes of Canada, chap. 95, was, with the exception of the specified sections, that is to say sections 4, 14 (1), 21 (1) (3) and (4), and 22, *intra vires*.

6. The Attorney-General for the Dominion, the Attorney-General for Ontario, and the Attorneys-General for Nova Scotia and Quebec respectively obtained special leave to appeal against so much of the said judgment as answered the said questions adversely to their respective submissions and contentions.

7. It is submitted on behalf of the Dominion that the answers to the said questions, so far as they are favourable to the jurisdiction claimed on behalf of the Dominion, are right in law and should be affirmed, and this appeal dismissed, for the following amongst other

REASONS.

1. Because public harbours, being specifically mentioned in the 3rd schedule to the British North America Act, become the property of the Dominion under section 108.
2. Because public harbours are part of the Royal Prerogative, and remain in the Dominion under section 102, and are not vested in the Provinces under section 109.
3. Because *Holman v. Green*, 6 S. C. R., 707,

2 Cart., 147, was rightly decided, and should be approved.

4. Because the respective matters in question are all within the matters enumerated in section 91, which are within the exclusive jurisdiction of the Dominion.
5. Because on a proper construction of sections 91, 92, 102, 108, 109, and 117 and of the 3rd schedule, the answers appealed from are right in law and should be affirmed.

R. B. HALDANE.

H. W. LOEHNIS.

In the Privy Council.

No. 10 of 1897.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN THE ATTORNEY-GENERAL FOR THE
PROVINCE OF QUEBEC . . .
AND THE ATTORNEY-GENERAL FOR
THE PROVINCE OF NOVA
SCOTIA *Appellants,*
AND
THE ATTORNEY-GENERAL FOR THE
DOMINION OF CANADA . . . *Respondent.*

Case of the Appellants,

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC
AND THE ATTORNEY-GENERAL FOR THE PROVINCE OF
NOVA SCOTIA.

1. This is an appeal brought by special leave of Her Majesty in Council from an opinion or judgment of the Supreme Court of Canada upon a reference to that Court by His Excellency the Governor-General of Canada for hearing and consideration of questions of law relating to fisheries or waters.

2. The said questions were heard and considered before a Court consisting of five Judges, namely:—the Chief Justice (Sir Henry Strong), and Taschereau, Gwynne, King, and Girouard, J.J., who being, in the case of nearly all the said questions, unable to agree as to the answers to be given thereto, on the 13th October, 1896, severally certified their opinions upon the said questions, and their reasons for such opinions.

3. Upon most of the questions submitted, the opinion of the majority of the said judges was in favour

of the contentions raised by these Appellants. For the purposes of the present appeal it is therefore necessary to set out such only of the said questions, with the substance of the findings of the learned judges thereon respectively, as are stated in the next two paragraphs.

4. The first of the said questions was as follows :—

Did 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, become under the British North America Act the property of the Dominion, or the property of the Province, in which the same respectively are situate, and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, etc., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, etc., and other rivers, or between waters directly and immediately connected with the sea coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more Provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

The learned judges all came to the conclusion that the beds of the public harbours, referred to in the question, that is to say, of the places described in the British North America Act as public harbours, were the property of the Dominion, holding themselves to be bound by the case of *Holman v. Green*, 6 S. C. R. 707, whereof a full report is contained in the Appendix. Mr. Justice Taschereau considered that case to have been wrongly decided, but the other learned judges appear to have accepted the decision as correct.

5. The second, third, fourth, and sixteenth questions were as follows :—

Question 2—Is the Act of the Dominion Parliament, Revised Statutes of Canada, chap. 92, intituled “An Act respecting certain Works constructed in or over Navigable Waters,” an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part?

Question 3—If not, in case the bed and banks of a lake or navigable river belong to a Province, and the Province makes a grant of land extending into the lake or river, for the purpose of there being built thereon a wharf, warehouse, or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

Question 4—In case the bed of a public harbour or any portion of the bed of a public harbour, at the time of the Confederation, had not been granted by the Crown, has the Province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

Question 16—Has the Dominion Parliament power to declare what shall be deemed an interference with navigation, and require its sanction to any work or erection in or filling up of navigable waters?

All the learned judges answered question 2 in the affirmative; Girouard, J., however, expressing a doubt as to the last part of section 9 of the Act referred to. The same learned judge answered question 3 in the affirmative, but the other four judges considered it unnecessary to give, and did not give, any answer to that question. All the judges answered question 4 in the negative. Gwynne, J., does not appear to have answered question 16, but all the other judges answered that question in the affirmative.

6. The broad contentions on behalf of these Ap-

pellants are : 1st. That the beds of the public harbours above referred to are, so far as regards the property in the soil thereof, vested in the respective Provinces and not in the Dominion. 2nd. That the erection of wharves, etc., in, or extending into, lakes or navigable rivers, is not subject to the control of the Dominion Government.

7. These Appellants humbly submit that this appeal should be allowed and the questions above set out be answered in a contrary sense, for the following amongst other

REASONS.

As to questions 1 and 4 :—

1. Because, under the British North America Act, the Dominion acquired, in the places called public harbours, such rights only as are peculiar to the use of such places as harbours for ships ; and did not, save as aforesaid, acquire any property in the soil under such harbours or any of the rights of property ordinarily attaching to similar places not used as harbours.
2. Because, under the British North America Act, the public harbours are transferred to the Dominion as public works only (in the same manner, for example, as embankments or other navigation improvements in a river) and for the purposes only of maintaining and improving them, and regulating and controlling the use of them as harbours.
3. Because the beds of public harbours belong to the several Provinces by virtue of section 109 of the British North America Act.
4. Because the soil of the public harbours and all rights of property in such places, other than the rights peculiar to the use of such places as harbours, were retained by the Provinces under section 117 of the British North America Act.
5. Because in the case of all other public waters, the foreshores thereof and the soil thereunder

are vested in the Provinces, and an exception in the case of foreshores and soil of public harbours would be inconvenient, unnecessary, and useless, and in the absence of any words clearly making such an exception cannot be taken to have been intended by the Legislature.

6. Because the decision in *Holman v. Green* was wrong and ought to be reversed.

And as to questions 2, 3, and 16 :—

7. Because the owner of the bed and banks of a lake or navigable river is entitled to build thereon, subject to any public rights of navigating and regulating the navigation therein.
8. Because the Dominion Statute referred to in the second question contains provisions which go beyond the powers in respect of navigation conferred upon the Dominion by the British North America Act and interfere with the rights of property of owners of land covered by navigable waters.
9. Because such Act purports to enable the Governor in Council to allow unlimited interference with the public right of navigation and even if the Dominion Parliament has power to interfere with such public right, it cannot delegate such power.
10. Because the power to remove and destroy works purported to be given by section 3 of the said Act is *ultra vires*.
11. Because section 11 of the said Act, whereby the Governor in Council may, for the purpose of securing better facilities for navigation, make such orders or regulations as he deems expedient, respecting existing works, purports to authorise an invasion of the existing rights of the owners of such works, and was therefore beyond the jurisdiction of the Dominion Parliament.
12. Because a power to declare what shall be deemed an interferenceⁱ with navigation,

is, in effect, a power to create, alter, and diminish rights of navigation and rights of property, and because, under the British North America Act, it belongs to the judicature alone to declare what is an interference with the public rights of navigation.

J. C. LEWIS COWARD.

Case for the Respondent.

1. This is an appeal by special leave from so much of the judgment of the Supreme Court of Canada, given on the 13th day of October, 1896, as answered favourably to the jurisdiction claimed by the Dominion and adversely to that claimed by the Provinces certain questions referred by the Governor-General in Council to the Supreme Court of Canada for hearing and consideration pursuant to the Revised Statutes of Canada, chap. 35, as amended by the Canadian Statute, 54 and 55 Vic., chap. 25.

2. A similar appeal raising the same points is pending on behalf of the Attorney-General for the Province of Ontario wherein the Respondent has lodged his case. To save repetition the Respondent craves leave to refer to his case so lodged, and relies on the matters therein stated as his answer to the present appeal.

3. The Respondent submits that the present appeal should be dismissed, and the judgment of the Supreme Court affirmed to the extent and for the reasons appearing in the case mentioned in the last preceding paragraph, copies of which it is intended to deliver to the present Appellant.

R. B. HALDANE.

H. W. LOEHNIS.

Privy Council,

28th July, 1897.

THE ATTORNEY-GENERAL FOR THE DOMINION OF
CANADA

v.

THE ATTORNEY-GENERAL FOR THE PROVINCES OF
ONTARIO, QUEBEC, AND NOVA SCOTIA,

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF
ONTARIO;

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF
CANADA;

AND

THE ATTORNEY-GENERAL FOR THE PROVINCES OF
QUEBEC AND NOVA SCOTIA,

v.

THE ATTORNEY-GENERAL FOR THE DOMINION
OF CANADA.

Before—

THE LORD CHANCELLOR (LORD HALSBURY).

LORD HERSCHELL.

LORD WATSON.

LORD MACNAGHTEN.

LORD MORRIS.

LORD DAVEY.

LORD SHAND, AND

SIR J. H. DE VILLIERS.

[*From the Shorthand Notes of Messrs. CHERER, BENNETT & DAVIS,
8 New Court, Carey Street, W.C.*]

FIRST DAY.

Counsel for the Dominion of Canada, Mr. C. ROBINSON, Q.C., Mr. HALDANE, Q.C., Mr. MacTAVISH, Q.C., and Mr. LOEHNIS, instructed by Messrs. Day, Russell & Co.

Counsel for the Province of Ontario, Mr. EDWARD BLAKE, Q.C., Mr. EMILIUS IRVING, Q.C., and Mr. J. M. CLARK, instructed by Mr. S. V. Blake.

Counsel for the Province of Quebec, Mr. CANNON, Q.C., and Mr. J. C. LEWIS COWARD, instructed by Messrs. Hill, Son & Rickards.

Counsel for the Province of Nova Scotia, Mr. LONGLEY, Q.C., and Mr. J. C. LEWIS COWARD, instructed by Messrs. Hill, Son & Rickards.

Mr. C. ROBINSON—My Lords, I appear for the Attorney-General of the Dominion with my learned friends Mr. Haldane and others. There are three appeals entered here, which I think substantially may be said to

resolve themselves into two. One is the appeal of the Dominion, the other being the appeal of the Provinces. The matter arises out of several questions which have been submitted by the Dominion and the Provinces to the Supreme Court of Canada and have been answered partially in a sense favourable to the Dominion and partly in a sense favourable to the Provinces.

Lord WATSON—Do the appeals cover the whole ground?

Mr. ROBINSON—Yes.

Lord WATSON—The Provinces appeal against all parts of the judgment which are against them.

Mr. ROBINSON—Yes; and we have done the same, my Lords. The question arises out of a controversy as to the respective jurisdiction of the Dominion and Provinces over fisheries and navigable waters, and as to the ownership of the beds of the waters throughout the Dominion. There are seventeen questions which have been submitted, but, unless otherwise desired by the Board, I do not propose to go into those questions at present in detail. My own impression is that if we can ascertain what is the jurisdiction of the Dominion Government over navigable waters, over navigation and shipping, and what is their jurisdiction over sea coast and inland fisheries and in the beds of the different waters, we shall have all the information which is necessary to enable us to answer the questions. There are one or two questions, such as the ownership of rivers and the ownership of harbours, which depend upon different considerations, but they are short and simple questions. I do not mean they are simple to answer, but the considerations upon which they depend appear to me to be simple.

The LORD CHANCELLOR—Are those questions governed by Canadian Statutes, or must we look to the common law?

Mr. ROBINSON—It depends upon the jurisdiction given to the Dominion and the Provinces under the British North America Act.

Lord WATSON—There are two questions, one of property and one of jurisdiction.

Mr. ROBINSON—Yes.

Lord WATSON—They would depend upon the Statute, but there may be questions which depend upon the general law.

Mr. ROBINSON—There may be. I do not wish the Board to understand that I am expressing the views of the other side.

Lord WATSON—The jurisdiction depends in the first instance upon the construction of sections 91 and 92 of the Act.

Mr. ROBINSON—Yes.

Lord DAVEY—And the property also?

Mr. ROBINSON—And the property also.

Lord HERSCHELL—These things are vested in the Crown, and the question is, how is the jurisdiction distributed under the Act?

Mr. ROBINSON—I do not think it depends upon sections 91 and 92, in answer to what Lord Watson asked. Certain properties are given to the Dominion by the 3rd section of the Act.

Lord HERSCHELL—The question of property as well as the question of jurisdiction must depend upon the Act.

Mr. ROBINSON—Beyond question. All the questions depend in substance upon the British North America Act.

Lord DAVEY—Is that section you referred to the one which was discussed in the *Mercer* case?

Mr. ROBINSON—That was a question of royalty and escheat.

Lord DAVEY—Yes.

Mr. ROBINSON—That was section 109, and section 117 is taken in connection with that. Section 109 is the one that was in question in the *Mercer* case. The *Mercer* case turned mainly upon the word “royalties”—your Lordship will remember.

Lord DAVEY—Yes.

Mr. ROBINSON—Now, I propose to say another

word with regard to the question I think Lord Watson asked, as to the bearing of the general law. A great deal will be found in what are called the factums which are submitted. The practice in our Supreme Court is to submit what is called a factum on either side. In those factums your Lordship will find a great deal of discussion as to the general law with regard to riparian rights in water navigable and unnavigable both with regard to boundary and with regard to fishing. I do not propose, except it may become material in the argument, to go into that at length, for this reason. I do not think there is any difference between the law of Canada and the law here with regard to any of those questions, except in this respect, that we have never held that the ebb and flow of the tide is essential to make water navigable in law. We have always held that our Great Lakes and our river St. Lawrence are navigable in fact and in law.

Lord DAVEY—Is the flow of the tide essential in navigable rivers in England?

Mr. ROBINSON—I think so. Your Lordship will readily see it would have been incongruous to hold that our Great Lakes and the St. Lawrence are not navigable in law and in fact. We have held in substance, and I think we both agree in that, that navigability in fact means navigability in law.

Lord WATSON—That is to say that the grant of land bounded by a navigable stream does not carry with it the solum of the river in mid-stream.

Mr. ROBINSON—That is it.

Lord HERSCHELL—The point to which the water ebbed and flowed was considered a very good test of the extent of navigability, and therefore it came to be held that the public right extended as far as the water ebbed and flowed.

Mr. ROBINSON—Yes.

Lord DAVEY—The solum of the river is vested in the Crown as far as the ebb and flow of the tide is concerned, but a river may be navigable in law although the solum may not be vested in the Crown.

Lord HERSCHELL—There will not be any conflict here as to that.

Mr. ROBINSON—No.

Lord WATSON—I should think that the conflict here would hardly be a conflict in the sense referred to in the Statute.

Mr. ROBINSON—I think not.

Lord WATSON—It must necessarily infer an interest of the Crown in the solum.

Mr. ROBINSON—I think so. I only mentioned that so that I may not have to go into these seventeen questions and into a mass of law which is not disputed. If I am right in that it makes unnecessary a good deal of discussion which perhaps might otherwise have been required.

Now, my Lords, it may be perhaps as well to explain that this case practically arises out of two cases, or mainly out of two cases which have been decided in our Supreme Court, and which are printed in the Joint Appendix at one end of the case. A case of *The Queen v. Robertson*, reported in 6 Supreme Court Reports, and which is printed at length for the convenience of your Lordships at the end of the Joint Appendix to our appeals, is the case out of which these questions have arisen. Then, if I may say how I propose to discuss these matters, subject to the direction of the Board, there are three appeals here. Speaking in substance, the decision of the Court was against the Dominion as regards the ownership of the beds of the river and as regards the rights which they claimed to fisheries, and in substance our appeal is against that part of the decision. The decision was in our favour as regards the rights which we claim under the terms "navigation" and "shipping," and as regards the ownership of the beds of harbours.

The LORD CHANCELLOR—Has this question been dealt with by the Provincial Parliament?

Mr. ROBINSON—Yes, my Lord; one of the questions is whether, if we have the right to legislate in particular

matters the Provincial Parliament have the right. They have legislated upon subject matters which we claim exclusive legislation over.

Now, my Lords, what I propose to do is to leave out in the discussion of this appeal, as far as possible, altogether the questions which have been decided in our favour and which are the subject of the second appeal. I thought that perhaps the more convenient plan would be for me to discuss only those questions which have been decided against us, and then to let that appeal be disposed of and to let my learned friends open the other.

Lord WATSON—There must be a reply upon your appeal and an opening of the other appeals.

Mr. ROBINSON—Very well. Then *The Queen v. Robertson*, I may mention, was a case turning entirely upon the question of fisheries. It did not relate to the ownership of the beds of the waters, but in that some suggestions were made by the learned Chief Justice, Sir Henry Strong, as to questions which might arise as to the ownership of beds in certain waters. It is to settle those questions that the first question here is submitted. I do not myself think that is a question of by any means such importance as the other question, but it is a question which, for administrative purposes at all events, it is necessary to have settled one way or the other. The first question is: Did 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 become under the British North America Act the property of the Dominion or the property of the Province in which the same respectively are situate.

Lord HERSCHELL—Is there any question that before the British North America Act the property was in the Crown?

Mr. ROBINSON—I think not; there can be none; “and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or

non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, etc., and other lakes, or the so-called great rivers, such as the St. Lawrence River, Richelieu, the Ottawa, etc., and other rivers; or between waters directly and immediately connected with the sea coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more Provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation." I suppose that question may be shortened by asking in whom is the ownership of the beds?

Lord HERSCHELL—There may be a question about the waters which separate two Provinces.

Mr. ROBINSON—I do not think there may be. There may, of course, be a distinction. I do not mean that would determine the ownership of the bed in another water. I think there is a most material distinction between the territorial limit and others. It has been decided by our Court that we own the bed of harbours. We claim under another clause that we own the bed of all rivers and so on. I only mention that to try and simplify the question.

Now, as your Lordships know, it is necessary in our Supreme Court to submit factums which are very elaborate and practically are in the nature of a printed argument; and merely for shortness I refer to page 8 of the Record of Proceedings, in which your Lordships will find set out the matters which the Dominion does claim.

Lord DAVEY—There are three appeals altogether?

Mr. ROBINSON—Yes.

Lord DAVEY—Your appeal and the appeal of the Province of Ontario and the appeal of the Provinces of Quebec and Nova Scotia are joined together?

Mr. ROBINSON—Yes.

The LORD CHANCELLOR—Will you call this Volume I.?

Mr. ROBINSON—Yes.

Lord DAVEY—Which will you call Volume II.?

Mr. ROBINSON—I will call Volume II. Ontario. My reason for saying they resolve themselves into two appeals is that Nova Scotia and Ontario have not joined, but it is the same case.

Lord DAVEY—Shall we call the Joint Appendix IV.?

Mr. ROBINSON—Yes, Volume IV. contains the decisions and the Statutes which are most material and applicable to all the questions in fact.

Now, my Lords, I may as well take these up just as they are in order here. First with regard to rivers, that raises a very peculiar question which has been raised repeatedly in our Courts. The decision, I think, has always been intimated as one that ought to be against us; it has always been against us; at all events, there has been no decision in our favour. Your Lordships are aware it is the duty of the Minister of Justice, as the legislation of Provinces comes before him, to report upon it whether it should or should not be disallowed as being *ultra vires*. In two or three instances the legislation of the Provinces has come before him as to rivers, and he has always taken the ground which I now take, and it is necessary to settle that.

Section 108 says: "The public works and property of each Province enumerated in the 3rd schedule to this Act shall be the property of Canada." Now, if your Lordships will turn to the 3rd schedule No. 5 of the British North America Act—this question turns wholly upon section 108 and the 3rd schedule—one of the items is rivers and lake improvements. We have contended that means what it says—that it means rivers and improvements in lakes.

Lord HERSCHELL—You do not couple "improvements" with "rivers"?

Mr. ROBINSON—You do not couple improvements with rivers. They, on the other hand, say the "s" has got in by mistake and that it means "river improvements."

Lord HERSCHELL—Canals are made the property of the Dominion.

Mr. ROBINSON—Canals are a river improvement I suppose nine times out of ten.

Lord HERSCHELL—Not always.

Mr. ROBINSON—Not always. We think there are reasons why the rivers should have been vested and intended to be vested in the Dominion, which are mentioned in our factum. In the first place, you must remember we have exclusive jurisdiction over trade and commerce, over shipping and navigation, over defences and over fisheries.

Lord WATSON—It is not limited to navigable rivers?

Mr. ROBINSON—No.

Lord WATSON—If your argument is right it will include all rivers?

Mr. ROBINSON—Yes. I am not contending that there are not arguments on both sides. We say that means what it says. Suppose instead of being “rivers” it had been “mines.”

Lord WATSON—We must find out what it says first.

Mr. ROBINSON—I quite accept that correction as true. What I mean is that “rivers” means “rivers.” If it had been “mines and lake improvements” nobody could have connected improvements with mines.

Lord WATSON—The plural gives some colour to that suggestion.

Mr. ROBINSON—It is the plural that gives probably the main colour to it.

The LORD CHANCELLOR—I do not think it is admissible to say that the Legislature have made a mistake.

Mr. ROBINSON—That is the question.

Lord SHAND—What are lake improvements? What is it that is transferred?

Mr. ROBINSON—I am coming to that afterwards. It must be improvements in the lakes on which public money has been expended.

Lord DAVEY—Embanking?

Mr. ROBINSON—Embanking, piers, breakwaters, and things of that sort. In Lake St. Peter, which is a part of the St. Lawrence, moneys have been expended in dredging. I suppose that is an improvement in the lake, but how can you ascertain how far that extends? and what part the Dominion owns under the words “lake improvements” it would be difficult to say.

Lord WATSON—Suppose a mile of the lake is dredged to the depth of ten feet below its original depth at the bottom, is it an interest in property in that improvement or in the lake bottom as far as occupied by that improvement?

Mr. ROBINSON—I do not pretend to answer that.

Lord DAVEY—It is a very subtle distinction.

The LORD CHANCELLOR—Where the general word is used you cannot define the extent always.

Mr. ROBINSON—No.

Lord HERSCHELL—You say that “rivers” means rivers unlimited?

Mr. ROBINSON—Yes.

Lord SHAND—That, as Lord Watson says, would include rivers not navigable?

Mr. ROBINSON—Yes, that is what we claim.

Lord WATSON—The fact that the property in improvements in lakes is given is rather against the contention of the Dominion that they have the property in the solum of the lake.

Mr. ROBINSON—I admit that is an argument, but I submit that the Legislature should have said something else.

Lord HERSCHELL—Do you say this is a navigable river?

Mr. ROBINSON—We must say so.

Lord HERSCHELL—A man may have a lake which probably answered that description on his own property which is absolutely private.

Mr. ROBINSON—Certainly.

Lord DAVEY—It is only lake improvements.

Lord HERSCHELL—There may be improvements on a private lake. You would not contend it included that case?

Mr. ROBINSON—I could hardly contend that.

Lord HERSCHELL—If not, the very nature of the enactment may be limited to public rivers and lakes?

Mr. ROBINSON—Yes.

Lord DAVEY—It is only public works that are referred to.

Mr. ROBINSON—When you consider, you will find you cannot limit it to public works.

The LORD CHANCELLOR—In English legislation, when the roads are vested in a body it means the public roads.

Lord HERSCHELL—Do you argue that a river or a lake improvement on strictly private property, in which the public, before the Dominion Act passed, had no rights at all, would by this Act be transferred from private owners to the Dominion?

Mr. ROBINSON—No, I do not think that should be so.

Lord HERSCHELL—You are content to argue it upon the basis that it applies only to public rivers and public lake improvements?

Mr. ROBINSON—Yes.

Lord WATSON—Reading section 108 and the 3rd schedule together, you cannot maintain that it was the intention of the Act to give to the Dominion any of the subjects described in schedule 3 which were not at, or prior to the date of the Act of 1867, public works and improvements.

Mr. ROBINSON—Of course not. It must have been the property of the Province.

Lord SHAND—What about the lakes themselves? You contend you have the property there.

Mr. ROBINSON—We contend we have the property in the lakes.

Lord SHAND—How do you get that?

Mr. ROBINSON—I will come to that question.

Lord DAVEY—You must get that under section 109.

Mr. ROBINSON—That must be confined to the property of the Province, which would be public property.

Lord DAVEY—It must be rivers which were the property of the Province.

Mr. ROBINSON—Whatever we claim must have been the property of the Province.

The LORD CHANCELLOR—The scheme of the sections from 102 to 106 consists of distributing between the Dominion on the one hand and the Province on the other the public revenues, debts, assets, and taxations.

Mr. ROBINSON—Yes.

Lord WATSON—There are no private rights intended to be dealt with?

Mr. ROBINSON—No.

The LORD CHANCELLOR—The “revenues, debts, assets, and taxations” referred to were printed as part of the Statute?

Mr. ROBINSON—I think they were. My learned friend Mr. Blake would know better; but I am almost sure they were, and there are decisions that they may be considered as part of the Statute. There is no question as regards this, that we can only claim something which is public.

The LORD CHANCELLOR—“Revenues, debts, assets, taxations,” that indicates what it means.

Mr. ROBINSON—Yes, I do not know that I shall be of any service to the Board in trying to elaborate a question of that sort.

The LORD CHANCELLOR—It is simply the letter “s.”

Mr. ROBINSON—That is all.

Lord SHAND—The lakes are not given. It is

suggested that the whole of this clause relates to improvements.

LORD WATSON—You say it includes all rivers that were the public property of the Province at the date of the passing of the Act. They are transferred to the Dominion, and also all improvements in the nature of public property that have been made in the navigation of any lakes.

MR. ROBINSON—Yes.

LORD SHAND—That would leave the lakes in a different position to the improvements.

LORD DAVEY—That is a different point.

LORD HERSCHELL—I suppose the rivers would be the means of transit from one part of the Province to another, whereas lakes might be confined as regards their navigation and limited to the Province strictly?

MR. ROBINSON—Yes.

LORD MORRIS—What section deals with lakes?

MR. ROBINSON—No special section.

LORD DAVEY—That is a more difficult question.

MR. ROBINSON—That is a more difficult question.

LORD SHAND—If that be so, then the point arises upon the consideration of this clause.

MR. ROBINSON—The two things have to be mixed up together.

Now, my Lords, I submit there may be reasons why the public rivers of the Province should have been intended to be vested in the Dominion. They have legislative jurisdiction over almost everything for which the public rivers are required, that is to say they have jurisdiction over navigation and shipping. They have jurisdiction over the regulation of trade and commerce, and they have jurisdiction over inland fisheries and sea coast fisheries.

LORD WATSON—Under section 91 of the Act there is jurisdiction in the sense of legislative jurisdiction to deal with a great many matters in the Province that are not the property of Canada. For instance, there

is the right to regulate, commence, and to make public regulations for particular branches of trade.

Mr. ROBINSON—Yes.

Lord HERSCHELL—If one is to be guided by the consideration that lakes are not given, one must be equally guided by the consideration that canals are.

Mr. ROBINSON—Yes.

Lord MORRIS—Do you claim the lakes?

Mr. ROBINSON—We claim the bed of the lakes. That depends upon different considerations.

Lord HERSCHELL—That is not under this clause.

Mr. ROBINSON—That is not under this clause. We have under this clause whatever it gives us, and whether we have also the lakes, which this clause does not touch, is a matter of argument.

Lord MORRIS—If you could show that you have the lakes it would more naturally follow that you would have the beds.

Lord SHAND—Under this clause you have not the lakes.

Mr. ROBINSON—Yes.

Lord HERSCHELL—You would say the Legislature has done what it has and you have only to interpret it.

Mr. ROBINSON—That is all. My argument is elementary.

Lord DAVEY—The Courts have said that the letter “s” got there by mistake.

Mr. ROBINSON—Yes.

Lord SHAND—That clause merely gives you, according to the argument of the other side, improvements and nothing else, and the question is what improvements you are to have.

Mr. ROBINSON—Yes.

The LORD CHANCELLOR—Does the Court give any reason for saying that the letter “s” has crept in by mistake?

Mr. ROBINSON—Speaking with deference, they simply laugh at us.

Lord SHAND—I suppose there must be the view that the letter “s” does no harm.

Mr. ROBINSON—The letter “s” has done infinite harm before now.

Lord HERSCHELL—I understand they say the “s” ought not to be there.

The LORD CHANCELLOR—Do not interrupt yourself. I wanted to know if they had given any reason why they suggested it was a mistake.

Mr. ROBINSON—If you will permit me to turn to the factum I will refer to what Mr. Justice Gwynne says in a case in the 2nd Cartwright.

Lord DAVEY—In the Quebec Resolution upon which the Act was founded it was “rivers.”

Mr. ROBINSON—Yes, with great deference, I think that has no bearing upon it. Mr. Justice Gwynne, in *The Queen v. Robertson* (it is page 46, line 29), says: “It was urged, it is true, but scarcely I think seriously, that by force of the 108th section of the British North America Act and of the fifth item of the 3rd schedule annexed to the Act, namely, ‘Rivers and lake improvements,’ the bed and soil of the Miramichi, as well as the beds and soil of every river in the Dominion, is declared to be the property of Canada. The sole ground for this contention is that the word ‘Rivers’ as printed in the schedule is plural, while the word ‘Lake’ is singular, and that if it had been intended that the word ‘Improvements’ should be read in connection with the former as with the latter it would have been printed ‘River’ in the singular as in the word ‘Lake.’ To this it was replied, that the absence of a comma after the word ‘Rivers’ afforded as good an argument,—”

Lord HERSCHELL—This is a statute of the Imperial Parliament?

Mr. ROBINSON—It is.

Lord HERSCHELL—I thought it was well established

that no comma can be regarded ; in fact, I am not sure that the copy for Parliament is not printed without stops.

The LORD CHANCELLOR—Some people's ideas of punctuation are very singular, and therefore it is not looked at.

Lord HERSCHELL—It is never the practice to amend a Bill by stops. Stops are absolutely disregarded for the purpose of amendment, because it is understood they will be disregarded in its construction. If you were to admit this for a moment, the work of the Legislature would be very largely increased.

Mr. BLAKE—I have never intended to argue upon the comma.

Lord WATSON—The learned judge goes on : “ I confess I think both arguments are of about equal weight, and I do not think it profitable to inquire whether the affix of the letter ‘s’ or the omission of a comma is the act of the printer or of Parliament,——”

Lord HERSCHELL—That is saying, if you are to regard the letter “s” you must regard commas, and that because you disregard commas you must disregard the letter “s.”

Lord DAVEY—I think the learned judge means you might just as well have “rivers improvement,” meaning improvements to rivers.

Mr. ROBINSON—Possibly so.

Lord HERSCHELL—He says : “ I confess I think both arguments are of about equal weight, and I do not think it profitable to inquire whether the affix of the letter ‘s’ or the omission of a comma is the act of the printer or of Parliament ; for by the 108th section of the Act it is clear that the things which are by that section made the property of Canada are the ‘public works and property of each Province’ enumerated in the 3rd schedule.” Whether therefore the word be printed ‘River’ or ‘Rivers’ in the 3rd schedule, the result is the same, and the word ‘Improvements’ must be read with it, to indicate the ‘Public Work’ which, having been the

property of the Province in which it had been situate, is made the property of Canada."

Mr. ROBINSON—I submit his Lordship's argument is untenable there. It is impossible to say that the word "improvements" applies to everything there.

Lord MORRIS—I think you have disposed of the letter "s."

Mr. ROBINSON—I have entirely disposed of the letter "s," but I am coming to the subsequent part of his Lordship's judgment in which he construes this section. I say that construction cannot be supported.

Lord WATSON—The learned judge reads the words of the schedule with reference to section 108, and in that section certainly the expression used is "public works and property." If you except the word "rivers," I do not see anything in schedule 3 which does not fall under both descriptions as public works and at the same time public property. The view that he takes is that the whole of the subjects referred to in the 3rd schedule ought to be read as public works and public property.

Mr. ROBINSON—Yes, but then does he not also say "whether therefore the word be printed 'river' or 'rivers' the result is the same and the word 'improvements' must be read in"?

Lord WATSON—I do not know whether he is right or wrong, but that is his view—that it was intended to give those works which were public works.

Lord HERSCHELL—It will not do to confine property by reference to public works, because this schedule is not confined to property created by public works.

Mr. ROBINSON—There are many things which you cannot call with any propriety public works; for instance, Sable Island in the 3rd schedule: no one could call Sable Island public works. I do not think anybody would call dredging there public works.

Lord HERSCHELL—Where is Sable Island?

Mr. ROBINSON—It is a barren island off the coast of Nova Scotia.

Lord HERSCHELL—What I understand to be suggested is this, that it does not mean public property, but only such public property as consists of public works. You say it cannot mean that because public property is mentioned here which it is impossible to call public works.

Mr. ROBINSON—That is my argument. You cannot call ordnance property public work, for instance.

Lord WATSON—Rivers are conveyed by this section you say, and if you separate one word from the other you say it falls quite aptly under section 108.

Mr. ROBINSON—Yes. One of the learned judges refers to the French translation, and he says the French translation is clearly against us; but surely a French translation of an Imperial Statute can have no bearing.

Lord DAVEY—May the Dominion Statutes be in French?

Mr. ROBINSON—I think they are printed in French as well as in English.

Mr. BLAKE—I do not contend that the French translation has any bearing; I relieve my learned friend from that.

Lord WATSON—The Code was enacted in both languages.

Lord SHAND—Has this decision in this case you have noticed been acted upon since 1882 as between the Dominion and the Province? The decision in *The Queen v. Robertson* was in 1882 and this is 1897, so that they have been fifteen years acting upon it. I mean it must have regulated a great many matters between the Dominion and the Province.

Mr. ROBINSON—I do not think it has. I cannot put the matter more plainly than by saying that we have never received any countenance for our interpretation of the Statute. This is not a dispute as between A. and B.

Lord WATSON—It might raise a question as to which of the authorities, the Dominion or the Province, was entitled to confer any right within these limits.

Mr. ROBINSON—It raises this important question, no doubt, that if we do own the bed of navigable rivers, water lots are granted upon them, and sold, and in the one case the revenue from that would go to the one Government and in the other case it would go to the other.

Lord WATSON—I do not suppose, unless you had the legislative power, that giving you the property in improvements upon the lakes, without giving you any right to the solum of the lakes, would put a stop to the legislative power if they had not power to make further improvements.

Mr. ROBINSON—It might.

Mr. BLAKE—We concede that under the interpretation of navigation and shipping the Dominion has the right to make navigation works.

Lord HERSCHELL—You might have fishery works, and it is not certain if you had not the solum of the river that you could do works to assist the fisheries.

Mr. ROBINSON—And this question might come up, whether we had to expropriate in terms the Province and pay them for it, or whether it belongs to us. Now I have only to point out further in connection with that, that in *The Queen v. Robertson*—

Lord HERSCHELL—If these points are distinct would not it be convenient that we should hear what the Courts have said in *The Queen v. Robertson* upon the point?

Mr. ROBINSON—I have read all they said.

Lord DAVEY—The Chief Justice, in giving judgment in this case, does not refer to the 3rd schedule at all.

Mr. ROBINSON—I do not think he does.

Lord SHAND—You think they have assumed that the word “improvements” covers everything.

Mr. ROBINSON—I think so.

Lord DAVEY—All he says is: “At the time of Confederation, the beds of all lakes, rivers, public harbours,

and other works within the territorial limits of the several Provinces, which have not been granted by the Crown, were vested in the Crown." He thinks they fall under section 109, but it does not say what his construction of rivers and improvements is.

Mr. ROBINSON—Now I have only, in connection with this, to point out that *Holman v. Green*, the case which relates to harbours, and which is at page 70 of Volume IV., applies also to lakes as well as to rivers. In deciding that we were entitled to the beds of harbours, at page 73 of Volume IV. the late Lord Chief Justice of the Province, Sir William Ritchie, after saying we are entitled to the bed, says: "It is but consistent with this that the property in public harbours, so intimately connected with and essential to trade and commerce and shipping and navigation, lighthouses and piers' should likewise be vested in the Dominion for their more efficient management, control, and regulation."

Lord WATSON—What was decided in *The Queen v. Robertson*, as I understand, was this. They held that the Dominion Minister of Marine and Fisheries had no right to issue to any person franchises of the fishing which should interfere with the exercise of the right of fishing by the Province or the license from the Province, although the Dominion Department had the power to pass general enactments relating to fisheries. Lord Chief Justice Ritchie, after arguing the point at considerable length, says: "As a necessary consequence of what I have said, the Minister of Marine and Fisheries has no authority to issue a lease of the bed of such a river as this where it passes either through ungranted or granted lands, and I have an equally strong opinion that the Dominion Parliament has no legislative power or authority to authorise him to issue, as against the owner, a licence to fish as a franchise or right apart from the ownership of the soil, whether owned by the Province or an individual. I am at a loss to conceive how it is possible for the Minister to have that power over lands owned by the Province and not have the same power over lands owned by private individuals; the franchise

or right is in the private individual by virtue of his property in the bed of the stream, and this he obtains by virtue of the grant from the general Government—why then should the Province not have the same franchise or right by virtue of its property in the soil, bank, and bed of the river ? ”

LORD HERSCHELL—You do not dispute that if the soil is vested in the Province, the Dominion Parliament could not interfere and grant a right in the soil ; but your contention is that the soil was in the Dominion ?

MR. ROBINSON—Yes ; and when I come to *The Queen v. Robertson* I shall show that what Lord Watson read is not part of the decision at all.

Now, I was reading from page 73 of the Joint Appendix the reasons which are given for holding that we not only have the right of regulation of harbours, but the beds of harbours. His Lordship says : “ It is but consistent with this that the property in public harbours so intimately connected with and essential to trade and commerce and shipping and navigation, light-houses and piers should likewise be vested in the Dominion for their more efficient management, control, and regulation, a matter in which not only the whole Dominion, but foreign shipping are likewise interested, and which could hardly be effectually managed and regulated if there were to be a divided control.” Mr. Justice Strong says : “ Then the object of vesting the harbours in the Dominion was doubtless with the object of enabling that Government to carry out with more facility such measures as it might, under the power granted to it to legislate on the subject of navigation and shipping, from time to time think fit to enact. And for this purpose it was material that the right of property in the soil of harbours should be under the control of the Dominion, a result which would not be attained by conferring a mere franchise or the police power of regulating harbours and taking tolls in them. Further, the taking of tolls or harbour dues would have implied the duty of conservancy, which could not have been properly performed if the bed of the harbour had been vested in a

different proprietor." Now, I submit that all that reasoning applies equally well to vesting the public rivers in us for the purpose of enabling us to exercise any legislative jurisdiction over all the subject matters which their Lordships refer to here.

Lord MORRIS—If one is to give a sensible construction to it, the river is the smaller of the two.

Lord WATSON—I do not think that anything can have been decided in *The Queen v. Robertson* which would preclude the Court or any other Court from deciding the present questions you are raising one way or the other. The decision there was that the river was an unnavigable river, that the banks of the river were not the property of the Dominion, and it was also admitted that there was a grant of the river and the river bed to a Company; and yet in the circumstances the Minister of Marine and Fisheries professed to give a right of fishery conferring an interest which was not theirs.

Mr. ROBINSON—That was so.

Lord HERSCHELL—With reference to the consideration of the question if they gave rivers why did not they give lakes. This Act was passed as the result of negotiations between Provinces and those who were framing the Dominion scheme. It is said that light is thrown upon it by a particular resolution passed, but it does not follow that in the ultimate determination of the question, seeing that there were difficulties, a compromise may not have been arrived at under which rivers would include lakes. I do not say it is so, but it would be in the highest degree dangerous in my mind if, when an Act of this sort is passed, we went a step beyond the construction of it. Compromises generally lead to anomalies, that is the very essence of a compromise. It seems to me, therefore, rather dangerous to advance that ground at all.

Lord MORRIS—It would appear to me that if you could show the lakes went with it the rivers would.

Lord SHAND—I understood Mr. Robinson to say he does not know why the lakes went with it.

Lord DAVEY—I do not think he is called upon to say.

Lord SHAND—I am expressing my own opinion that I see an immense difficulty why the rivers should be transferred and the lakes not, and the other construction avoids that, which I call an anomaly.

Mr. ROBINSON—And if the other construction is admissible?

Lord MORRIS—I did not suggest that it was not capable of that construction. There are two constructions it is capable of, and it appears to me that the rational one is that as this was a transfer of property to the Dominion the lakes, which are the greater property, were not transferred to it. There are lakes in rivers and rivers in lakes. I do not know where you are to draw the line between the lake and the river.

Lord WATSON—The effect of section 108 and of section 8 is to vest certain property and revenues in the Crown, and the distribution between the Province and the Dominion is made because when vested in the Crown such property is subject to appropriation by either Parliament.

Mr. ROBINSON—And with regard to those resolutions it is to be remembered that those resolutions were certified in London.

Lord HERSCHELL—There were resolutions passed by the different Provinces forming the basis of negotiation.

Lord DAVEY—It is new to me that you can look at a document drawn up as the basis of legislation to interpret an Act. You might as well look at the minutes which pass between Members of the Cabinet.

Lord WATSON—Or when construing a Railway Act to look at an agreement.

Lord DAVEY—I personally tried it, but always without success.

Lord HERSCHELL—Are the words there “river and lake improvements?”

Mr. ROBINSON—Yes, my Lord.

Lord HERSCHELL—I am not sure which way that

resolution tells ; an alteration having been made in it one is asked to give the same reading as if no alteration was made. The argument, it appears to me, cuts both ways.

Lord DAVEY—At any rate the Statute is the later edition, and the later edition is more likely to be correct.

Lord SHAND—That seems to come to this, that we had better confine ourselves to the words of the Statute and get the true interpretation of them.

Mr. ROBINSON—That is all I contend for.

Lord WATSON—You say although the word “river” might have been quite unintelligible if dissociated from the word “improvements,” that the word “rivers” is not necessarily so.

Lord SHAND—On the other hand, it is said it is a curious combination to put first “rivers” and then put “lake improvements.”

Lord HERSCHELL—If one is to throw light on rivers from the lake improvements and the consideration that the lakes are not transferred, and shut one’s eyes to the fact that canals are given, I understand the point to be that it would be very extraordinary that rivers were given if lakes were not given. What are given are canals, and it would be very extraordinary that canals should be given and that rivers should not be given, a canal being an artificial river, that the artificial river should be given and that the natural river should not.

Lord MORRIS—A canal is an artificial work and a river improvement is an artificial work. That would be, to my mind, an argument the other way ; it would go to show that “improvements” ought to refer to improvements to river, because you are dealing with subjects artificial.

Lord HERSCHELL—I do not know whether lands set apart for public purposes are artificial.

Lord MORRIS—I am referring to canals.

Lord HERSCHELL—You may use arguments one way or the other and you may land yourself in a maze ; the question is whether you should not construe it without regard to any of these things.

Mr. ROBINSON—That is what I suggest. If there was this alteration made by adding the letter “s” after the Quebec Resolution, one must assume there was some motive for doing it, and it certainly was done by some one. We all know there are cases in which the addition of the letter “s” in wills and other documents has worked the greatest injustice. We have to take things as they are passed and as they are written.

Now I have done with that word “rivers” and I pass to the next matter. The next is harbours, and that I pass over because we have succeeded in harbours. I have read through the part of the judgment about harbours merely because I thought it had an equal bearing here. Canals we get by schedule 3.

Lord DAVEY—Before you pass from rivers I should like to understand from you whether you claim every river in the territory of the Dominion, or whether you claim only what are public rivers; and if you say that you claim only public rivers what your definition of a public river is.

Mr. ROBINSON—There may be some difficulty in giving a definition of a public river. It must be a river the property of the Province.

Lord DAVEY—It must have been the property of the Province at the date of the Confederation.

Mr. ROBINSON—Yes, and being the property of the Province it would be public property.

Lord DAVEY—It must be a river which was either a public work or a public property.

Mr. ROBINSON—It must be one or the other.

Lord DAVEY—And the Statute itself says it must have belonged to the Province at the time of the Confederation.

Mr. ROBINSON—Yes.

Lord WATSON—It meant property which had not been granted to any subject at the date of the Act.

Mr. ROBINSON—Canals we get from the schedule. I am reading from page 8 of the Joint Appendix. Then

the waters occupied by lighthouses and piers—that we get because the lighthouses and piers are given us. Then so much of waters of lakes of every description as were occupied by improvements. We get that under the word “improvements.” Then “the large fresh water lakes, more especially the chain of great lakes from Lake Superior to the St. Lawrence River.” Upon that I have only, in point of fact, to refer to what I have read from that judgment in *The Queen v. Robertson* as being my argument with regard to the reason for the lakes being vested in us as public property.

Lord SHAND—What is the argument?

Mr. ROBINSON—We do not get lakes by any specific words; if we are entitled to them we are entitled to them by reason of our jurisdiction over navigation and over our commerce and over fisheries.

Lord SHAND—You would only get them so far as necessary for those purposes, and that does not in the least involve transferring the property.

Mr. ROBINSON—Then we have not got it.

Lord HERSCHELL—You say Chief Justice Ritchie said it did involve the transferring of the solum of harbours.

Lord SHAND—Then that would have given you the rivers.

Mr. ROBINSON—What they say on the other side, is that everything which was intended to be given to the Dominion is given specifically.

Lord HERSCHELL—The fact that certain things are given specifically is no doubt a strong argument against you; but, at the same time, it is perhaps not a conclusive argument, because my impression is that there are several matters dealt with more than once in this Dominion Act.

Lord WATSON—I do not know why it is necessary to refer to all these external matters. It may be very useful after we have heard Counsel on the other side. The finding is in your favour, is not it, upon this point?

Mr. ROBINSON—No, it is against us.

Lord DAVEY—I can quite understand why they should have given you rivers and not given you lakes. From the physical character of a river it requires more constant attention to maintain the navigation, to remove obstructions, and so forth; whereas these great lakes, which are inland seas in fact, do not require that amount of attention for the purpose of maintaining the navigation over a lake. It is true that for the purpose of navigation certain works on the shores of the lakes are necessary, such as embankments, quays, and so forth, but those are given you.

Mr. ROBINSON—Yes, I see the force of the argument. I do not dissemble it for a moment.

Lord MORRIS—All the lakes are not large and all the rivers are not small.

Lord SHAND—Could the matter be worked practically, supposing it were held that rivers remained in the Dominion and lakes remained in the Provinces?

Mr. ROBINSON—Oh, yes.

Lord DAVEY—In large rivers constant attention is necessary to keep the rapids fit for navigation.

Mr. ROBINSON—Yes, it is more necessary in the rivers than in the lakes, because the channels are narrow.

Lord WATSON—I do not know what is considered a river in Canada, but I believe that there are streams in Canada which might be contained in this term, and which may have been entirely within the property of the Province, and reserved to the Province. If these are all given, non-navigable rivers, small rivers, if there is such a thing in Canada, the result would be that the Provinces of Canada, whilst retaining the land through which they run, might not give a grant to a subject alongside it which would enable him to acquire riparian rights.

Lord HERSCHELL—Is “river” in Canada applied to anything that is not tolerably large? I am not sure what you call streams we may not call rivers. I know we had a case before this Board about floating timber down rivers.

Lord DAVEY—There may be some question where the lake ends and the river begins.

Lord WATSON—My ideas of a Canadian stream are very hazy.

Lord DAVEY—It is a question of fact, where the Lake of Ontario ends and the St. Lawrence begins.

Mr. ROBINSON—That no one can tell unless it is specified in a treaty.

Lord DAVEY—It is conventional.

Mr. ROBINSON—It is local to a certain extent. They begin calling a thing a river and they go on calling it so.

Lord WATSON—Great Britain has its own idea as to what constitutes a river, although it is a very varying idea.

Lord DAVEY—I remember one case which I argued a great many years ago, when Lord Blackburn was here, where the question was whether a particular spot was in the lake of Loch Lomond or in the River Severn.

Lord HERSCHELL—I fancy it depends a good deal upon the locality. I heard of an American boy, who said: "There is a river runs through my father's garden which is larger than your Thames, but not larger than our house."

Mr. ROBINSON—Now this question of the ownership was suggested by his Lordship, Sir Henry Strong, at page 67 of the Joint Appendix, Volume IV.: "There are, of course, fisheries of a very different character from those in non-navigable waters to be found within the limits of all the Provinces—public fisheries, such as those in tidal rivers and in the great lakes of the Western Provinces. A question may arise whether the provisions contained in section 91 authorise Parliament to empower the Crown to grant exclusive rights in respect of such fisheries."

I do not think I can say more with regard to the ownership of the beds of the lakes. I submit we ought to have the beds of the lakes, as being applicable to lakes.

Lord DAVEY—Would you mind telling me, do you concede you must show that the lakes if vested are vested

in the Province? I mean the burden of proof is upon you.

Mr. ROBINSON—I suppose so.

Lord DAVEY—Section 109 would carry them to the Province supposing you cannot show words taking them out of that section.

Mr. ROBINSON—I should suppose so. Another section which has a strong bearing upon it is section 117. I think it lies upon us to show that we get it expressly.

Lord DAVEY—You say you do show that with regard to canals, public rivers, and harbours, and you think you make it probable with regard to the lakes.

Mr. ROBINSON—The one I say I show directly, the other I can only show by argument and inference.

Then I come to the next question, and I think that is a question upon which, if I am not mistaken, we have succeeded. As to harbours, we have succeeded. As to fresh water lakes, of course there is a distinction drawn in the United States between lakes which form national boundaries; but I do not think it avails us much, for this reason, that in the United States the beds of those lakes are vested in the States, while the jurisdiction of the United States, with regard to trade and commerce, extends to anything they may require to do with regard to navigation.

Lord DAVEY—I suppose your opponents would say that is the position here: You can do anything that is necessary in the opinion of the Dominion Government for the purpose of improving the navigation, but you have not got the soil.

Mr. ROBINSON—They do say so. Then there is water set apart for public purposes and lands set apart. Those we do get. Then, as to the sea shore which is between high water mark and low water mark, and as to territorial waters.

Lord HERSCHELL—What is the difference between It and I? What is the difference between sea coast and territorial waters?

Mr. ROBINSON—Sea shore is the ground between

high and low water marks ; sea coast is the territorial limit.

Lord HERSCHELL—Where do you say the sea coast is given ?

Mr. ROBINSON—I want to draw your Lordships' attention to the words of the section which gives us fisheries, and the comment made upon it by Lord Selborne. We get sea coast and inland fisheries under section 91, No. 12. The Dominion has exclusive legislation and jurisdiction over sea coast and inland fisheries.

Lord SHAND—Have you gone now to the question of jurisdiction ?

Mr. ROBINSON—No ; we are still upon the question of property.

Lord DAVEY—Your appeal relates exclusively to property ?

Mr. ROBINSON—At present it does under the section 91.

Lord WATSON—Upon what authority do you say that section 91 gives you any right to property in anything ?

Mr. ROBINSON—I do not think it does.

Lord DAVEY—That is merely legislative jurisdiction.

Mr. ROBINSON—That is all.

Lord HERSCHELL—Do you abandon the sea coast ?

Mr. ROBINSON—Unless it follows from territorial waters.

Lord WATSON—I am unable to mix these two things up. It is one thing to say within a certain tract of the shore is the property of the Dominion, and another thing to say that the Dominion have legislative power. Their legislative power is equally intact whether the property belongs to them or not.

Mr. ROBINSON—Quite so.

Lord DAVEY—You give up foreshore.

Mr. ROBINSON—Territorial waters I submit rest upon an entirely different foundation. The three mile limit rests upon international law, so to speak, and upon peculiar law applicable to it alone. I submit first that it is not strictly speaking part of the territory, and never was part of the territory of the Province. If either have property in it I should say it is the Dominion.

Lord DAVEY—I do not see how you get it into the Dominion if the Provinces had it before Confederation.

Lord HERSCHELL—These maritime Provinces before Confederation had certain international duties which now are transferred to the Dominion.

Mr. ROBINSON—That is what I am endeavouring to point out.

Lord WATSON—A right to territorial water is only a right to keep out under certain considerations other nations.

Lord DAVEY—It might be rather more than that.

Lord HERSCHELL—If neither had the property then whoever had the jurisdiction might have the right to take possession of the soil ; but if there was property in the soil before Confederation it might become an important question whether that is transferred.

Lord DAVEY—As to the right to property within the three mile limit, an injunction was granted in the English Courts to restrain Sir Edward Watkins and others from tunnelling under the bed of the sea below low water mark, on the ground that the property was in the Crown.

Lord HERSCHELL—If it is not in the Crown then it may be that any private individual might have a right to do what he pleased in it provided he did not interfere with navigation.

Lord DAVEY—It is all discussed in *The Queen v. Keyn*.

Lord HERSCHELL—It was left in some doubt what the result there was. Someone said that the Crown had a right to deal with it, but could only deal with it and appropriate it, so to speak, by legislation. Ultimately

those doubts were solved by legislation. I think that is how the matter stands.

Mr. ROBINSON—That is exactly how it stands.

Lord WATSON—The ratio of our three mile limit has rather disappeared.

Lord HERSCHELL—Some international writers put it at five, and some say neither, but substitute the words “gun shot,” which raises some very peculiar questions, because a gun shot certainly has gone as far as thirteen miles in a well recorded case, and if it extends for thirteen miles some interesting questions might arise between this country and France; the territories might overlap.

Mr. ROBINSON—Our territorial Statute has adopted one marine league. It is the 41 and 42 of Victoria, chap. 73. That has settled it by legislation for this country and for all parts of Her Majesty's Dominions. That is the Imperial Territorial Waters Jurisdiction Act, and it recites, “The rightful jurisdiction of Her Majesty extends and has extended always over the open sea adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's Dominion.” That is upon page 15 of the Record.

Lord HERSCHELL—I suppose the jurisdiction would not necessarily depend upon the property being in the Crown?

Mr. ROBINSON—I do not think it would.

Lord HERSCHELL—Unless it is part of the Queen's Dominions, you could not legislate with regard to all the world. Can you have any general legislation in any territory that is not part of the Dominion?

Mr. ROBINSON—They define it to be “such part of the sea adjacent to the coast of the United Kingdom or the coast of some other part of Her Majesty's Dominion as is deemed by international law to be within the territorial sovereignty of Her Majesty.”

Lord HERSCHELL—The territorial sovereignty implies that it is within the Dominions of the Crown and is not land which is privately owned.

Mr. ROBINSON—If it is the property of anyone it is

the property of the Crown. The question is whether it is the property of the Crown for the purpose of the Dominion or for the purpose of the Province. I submit it is the property of the Crown represented by the Dominion. I should question whether it ever could be said to have been part of the territory.

LORD SHAND—This point has been decided against you.

MR. ROBINSON—The whole thing has been decided against us, but this point has not been taken up separately.

LORD WATSON—It is impossible to tell what nest of questions might be developed from question 1.

MR. ROBINSON—Quite so.

LORD DAVEY—There are mines on the coast of Cumberland that go out miles under the sea. There was a question between Lord Lonsdale and the Crown about it, and I think it was settled by large payments.

LORD HERSCHELL—That definition of territorial waters is only a definition for the purposes of the Act.

MR. ROBINSON—That was all, nothing else.

LORD HERSCHELL—It therefore cannot be said to be a legislative declaration that it is within the territorial limit?

MR. ROBINSON—No.

LORD HERSCHELL—It is only used for the purpose of giving jurisdiction with respect to offences committed within the territory. On the other hand, it is difficult to see on what ground there can be legislation directed against all the world, except on the ground that it is within the territory.

LORD DAVEY—Territorial sovereignty rather implies the possession of the territory. It is sovereignty reserved by virtue of territorial rights.

MR. ROBINSON—In *Keyn's* case, which was heard by fourteen judges, one of whom died before the judgment was delivered, six only took the ground that it was part of the territory of the Crown. The remainder of the judges did not adopt that view. In the *Franconia*,

which is in 2 Common Pleas Division, page 177, and which was after the decision in *Keyn's* case, Lord Coleridge says: "I am of opinion that the order must be set aside. It seems to me to be quite plain that the decision in *Reg. v. Keyn* is binding upon all the Courts. The *ratio decidendi* of that judgment is, that, for the purpose of jurisdiction (except where, under special circumstances and in special Acts, Parliament has thought fit to extend it) the territory of England and the sovereignty of the Queen stops at low water mark."

Lord HERSCHELL—Is that quite an accurate description of it?

Mr. ROBINSON—I do not presume to criticise it.

Lord HERSCHELL—I do not think it is quite.

Mr. ROBINSON—It was said the jurisdiction of the Sheriff of the County did not extend below low water mark.

Lord HERSCHELL—That opinion of the judges was governed by this. When they looked at the way in which the Criminal Law was administered, it was confined to Counties, and therefore there was no machinery by which the Crown, if they possessed the territory, had dealt with it.

Lord DAVEY—I think they all agreed that the spot in question was not within the County of Hampshire.

Lord WATSON—I do not think it can be maintained for one moment, if you take the three mile limit in the English Channel, that that is not open to all the world. It is a highway unless there be State reasons to prevent ships coming there.

Lord SHAND—Really what we are talking about does not touch the question.

Lord HERSCHELL—If at the time it was not vested in the Province it cannot now have passed to the Dominion.

Lord DAVEY—Mr. Robinson really invites us to decide a very big question.

Lord WATSON—A very big question.

Lord DAVEY—I think the Attorney-General of England might have something to say to this question.

Mr. ROBINSON—I do not wish to invite your Lordships to a discussion of the question.

Lord WATSON—Perhaps the safest thing would be to say that the test is whether the country along whose shores the sea flows has within certain territorial limits been permitted to exercise territorial laws, and if so how far the right of property is included.

Lord HERSHELL—You claim the ownership of the territorial waters?

Mr. ROBINSON—Yes.

Lord DAVEY—Mr. Robinson, for the purpose of this case all we need say is whether it was vested in the Province, whether it passed to you, or remained in the Province.

Mr. ROBINSON—Except that that would leave the question of whether it was vested in the Province to be determined upon a future occasion.

Lord DAVEY—We are not bound to decide that now?

Mr. ROBINSON—No.

Lord MORRIS—If it were vested in the Province, what was there to transfer it to the Dominion?

Mr. ROBINSON—If it was vested in the Province as part of the territory of the Province, then I am inclined to think that what we should get over it is only legislative jurisdiction; whatever interest the Province had they had under international law for certain purposes, mainly for the purpose of defence. Now the subject of defence is expressly entrusted to the Dominion.

Lord WATSON—As far as I can see, the Dominion can do whatever is proper for its own defence, whether by legislation or otherwise; and it appears to me to be idle to sit and discuss questions as to what are the limits imposed upon that property by international law, or whether the Dominion Government, which has power to do everything which is necessary, does acquire the character of a proprietor or not.

Lord DAVEY—If a coal mine is discovered under the three mile limit the question may arise, but at present it is a mere academical question.

Lord HERSCHELL—In what question is it included?

Lord DAVEY—We have assumed it is included in section I.

Lord WATSON—The second part of the question says: "And is there in that respect any and what difference between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable?"

Lord DAVEY—I do not think it is substantially raised by the first question.

Mr. ROBINSON—If your Lordship should think it better not to go into it I will not go into it.

Lord HERSCHELL—"Did the beds of all waters situate between the territorial limits of the several Provinces and not granted before Confederation become, under the British North America Act, the property of the Dominion?" That is the beginning of the first question. If this was water situate within the territorial limit of the Province then the question is raised.

Lord DAVEY—We may answer that without affirming that it is the property of the Province.

Lord WATSON—It appears to me to be a very barren point now. If it comes to a question of foreshore it may be a different matter.

Mr. ROBINSON—Then I shall not discuss it.

Lord DAVEY—Have you anything more to say about the foreshore except that you have rights of jurisdiction over it?

Mr. ROBINSON—No.

Lord DAVEY—Do those rights of jurisdiction render it necessary to have the right to the soil of the bed?

Mr. ROBINSON—That is the question to be decided.

Lord DAVEY—Which part of your jurisdiction do you say necessitates your owning the soil of the foreshore?

Mr. ROBINSON—Our jurisdiction as to the foreshore could not come under anything else than the foreshore, or navigation, and trading, and commerce.

Lord MORRIS—Why should it come under fisheries?

Mr. ROBINSON—The question whether we own the bed of certain fishing grounds becomes material in this way. We have passed several Orders in Council setting apart several fisheries.

Lord HERSCHELL—There are some fisheries which are connected with the ownership of the soil, there are others which are not. As regards the water within the territorial limits, I suppose it would answer your purpose to say, in so far as rights and duties in respect of those territorial waters are given to the Dominion, that what was necessary for exercise of those territorial rights within those waters was given also.

Mr. ROBINSON—That would answer our purpose.

Lord DAVEY—You have jurisdiction over fisheries?

Mr. ROBINSON—Yes.

Lord DAVEY—I think, in English cases, the ownership of the fishery by the Lord of the Manor has been admitted as evidence of ownership of the foreshore.

Lord HERSCHELL—The House of Lords affirmed in *The Attorney-General v. Emerson* certain cases which decided that, wherever you find a several fishery, the ownership of the several fishery was *primâ facie* evidence of the ownership of the soil, but only *primâ facie* evidence, and the question was to be decided, subject to that, by a consideration of the whole of the evidence.

Lord DAVEY—You cannot show you cannot exercise fishing rights without having the ownership of the foreshore?

Mr. ROBINSON—In some respects I can; I am not prepared to say you cannot exercise them in some cases without the ownership. We have, for example, set apart several rivers for hatching and artificial propagation. We must have that power. Whether you call it owner-

ship or whether you call it exercise of our legislative powers, is another question.

Lord HERSCHELL—Do you mean that, in some fisheries, a certain use of the soil is ordinarily connected with the dominion over it?

Mr. ROBINSON—Yes.

Lord HERSCHELL—Whether you get that simply as ancillary to the fishery, or whether you get the soil in order that you may have the full enjoyment of the fishery does not matter?

Mr. ROBINSON—No.

Mr. BLAKE—They have only legislative jurisdiction over the fisheries; over sea coast fisheries and inland fisheries they have only legislative jurisdiction.

Lord DAVEY—That is how you construe it?

Mr. BLAKE—Yes; it has been misconstrued by this Board, but that is the accepted construction.

Lord DAVEY—"Sea coast fisheries" is not a very good expression, because it may include fisheries out at sea.

Mr. BLAKE—They would be deep sea fisheries.

Lord MORRIS—The power of legislating as to the fisheries, I should think, does not give them any property.

Lord SHAND—Mr. Robinson says the moment they get legislative powers that gives him the right to the property.

Mr. ROBINSON—I have been utterly misunderstood.

Lord DAVEY—Mr. Robinson says harbours are expressly given to him; but I understand Mr. Robinson's argument to be that, in some cases where the franchise or right of legislation cannot be exercised without the soil then the soil, by implication, passes.

Lord WATSON—I cannot understand that. I can quite understand if they had any power given to create a franchise that would be another matter, but a power to create a franchise and a power to regulate fisheries are, to my mind, two things absolutely distinct.

Lord HERSCHELL—It may deprive the owner of the soil of all exercise of his rights, because you may suppose the only way in which he can exercise his rights in respect of a particular *locus* is by the fishery; and if exclusive legislation is given, it may be it would enable the Dominion, within a certain time, within a certain area, to deprive him of all effective use of the property in the soil used in that way, it may enable interference with the rights of ownership: but that would not give it the property.

Lord WATSON—I am not satisfied that apart from preventing it, you can regulate fishing by other stations within the three mile limit.

Lord HERSCHELL—Your argument now is not dealing with the three mile limit.

Mr. ROBINSON—No, I have passed from that. I have passed from the question of proprietary ownership altogether. That is involved in question 1, and I have done with question 1.

Now question 2 has been answered in our favour.

Question 3 only becomes material if question 2 had been answered differently.

Question 4 becomes immaterial, I should say, here at all events it is answered in our favour.

Question 5 is a question which I think has been answered in the same way by both of us. I have gone on, my Lords, to question 5. I have passed over questions 2, 3, and 4, saying what I have to say about them, that it is not material to discuss them now.

Question 5 is a question about which there is no dispute in the answers, we have both answered that in the same sense, namely, in the affirmative.

Lord WATSON—You are agreed upon that, that they had?

Mr. ROBINSON—I think so.

Now, questions 6, 7, and 8 raise very important questions.

Lord WATSON—Then no question arises for us under question 5.

Mr. ROBINSON—I do not think so.

Mr. BLAKE—We are satisfied with the answer.

Lord DAVEY—They have succeeded in satisfying you both?

Mr. ROBINSON—One of the learned judges declined to answer that question.

Now, my Lords, I go to questions 6, 7, and 8, and they are all connected together and they all relate to the legislative jurisdiction. Your Lordships are aware I have passed now from the question of proprietary ownership. I connect questions 6, 7, and 8 together because substantially they are connected together and they relate to what I think is at all events one of the most important questions submitted to your Lordships.

Now, before entering into the discussion of that question, I may venture to explain what I understand *The Queen v. Robertson* to decide.

Lord SHAND—Why is there a distinction between 6 and 7?

Lord HERSCHELL—Question 6 is: “Has the Dominion Parliament jurisdiction to authorise the giving by lease, licence, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?” No. The right of fishing in such waters as mentioned in the last question is strictly a right incidental and accessory to the ownership of the soil. That is in waters the beds of which had been granted by the Crown.

Lord WATSON—That must be a mistake.

Lord HERSCHELL—It must mean which had not been granted by the Crown.

Mr. BLAKE—Question 8 is the one which deals with not granted.

Lord DAVEY—Questions 6 and 7 are only a repetition of question 5.

Mr. ROBINSON—One says jurisdiction and the other says exclusive jurisdiction.

Lord HERSCHELL—Do you contend that the Do-

minion Parliament has jurisdiction to authorise anyone to fish in waters the beds of which had been granted by the Crown?

Mr. ROBINSON—Yes.

Lord HERSCHELL—If the riparian proprietors had the exclusive right of fishing before the Act of Confederation, that is to say, if nobody had it but the Province.

Mr. ROBINSON—They had not jurisdiction as against the Provincial Legislature.

Lord HERSCHELL—It is not a question of jurisdiction.

Mr. ROBINSON—I mean they had not the exclusive right of fishing.

Lord DAVEY—I thought you admitted that they had?

Mr. ROBINSON—No.

Lord HERSCHELL—I suppose Mr. Robinson says that although there has been a grant by the Crown, the Provincial Legislature would have the right to take away the grant by the Crown. Whether it is a right thing to do or not the Legislature can do anything.

Lord WATSON—Then we must treat it as a question whether they have the power to repeal the rights granted.

Mr. ROBINSON—Yes, we have unquestionably the power.

Lord DAVEY—I think the judges were right not to answer that.

Lord WATSON—The basis of question 6 is that the Crown had actually parted with the bed of the river. Do you maintain that ground vested in the Crown for the behoof of the Province which the Province had given to a grantee is given by this Act to the Dominion?

Mr. ROBINSON—Not at all.

Lord HERSCHELL—This Board has held that although there be a grant of a piece of a river which is perfectly private, and although that had been made only navigable by the acts of the person to whom it was

granted, it was not only competent, but it was the true construction of the Act of the Legislature that other people had equal rights. I argued against that that the Legislature could not have done it, but this Board held they could in spite of all I said to the contrary. Therefore, I apprehend it might equally be the case that after the grant of an exclusive fishery it was competent to the Legislature to give other rights to other persons in the water as to which the exclusive right had been granted and that would be no more violence than the interference with private rights which was held to have been effected by the act I have referred to. Assuming that legislative right and power existed before the Act of Confederation, the question is, Has it passed to the Province?

Mr. ROBINSON—Yes.

Lord SHAND—Do these questions mean, Has the Dominion Parliament power by legislation to do these things?

Mr. ROBINSON—Yes.

Lord SHAND—It is a pity that was not expressed.

Mr. ROBINSON—Parliament can only do it by legislation.

Lord SHAND—That is quite true.

Lord WATSON—I did not mean to suggest a doubt that these two Legislatures, one or other of them, can take away any private property in Canada for public purposes. I suppose they would give compensation; probably they did so in other cases.

Lord HERSCHELL—They did not in the case to which I have alluded.

Mr. ROBINSON—We need not discuss the question of justice or injustice.

Lord DAVEY—You say it is inland fisheries?

Mr. ROBINSON—And sea coast fisheries.

Lord DAVEY—This is inland.

Mr. ROBINSON—I am coming to the consideration of that.

Lord WATSON—The question is, which Parliament can do it.

Mr. ROBINSON—Yes, one Parliament or the other in Canada can do whatever the Imperial Parliament can do here; that has been decided by this Board. Over any subject committed to either Parliament they are as supreme as the Imperial Parliament is over all subjects. That has been distinctly decided.

Lord WATSON—These questions will involve some curious questions. Suppose we were to hold, as the judges have already done, that non-navigable waters as at present existing are not the property of the Dominion, the Dominion has power to legislate as to navigation; could they open up and render one of these non-navigable rivers navigable?

Mr. ROBINSON—Yes.

Mr. BLAKE—That I think is conceded.

Mr. ROBINSON—According to the best authorities we have there is no question upon that.

Lord DAVEY—You have exclusive power over navigation?

Mr. ROBINSON—Yes, I am coming to that afterwards.

Now my learned friend has said, and he may be very right—I do not take it for granted that he is right, because I feel it impossible to say that what Lord Selborne said when sitting upon this Board was clearly wrong.

Lord DAVEY—In what case?

Mr. ROBINSON—*L'Union St. Jacques de Montreal v. Bélisle*, in the Law Reports, 6 Privy Council, page 37. It is at page 15 of the Record. This was an argument about a different matter. Lord Selborne says: "It was suggested, perhaps not very accurately, in the course of the argument, that upon the same principle no part of the land in the Province upon the sea coasts could be dealt with, because by possibility it might be required for a lighthouse, and an Act might be passed by the Dominion Legislature to make a lighthouse there. That

was not a happy illustration, because the whole of the sea coast is put within the exclusive cognisance of the Dominion Legislature by another article." That shows that his Lordship considered these words, "sea coast and inland fisheries," not as being sea coast fisheries and inland fisheries as we have always supposed they meant, but as being the sea coast and inland fisheries.

Lord DAVEY—The point was not directly in question there.

Mr. ROBINSON—No.

Lord SHAND—It is very like the rivers.

Mr. ROBINSON—That suggested itself to me in reading that remark. I do not think that is a wholly impossible construction to have been intended, at least I submit it is not. It may be they intended to give us the sea coast, which would include the fisheries.

Lord SHAND—This is exactly the same argument as upon the other point of the rivers and the river improvements.

Mr. ROBINSON—I do not desire to dwell upon it.

Lord DAVEY—Which do you say is the right construction?

Mr. ROBINSON—My impression is that the other construction is the right one.

Lord DAVEY—Sea coast fisheries?

Mr. ROBINSON—Yes.

Lord WATSON—The whole question there was whether the Legislature had in an Act of 1872 enacted a Statute which was in violation of the powers given to the Dominion Parliament in 1891.

Lord DAVEY—Mr. Robinson does not refer to it for the decision in the case, he only gives it as an illustration.

Lord WATSON—In disposing of that question, the noble and learned Lord said that you might as well say that legislating for the sea coast was an interference with the power of the Dominion, because by possibility that point of the sea coast might have been selected for the erection of a lighthouse.

Mr. ROBINSON—Yes.

Lord DAVEY—It shows that a man of Lord Selborne's eminence expressed that opinion; but it is no authority, because it was not a point decided in the case.

Mr. ROBINSON—I do not cite it in the case. They may have said you have got the sea coast fisheries, we will also give you the inland fisheries.

Lord MORRIS—A portion of the sea coast must have been a private property.

Mr. ROBINSON—They would have legislative jurisdiction over it. We will assume it was not so, and that that was a misapprehension of his Lordship.

Now, will your Lordships allow me to say what I think *The Queen v. Robertson* has decided? I think there are few instances of a case in which the opinions expressed have gone farther beyond the actual point in dispute; but the opinions were expressed after great deliberation and consideration, and when this case came to be argued before the Supreme Court they intimated that they would adhere to those opinions, and they did adhere to them, I suppose, without further consideration. All that was decided in *The Queen v. Robertson* was that under section 4 of the Dominion Act, which authorised the Commissioners to grant a fishery or a licence to fish where no exclusive right existed by law, they were not authorised to grant a licence to fish in the bed of a non-navigable river, the bed of which had been granted to private individuals before Confederation. They had actually done much more than give a licence to fish, they had given the bed of the river. It was not necessary for us to quarrel with that decision so far as the decision went. At first there was an impression that part of the land in question in *The Queen v. Robertson*, which was a stretch of water in the River Miramichi where it was not navigable, had not been granted. Mr. Justice Gwynne said the Minister had no right to grant the licence, because he said the exclusive right of fishing did exist in the Company to whom before Confederation it had been granted, and in that respect he was agreed with by the Supreme Court. But it was thought in the argu-

ment before him that part of the land had not been granted, and he said even if the land had not been granted it was his opinion that under the legislative jurisdiction given to the Dominion they would have power to give the licence.

Lord HERSCHELL — That was in favour of the Dominion ?

Mr. ROBINSON—Yes, that went to the Supreme Court.

Lord DAVEY—They holding that the rivers were not vested in the Dominion.

Mr. ROBINSON—They held that as far as the property went.

Lord DAVEY—But if the rivers are vested in the Dominion the inland fisheries would go with them ?

Mr. ROBINSON—Yes.

Lord WATSON—As I understand they said that whilst the Dominion had the power of legislating against the tenant or occupant of the fisheries, and regulating his mode of fishing in any way—fixing a close time and so on—that the property was in the Province, and that they were the only persons who could lawfully create a tenant.

Lord DAVEY—It may be that the legislative authority was in the Dominion over the fisheries, but yet they could not grant a licence to fish, which is the exercise of a right of property. It may be they could make regulations, as the noble and learned Lord says, for a close time and so on, but it does not follow from that they can grant a licence to fish against the owner of the soil.

Mr. ROBINSON—We are legislating in that case to take away property. We can take away this species of property.

Lord DAVEY—I do not think it follows because you have jurisdiction over fisheries you can alter the property in fisheries. You may prescribe the period during which nets may be used or the period during which angling may be permitted, or the mode in which it may be exercised, but it does not seem to me to follow that you

can alter the property in the fishery, either by granting a lease or in another mode.

LORD HERSCHELL—You say notwithstanding a licence was granted to a person the Legislature might afterwards say it is inexpedient that the public should be deprived of the right to fish, and therefore we will pass an enactment by which anyone can upon payment of a certain sum obtain a right to fish. You say that is dealing with the fishery quite independently of the question of the property in the soil.

MR. ROBINSON—Quite so; that is my argument. I put this case to show the importance of the matter to the Dominion, and next to show what legislation may be necessary. As I understand, in the Dominion—take the mouth of the River Fraser—where the great salmon fishings are going on, and the Dominion have spent enormous sums, I am told half a million this year—for the purpose of keeping the channels clear and enabling the fish to run and making fishing stations. Those fishing stations they let out. They say that is Provincial land. If that is so we have no right after expending that money to give anybody the right to fish there.

LORD DAVEY—This question does not arise if you succeed in showing that the rivers are in you.

MR. ROBINSON—No it does not.

LORD HERSCHELL—You are assuming that the body of the river is in them?

MR. ROBINSON—Yes.

LORD HERSCHELL—The soil may be in the person who has the fishery or has not. You say that if all the legislation with regard to fisheries is vested in the Legislature it has power, quite independently of any ownership of the soil, to grant the right of fishing.

MR. ROBINSON—Yes.

LORD WATSON—I do not follow the definition of a fishing right. I have always taken a fishing right to be an appurtenant to land, passing with the ownership of soil.

Lord HERSCHELL—There are many several fisheries held in England in which the ownership of the soil is in the Crown, or in the Lord of the Manor, and the several fishery is in another person.

Lord SHAND—What do you ask the Board to declare with regard to these fisheries?

Mr. ROBINSON—That we can legislate with regard to fisheries, which is a subject matter of property.

Lord SHAND—And give the fishery tenant the right to make erections?

Mr. ROBINSON—Just as we please.

Lord DAVEY—And to grant licences?

Mr. ROBINSON—And to grant licences. Now let me endeavour to explain that a fishery, according to all the definitions, is a right to take fish. There are two meanings given to it, one is the industry and the other is the right to take fish. We say that fisheries in that sense are subject matter of property, and we say that this Statute must be read as it has been read in numerous other cases, as if the property and civil rights the legislative jurisdiction over which is given by the Act of 1892 were read as property excluding Fisheries.

Lord HERSCHELL—You would say that if the property is said to be in the Province and all that you have is the legislative authority, and if the Province is left free to deal with the property, it might preclude the Dominion from this authority by granting away to third persons the whole of the fishery?

Mr. ROBINSON—Of course it might. There are other considerations I shall call your Lordships' attention to in a moment. Take section 91, patents and inventions and copyrights. These are matters of property that are entrusted to the Dominion. I take it that property and civil rights in section 92, No. 13, is to be read as property and civil rights, with the exception of patents and inventions and copyrights.

Lord HERSCHELL—You say that the Dominion

Legislature, having legislative power with regard to patents and inventions could legislate to a certain date as to all property in patents.

Mr. ROBINSON—If the Dominion Legislature chose they could take away my patent and give it to another. The Provincial Legislature can take away A.'s farm and give it to B. I say that whatever the Province could have done before Confederation we can do now, and they did license before Confederation. We say we have the exclusive legislative authority over fisheries.

Lord WATSON—That raises a very important question upon section 91 coming pretty near to questions that have been raised under that section as to what is meant, a power to regulate or a power of abolition.

Mr. ROBINSON—Yes, you must remember that regulation is not mentioned here.

Lord WATSON—Take one for instance. The regulation is mentioned as to trade and commerce.

Lord HERSCHELL—The words of the section are very wide; the exclusive legislation is extended to all matters coming within the class of subjects. The question is whether legislating as to who shall have the right to fish is a matter coming within the class.

Mr. ROBINSON—Yes.

Lord WATSON—I suppose you would not say they could abolish navigation and shipping because the word "regulation" does not occur?

Mr. ROBINSON—I should have thought you could not limit their powers over navigation. If your Lordship puts the question to me my own impression is that the Dominion Legislature could abolish navigation if they chose and they could abolish fishing if they chose. Let me put a case which has happened in the United States upon the question of fishing. It was found in the State of Massachusetts that it was necessary to stop fishing altogether and to say that nobody should catch fish within the limits of that territory except a committee appointed by officers of the Legislature.

Lord SHAND—Was that for all time?

Mr. ROBINSON—I cannot undertake to say ; what I mean is this, they passed a statute to take away the right to fish from the individual proprietors and give it to persons named by them. They passed it I assume under the assumption that that was necessary in order to prevent the destruction of fish.

Lord WATSON—That is exactly what they do in this country with salmon fishing. They take away from the riparian proprietor the right to fish at certain times of the year, and a Board is constituted to protect the fishing.

Mr. ROBINSON—They not only did that, but they named people who had no interest in the fishery to catch the fish.

Lord WATSON—I have no doubt the time will come when you will require a Salmon Act.

Mr. ROBINSON—Very possibly.

Lord HERSCHELL—Before the Confederation Act, even although a several fishery was granted, no one can question the Province had power to legislate with regard to it, and to give to whom it pleased and on what terms it pleased the right of fishing. Supposing they were to attempt that legislation now, the question is whether it might not be said you are legislating on a matter coming within head 12 in section 91. The question is what would be the answer to it. At first sight it does seem to come within the class of fisheries, because it determines who is to fish. You say if that vests in someone it must be in the Dominion by virtue of No. 12 of section 92?

Mr. ROBINSON—That is the exact argument, my Lord.

Lord WATSON—In considering that argument you must have reference to the terms of section 109. The right of fishing was in the Province and could be granted by the Province. Section 109 provided 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." If these rights were in the Province they are preserved to the Province unless they are to be found under public property in schedule 3. The answer which I have no doubt will be made is that that does not take away the right given by section 109 and vest it in you, but it gives you legislative power to deal with it.

Mr. ROBINSON—Legislative power to deal with it includes legislative power to take it away and give it to another.

Lord HERSCHELL—You do not claim to take away or interfere with the land?

Mr. ROBINSON—Not in the least.

Lord HERSCHELL—You say the giving to certain persons upon certain terms a right to fish does not take away your legislative power to interfere. If the Province had given to certain persons a fishery and reserved to itself legislative power to interfere with fishing in a way that might interfere with their grant?

Mr. ROBINSON—Yes.

Lord WATSON—I think the question of property and the question of legislative power are kept quite distinct in this Statute, and I had no intention to suggest that property which did not pass under one or other of those clauses 108 or 109 would be exempted from legislation either in the Province or in the Dominion.

Lord HERSCHELL—The difficulty is one which has to deal with matters connected with the enjoyment of property which are not the property itself, and with which enjoyment the province, notwithstanding its grant, could always interfere by legislation.

Lord SHAND—The word "fisheries" I think does not occur in 109.

Mr. ROBINSON—No, I am assuming for the purpose of my present argument that we have not the property and that is a section which relates to proprietary rights.

Lord SHAND—"Lands" there would cover fisheries?

Mr. ROBINSON—Very probably.

Lord DAVEY—It would be under "royalties."

Lord MORRIS—"The right of fishing in such waters as mentioned in the last section," that is the waters in a navigable or non-navigable river the beds of which have been granted to a private individual by the Crown.

Mr. ROBINSON—I have dealt with that.

Lord MORRIS—What is the answer?

Mr. ROBINSON—The answer is in the affirmative.

Lord MORRIS—If that is so how can the Dominion Parliament have the jurisdiction to authorise the licence?

Lord DAVEY—Because they may take away a man's licence if they like.

Lord MORRIS—"Fisheries" must mean fisheries that belong to the Province!

Mr. ROBINSON—Oh, no.

Lord DAVEY—The British Parliament legislates for private fisheries.

Lord MORRIS—Before 1867 the fisheries belonged to the Provincial Parliament. A fishery under section 5 did not belong to them. They had given away the property of it.

Lord HERSCHELL—They could legislate and take away the property.

Lord MORRIS—They could legislate and order a man to be hanged.

Lord HERSCHELL—No grant of land or sea shore deprived the Legislature of the right to give any person the right over it, and you say that if the right over it was the right of fishing the power to interfere with the bed of the river and its adjuncts which was before in the Provincial Parliament is now in the Dominion.

Mr. ROBINSON—Yes.

Lord WATSON—In one sense it is the main consequence of legislative power to affect the rights of property.

Mr. ROBINSON—I suppose it is.

Lord DAVEY—You might conceivably have an Act which enacted that every owner of a salmon fishery shall be obliged to grant licences in terms not exceeding what may be settled by arbitration.

Lord WATSON—Or the Provincial Parliament might enact a clause.

Mr. ROBINSON—Let me take another instance. Bills of exchange and promissory notes by No. 18 of section 91 are committed to the Dominion. It has been held with us, and held almost as a matter of course, that although property and civil rights would have included property and rights of contract, which would have included bills of exchange and promissory notes, nevertheless it must be read as if it were rights in the Province exclusive of bills of exchange and promissory notes.

Lord HERSCHELL—Can it be that whatever comes within the clause is taken away?

Mr. ROBINSON—I should have thought not.

Lord DAVEY—I should leave this question to your opponent.

Lord WATSON—They may even enact legislation which would not be legitimate if there had been a general Act passed by the Dominion.

Mr. ROBINSON—The *Insolvency* case points that out.

Lord DAVEY—And the *Liquor* case.

Mr. ROBINSON—Yes.

Lord HERSCHELL—Supposing some land is still vested in the Province which can be enjoyed by means of fishing, and they made a grant of that to a private individual, they could still grant that to a private individual, and that grant would give him the exclusive right of fishing, although, nevertheless, as you say, the Dominion Parliament might afterwards interfere with the enjoyment of those rights by giving other persons the right; you do not dispute that?

Mr. ROBINSON—No, it would pass to him under our right to legislate.

Lord DAVEY—It is conceivable that Parliament might pass an Act that the owners of Scotch rivers should upon certain terms give licences to fish.

Mr. ROBINSON—What I do not understand is how to argue against the power of the Legislature from the possibility of their not doing justice.

Lord HERSCHELL—Whichever has it has an equal power of doing injustice. It does not seem to me to matter which has the power to do the injustice.

Mr. ROBINSON—Not the least.

Now I am coming to two or three of the arguments given by the learned judges, because that is the best way of testing the case. How far are the reasons which they have expressed applicable? In the first place, I refer to page 68 of Volume IV., Mr. Justice Fournier; then to page 69, Mr. Justice Henry; and at page 121 of the Record, to Mr. Justice Girouard. "The Dominion cannot exercise the rights of the owner of the fisheries as is intended by section 4 of the Canada Fisheries Act, and issue 'fishery leases and licences for fisheries where-soever situated or carried on.' Section 91 of the British North America Act does not grant any right of ownership in the fisheries; the Dominion does not own the fisheries any more than it owns the banks, railways, telegraphs, or ships which it may regulate." And then he cites your Lordships' judgment in *St. Catharine's Milling and Lumber Co. v. The Queen*, which was a question of proprietary right. I do not contend for a moment that the Dominion does own the fisheries upon this branch of my argument.

Lord WATSON—The converse or the reverse of that proposition, whichever you call it, would come to this, that the Legislature has only power to deal with subjects of which it is the proprietor.

Mr. ROBINSON—Quite so.

Lord WATSON—And the great mass of legislation is directed to matters with which they have nothing to do.

Lord HERSCHELL—One of their intentions is to give the Dominion Parliament the power to create rights, and

by creating a patent they create a right—they can take it away.

Mr. ROBINSON—I know of no possibility of denying that the Dominion can take away my copyright and give it to somebody else if they choose.

Lord HERSCHELL—I do not know that they could, under sea fisheries and so on, take away the property, whatever it was, that was given. They might give such rights as to make it remain of very little value to the owner. That is rather the question—whether they can give persons rights which interfere with that.

Mr. ROBINSON—Yes.

Lord WATSON—They cannot give rights which would repeal the Statute of 1867?

Mr. ROBINSON—No. We had a case in which that question came up for the first time. The Provincial Legislature construed a will, and they took away property which was given by the will to one man and gave it to another. It was said they had no power to do that.

Lord WATSON—I doubt if they could take away from the Province property which the British Parliament has said is to belong to the Province.

Mr. ROBINSON—I am satisfied with that.

Lord WATSON—They may affect the value of its enjoyment.

Mr. ROBINSON—Yes.

Lord HERSCHELL—Your question relates to property of which the Provinces have since been deprived, because your case is that it was not their property at the time of their Confederation.

Mr. ROBINSON—It was their property. Questions 6, 7, and 8 cover all.

Now if your Lordships will turn to the Joint Appendix, at page 65 his Lordship Sir Henry Strong makes use of this argument; and I venture to ask whether that is applicable at all, or in any strictness, to the question we are now discussing. He invokes the well-known maxim in the construction of Acts

of Parliament against ascribing to an Act of Parliament any intention to impair rights of property unless it so expresses ; and he says at line 30 : " It is a sound and well recognised maxim of construction that in the interpretation of statutes we are to assume nothing calculated to impair private rights of ownership unless compelled to do so by express words or necessary implication." Surely it is not impairing the private right of ownership to give the Legislature jurisdiction over it ?

LORD HERSCHELL—The only question is, which of two Legislatures is to have the power ?

MR. ROBINSON—That is all.

LORD HERSCHELL—I do not see why a construction should be favoured which gives it to one rather than to the other.

MR. ROBINSON—It is not to be assumed that giving legislative power to the Dominion is taking away the property.

LORD DAVEY—Their judgments are based upon the assumption that the property is in one and the legislation is in the other, and they say you must not give such a meaning to the legislative power as will destroy the property.

LORD HERSCHELL—That applies to question 8, but not to questions 6 and 7.

MR. ROBINSON—Your Lordship understands my argument. I venture to submit that maxim has no proper application here.

LORD DAVEY—The fact of the legislation of the inland fisheries being vested in you is a presumption, you say, in favour of your argument upon the question of rivers ?

MR. ROBINSON—I think it is.

LORD DAVEY—All these nice questions do not arise if you get that.

MR. ROBINSON—They do not arise, but it is necessary to discuss them all.

LORD HERSCHELL—I think I am wrong in saying it

applies to question 8, because that refers to private rights of ownership. That would be the language used if it referred to a fishery which belonged to the Province.

Mr. ROBINSON—No.

Lord SHAND—The question is put very awkwardly. It looks as if there was to be some autocratic power used. They might take away a man's power or property, but give compensation; but it is no question of taking away private property.

Mr. ROBINSON—Not the least.

Lord SHAND—The question is which of the two Legislatures has the right to legislate with regard to this property?

Mr. ROBINSON—That is it.

Lord HERSCHELL—In a case I remember, a man was possessed of a master pattern in a patent which could not be used for forty years without a licence, and the Legislature said they would grant a licence. Here it is conceivable that the Legislature might interfere and say, "This fishery must be fished, and we will give the public a right to fish."

Mr. ROBINSON—If there is any assumption from our legislation, it is that we have not strictly guarded private rights. I dare say we shall never go further than we have; but we are startled with the decision which said we could not interfere with the exercise of the rights of property.

Lord DAVEY—You say that if you enact a clause by which you permit the owner of the fishery fishing for certain months in the year, that in a sense is depriving him for a time of his right of fishing.

Mr. ROBINSON—Yes, this case of *The Queen v. Robertson* arose out of two cases that had arisen in New Brunswick. Chief Justice Allen said that telling a man that he shall only fish in a certain way is only a bit less than saying he shall not fish at all. Justice Fisher used an illustration which I may refer to. He said if they have the power under this legislation to take away a

man's right of fishing, under navigation they might have a right to take away a man's ship. That is not altogether an illustration *ad absurdum*.

Lord HERSCHELL—If all legislative authority is within the power of the two, the Dominion must have the power even in that extreme case.

Mr. ROBINSON—And now we exercise the power. We have passed a series of Shipping Acts which are very similar to the Imperial Shipping Acts, which deal with the title to ships, which deal with masters and seamen, and which deal with ships being seaworthy, and we say in certain cases if the owner disobeys the regulations we shall take away his ship.

Lord DAVEY—You say that what they put forward would be a good argument in Parliament, but a bad argument in a court of law.

Mr. ROBINSON—I should have thought so.

[*Adjourned for a short time.*]

Mr. ROBINSON—I was pointing out to your Lordships some of the reasons given by the judges for the conclusion arrived at. I see also that in the Joint Appendix, on pages 58 and 61, Volume IV., the Chief Justice seems to take as the standard of the power of the Dominion Parliament the power which the Provincial Legislatures before Confederation exercised. Now your Lordships will see what I mean by that. He says he thinks that they have certain powers (I am reading from line 30) of regulations which he describes, and he says: "In other words, laws in relation to the fisheries such as those which the local Legislatures had previously to and at the time of Confederation been in the habit of enacting for their regulation, preservation, and protection with which the property in the fish, or the right to take the fish out of the water, to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the Province, or the individual, as the

dry land or the land covered by water." At page 61 he repeats the same thing. "I think Mr. Justice Fisher, in *Steadman v. Robertson*, took a correct view of the law. I have arrived at like conclusions, namely, that it was not the intention of the British North America Act, 1867, to give the Parliament of Canada any greater power than had been previously exercised by the separate Legislatures of the Provinces."

LORD HERSCHELL—Does he mean to draw a distinction between previously exercised and previously possessed?

LORD SHAND—He cannot have meant to draw that distinction.

LORD HERSCHELL—I think he must.

LORD WATSON—Whose opinion is this?

MR. ROBINSON—Chief Justice Ritchie's. It is in the Joint Appendix.

LORD SHAND—I should rather read it as "possessed."

LORD HERSCHELL—It cannot mean "possessed," because then his conclusion would have been the contrary.

MR. ROBINSON—What his Lordship does to show it conclusively is he first traces (and no one knew better) the course of legislation in New Brunswick on this subject, and he says, this being what they have done, I think the Dominion Legislature acquired no greater power to do this than what the Provinces previously had.

LORD DAVEY—What they previously could do?

MR. ROBINSON—That is another question altogether. I venture to submit that it is no standard of the power of the Dominion to consider what the Provinces previously did. The Provinces could do anything they pleased with regard to fisheries. Our contention is that that power passed to us, and all these reasons which I have mentioned, and which I think are the main reasons which they rely upon for coming to a different conclusion, are reasons really not tenable or sound. We have to get at the power of the Legislature over the particular subject

matter, and we have to begin with the propositions that all legislative power formerly possessed by Parliament was intended to be divided.

Lord WATSON—The only question he was there dealing with was whether the Dominion had power to grant a lease, not what was the extent of the power which might be exercised by the Dominion Parliament. That was not before him, though he expresses an opinion on it.

Lord HERSCHELL—Was it the same point in *Robertson's* case?

Mr. ROBINSON—Nearly the same point, my Lord. There were different cases of trespass. That is the way it came up.

Lord WATSON—There was no legislation and no question whether that legislation was in excess of the right of the Dominion power.

Mr. ROBINSON—Not in the least. If I may say so, I have rarely seen a case in which the opinions expressed went so far beyond the actual point in discussion.

Lord WATSON—It would only be an *obiter dictum* at the best.

Mr. ROBINSON—Two-thirds of the judgment in *Robertson's* case are not necessary for the decision, or the facts of that case.

Lord SHAND—You spoke about the matter not being fully re-argued in this case on that account. Did the judges announce to you that you need not argue this case?

Mr. ROBINSON—They said they would adhere to the opinions expressed in *Robertson's* case.

Lord WATSON—I do not know why so much respect should be based in a case like this on opinions uttered in another case where they were *obiter dicta* in the sense that they were neither necessary for the judgment nor made part of the judgment.

Lord HERSCHELL—In this case they adopted those *obiter dicta* as the grounds of their judgment?

Mr. ROBINSON—Yes, my Lord.

Lord DAVEY—They had expressed certain opinions in *Robertson's* case, and when this case was argued before them they said, not unnaturally, we adhere to the opinions we expressed, whether *obiter dicta* or not.

Lord HERSCHELL—I do not know that it is quite that. I apprehend, though you commit yourself to *obiter dicta* in a case in which the question does not arise, if the question does arise in another case the course would rather be to reconsider it *de novo*.

Lord DAVEY—I think so too, but they did not do that.

Lord WATSON—These *obiter dicta* were not founded on considerations which appeared to the judges sufficient, and I should like the observations examined rather than the *obiter dicta* repeated.

Mr. ROBINSON—I do not for a moment say that they declined to hear argument, but they intimated that they had thoroughly considered these questions.

Lord HERSCHELL—The expression of their opinion, as it was an *obiter dictum*, even if adopted here, is very unimportant ; it is useful in any case in which they give reasons for that opinion ; but they are not given here.

Mr. ROBINSON—I can see no reasons, my Lord, beyond the assertions, if I may venture to say so ; they simply say that they can see nothing to the contrary.

Lord HERSCHELL—That it was not the intention of the Legislature ?

Mr. ROBINSON—I cannot speak of the intention of the Legislature except from reading their words.

Lord WATSON—I do not in the least degree mean to suggest that Chief Justice Ritchie had not always a very good reason for his opinion. He generally had.

Mr. ROBINSON—Your Lordship will that find in one of the New Brunswick cases, Chief Justice Allen says that in arguing before them it was conceded by the Council for New Brunswick that the Dominion Legislature could legislate to the utmost extent with regard to the rights of

property, and otherwise with regard to sea fisheries; but it was contended that they could not legislate as to an inland fishery, which this was.

Lord WATSON—I think Chief Justice Ritchie decided this, that the Parliament of Canada had not any greater power than had been previously exercised by the separate Legislatures of the Provinces.

Lord HERSCHELL—If he had said the powers had been possessed by them you would have agreed, but he said it is only inasmuch as they have exercised them; inasmuch as they have not exercised them the Dominion have no power. In *Robertson v. Steadman*, 3 Pugsley (16 New Brunswick Reports), which is one of the cases out of which this arose, at page 632 the learned Chief Justice said it was admitted as to the fisheries in tidal rivers the Dominion might legislate and that so far as regarded time and manner of fishing they might regulate fishing in non-tidal rivers; but he says he can draw no distinction.

Lord WATSON—There had been an Act of the Dominion Legislature in that case which did not interfere with any existing exclusive rights of fishing, and which did authorise the granting of leases where the property, and therefore the right of fishing thereto belongs to the Dominion, or where such rights do not already exist by law. The lease which was before the learned judge, and with which he was dealing, was a lease not of property which belonged to the Dominion, but a lease of property which had been granted by a proprietor before the Dominion could have had that right.

Mr. ROBINSON—In truth, the whole decision was that the Statute authorising a licence did not apply to that case.

Lord WATSON—I do not find that the learned judge necessarily meant to hold that the Legislature of the Dominion could not carry the exercise of their legislative powers any further than they had actually done, which is the question here. It would not be disputed that an Act of the Legislature might be a very useless Act, authorising the granting of leases where the right of fishing

belongs to the Dominion, or where the lands over which the fisheries were constituted belongs to the Dominion.

Mr. ROBINSON—That would be unnecessary. That would be done by the Executive, I think.

Lord WATSON—That does not touch any such question.

Mr. ROBINSON—No, the decisions do not; but the opinions conclude them if they are necessarily part of the judgment.

Lord WATSON—The only finding which bears upon the facts of the case is thus expressed on page 61: “That any lease granted by the Minister of Marine and Fisheries to fish in such fresh water, non-tidal rivers, which are not the property of the Dominion or in which the soil is not in the Dominion, is illegal.”

Lord HERSCHELL—If that is right that governs the present case?

Mr. ROBINSON—Yes.

Lord HERSCHELL—And the ground of it is that though the Dominion Parliament has power to legislate in relation to sea fisheries, it has only power to legislate in relation to them to the extent to which that power had been previously exercised.

Lord WATSON—On the other hand, it appears to me no question as to legislative power was involved in that decision. The lease was not granted by Parliament. It was not granted under the authority of an Act of Parliament, but by a Minister whose duty it was to administer the properties and revenues of the Dominion.

Mr. ROBINSON—It was granted under the assumed authority of an Act of Parliament in a case to which the Act did not apply.

Lord WATSON—He is speaking of the 31 Victoria, chap. 60, and he says: “While it provides for the regulation and protection of the fisheries it does not interfere with existing exclusive rights of fishing, whether Provincial or private, but only authorises the granting of

leases where the property, and therefore the right of fishing thereto, belongs to the Dominion, or where such rights do not already exist by law." The lease granted, therefore, was not on the terms of the Statute, unless the learned judge is mistaken in his statement of the facts.

Mr. ROBINSON—Now, with regard to sea fisheries, one can readily understand why in New Brunswick the Counsel there thought it impossible to contend against the absolute unlimited power of the Dominion with regard to sea fisheries. It is of the utmost importance that they should have almost unlimited power there.

Lord WATSON—No doubt he does, and I think that there is not *obiter* because I do not see him discuss that point at large. He proceeds to say, "that where the exclusive right to fish has been acquired as incident to a grant of the land through which such river flows there is no authority given by the Canadian Act to grant a right to fish"; that is to say, if its officers act in granting a lease it was without the authority of the Act of Parliament, and then he adds—which is unquestionably an opinion on this part of the case—"and the Dominion Parliament has no right to give such authority."

Mr. ROBINSON—I do not mean to say that we have not the judgment of this case.

Lord WATSON—And if they had not given it, and the only question was a lease without authority, it was surely *obiter dictum* to say they had no authority to do what they have done.

Mr. ROBINSON—With regard to sea fisheries your Lordship will understand the vast importance, as we think, of unqualified power being given to the Dominion for the entire governance of sea fisheries in every way. That is an industry of vast importance taken in connection with the salmon fishery.

Lord WATSON—The reason he assigns is not a satisfactory one,—“and also that the ungranted lands in the Province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident and is in the Crown

as Trustee for the benefit of the people of the Province exclusively, and therefore a licence by the Minister of Marine and Fisheries to fish in streams running through Provincial property or private lands is illegal."

Lord DAVEY—What page are you reading from?

Lord SHAND—Page 61.

Lord WATSON—That goes to the illegality of the Minister to grant the lease, and the right to give a title to the fisheries was with the Crown; but then that right on the part of the Crown might be regulated or interfered with by the Dominion Parliament unquestionably to some extent. To what extent is one of the questions in this case.

Mr. ROBINSON—It is the main question. The people of New Brunswick, for whose benefit it is said they exist, are represented in the Dominion Parliament as they are in their own Legislature, and we submit it has been thought best by the Imperial Legislature that all legislation of every kind connected with the right to take fish should vest and be in and be enjoyed by the Dominion Parliament. Now with regard to sea fisheries your Lordships will see the vast importance of their being under one management. Inland fisheries rest on a different ground. It may be of comparatively little importance who regulates the small inland fisheries of each Province, but as to the sea coast fisheries it is of great importance. We have seven or eight vessels employed to guard those Fisheries; we go to enormous expense, and they run from one Province into another; it is of very great importance that everything connected with them should be under the control of the one Parliament which we think is the Dominion Parliament.

Lord WATSON—Are not all these arguments directed *ab inconvenientia*? Can we sit in judgment on them on that ground?

Mr. ROBINSON—No.

Lord HERSCHELL—The arguments in the Court below have gone in the direction of limiting and restricting the wide effect on grounds of convenience,

and your argument now is only that the grounds of convenience are the other way?

Mr. ROBINSON—Yes.

Lord SHAND—I am not sure it does not go deeper, because your saying by implication that these things must necessarily be done by you implies that you have the right to do them.

Mr. ROBINSON—If I had nothing but the question of convenience to argue I should have very little to say; but there is, with reference to the salmon industry at the mouth of the River Fraser, all the expenditure we have gone to, and are going to, to keep those fisheries open and to encourage that industry.

Lord DAVEY—The Provinces reap the benefit.

Mr. ROBINSON—They reap the benefit in a certain sense, no doubt; we have a lot of their fishing stations along the river there.

Lord SHAND—According to the argument of your opponents the Provinces reap the exclusive benefit.

Mr. ROBINSON—Yes, they do. It is an industry carried on in the Province, but we are maintaining and regulating it at very great expense. The only way in which we get the revenue to enable us to do that is by licensing these fishing stations. If we have gone to all the expense, and the Province is to get the benefit of the licensing, it would end in the Dominion having to give up the conservation of those fisheries. We think that was never intended and ought not to be.

I do not think, my Lords, that I have any more to say on that point now without repetition, which I wish to avoid. I may say this, as a further illustration: it has always occurred to me that we have, or ought to have, almost precisely the same power of legislation over fishing which the Provinces have and are accustomed to exercise over game. The question of dealing with game has been assigned to the Provinces; they exercise in each Province the right to make Game Laws of every description. I think nobody has ever doubted that the Provinces, if they choose, might exercise the

power we claim with regard to fish, over game. Nobody will question that we have that power, and why should we not have the same power and be intended to have the same power by words which will clearly bear it over a cognate subject.

Then I turn to question 9. The question of licensing, as your Lordships will see, is a very peculiar question; I mean it may be mixed up with taxing, because the Provinces have the power to raise money by licences by direct taxation.

Lord WATSON—There is an express sub-section at the end of section 92 respecting licences.

Mr. ROBINSON—There is, under that, after some discussion and after several decisions. In the *Bank of Toronto v. Lamb*, I think, it was held in substance licensing was direct taxation.

Lord WATSON—I do not see any reason to depart from that view.

Lord HERSCHELL—We discussed it a great deal in the last case in connection with direct taxation.

Mr. BLAKE—The *Brewers'* case.

Mr. ROBINSON—There the Dominion have the power of raising money in any way.

Mr. BLAKE—I think I might save my learned friend from argument by saying this: I do not think, after the decision of your Board, I could contend that that larger power which my friend has just alluded to of the Dominion to tax can be held not to include a power to tax by licences. I do not conceive it. They are concurrent powers in this respect.

Lord DAVEY—This is the question, Mr. Blake, whether the Provincial Legislature can impose a licence tax on a Dominion lessee or licensee.

Mr. BLAKE—That is another question. I make my concession such as your Lordship has heard it.

Lord WATSON—What can you give him for his licence? A licence means to give him permission to do something which you could prevent or put a stop to; and

the licence is paid, from the very form of it, for the permission to do that thing.

Lord HERSCHELL—The question is what could your opponents do? Has it been decided that the Provincial Legislature have jurisdiction?

Mr. ROBINSON—Yes, it has been decided that they have concurrent jurisdiction with regard to granting licences. In a sense they have concurrent jurisdiction, I suppose; but of course we must always look upon this as a practical business matter. You can only get out of the fisheries what they will yield.

Lord DAVEY—If the Provincial Parliament can require a Dominion licensee (assuming the power of licensing fishermen is in the Dominion) to take out a Provincial licence before he can exercise his calling, are they not usurping to themselves part of the jurisdiction over fisheries, that is to say imposing new conditions which are not imposed by the Dominion Parliament?

Lord WATSON—In other words my difficulty lies in this: Can the Provincial Legislature exact a payment from a person who is either fishing, or trading in spirits, or anything else, for doing that which only the Dominion Parliament can permit him to do?

Mr. ROBINSON—Your Lordships know that there are many decisions which would make it difficult to say no to that.

Lord HERSCHELL—There are, and there are the licensing cases.

Mr. ROBINSON—There is the *Banking* case.

Lord DAVEY—The Provinces may tax banks.

Mr. ROBINSON—It was held that the Provinces may tax banks.

Lord HERSCHELL—I think it was held that they may require a man to take out a licence in connection with spirits, though he may hold a licence from the Dominion.

Mr. BLAKE—Yes.

Mr. ROBINSON—Yes.

Lord WATSON—That is given them under the precise terms “shop, saloon, tavern, and other licences.”

Mr. ROBINSON—Yes, but “banks” would not come within it.

Lord DAVEY—“Banks” was under another section the power to raise revenue by direct taxation within the Province; I think those are the words; that is another section.

Mr. BLAKE—It was done by licence.

Lord DAVEY—But it was defended, Mr. Blake, if I recollect right, under that earlier section—the power of direct taxation generally.

Lord HERSCHELL—You may call it a licence though you need not give it the name of a licence, and you need not grant a licence; but you may say every person who carries on the business of banking must pay a certain amount of taxation. So you might without any licence. These persons say every person who fishes within the waters of the Province must pay such and such a tax. It would not be done by licence but direct taxation in the Province in order to create a revenue.

Mr. ROBINSON—Yes.

Lord HERSCHELL—How do you get out of that? A licence is a mere form. Whether you grant a licence or not it is immaterial if you can do the same thing, namely, require the man to pay a tax for the purposes of the Province, and in some way arrange with him to have an evidence that he has paid that tax—you need not call it a tax, then they may just as well do it whether they can give a licence or not strictly so called.

Mr. ROBINSON—I think so.

Lord HERSCHELL—Do you dispute that they could require a payment of a direct tax by every person fishing in Provincial waters to raise revenue for Provincial purposes, even although they had obtained that fishing right from the Dominion?

Lord WATSON—Is it not within sub-section 2 in other words

LORD HERSCHELL—If you granted a licence you could not take away his rights of fishing, because those have been given him *ex hypothesi* under the Dominion legislation; you could only in some way or other enforce the payment.

MR. ROBINSON—Yes, my Lord.

LORD HERSCHELL—Therefore, is not it immaterial to answer in its terms question 9, whether they could be required to take out a Provincial licence if they could impose upon him direct taxation in the form of a payment in respect of his fishing within the Province?

MR. ROBINSON—I suppose they could.

LORD DAVEY—It is directory in *Lamb's* case.

MR. ROBINSON—I think so.

LORD WATSON—Or to enact that he shall not be allowed to fish till he has paid it?

MR. BLAKE—That was the view in the *Breweries'* case; it was in the form of a licence, but you could not distinguish it.

LORD DAVEY—The only difference as to a licence would be, you could prevent his doing it till he had paid the tax. Probably you could not prevent the man fishing if you make the assumption under which this question is asked.

MR. ROBINSON—You might confiscate the means with which he could fish.

LORD DAVEY—I should doubt whether you could prevent his fishing, but you could employ methods against him to prevent him fishing.

LORD WATSON—In the event of the licence not being paid, you could send him to prison till it was paid.

LORD HERSCHELL—That would be an effective way of preventing him fishing. That covers question 9, does not it?

MR. ROBINSON—I think it does.

LORD SHAND—Then what is the result of this?

Lord HERSCHELL—The result is, whether the Provincial Legislature has a right to require the owner of a Dominion licence to take out a Provincial licence in that form or not, it has the power to impose direct taxation on every person, including the Dominion lessee who fishes in the waters of the Province, in order to raise revenue.

Lord SHAND—That would answer the question in the affirmative.

Lord HERSCHELL—It is a mere question of words.

Lord DAVEY—How have the Court below answered it?

Mr. ROBINSON—I think that they can. The argument might be, it might stop the licence; but you cannot help that. All the Sections are stated in the beginning of the Appendix. I am reading it from page 3 of the book your Lordship has.

Lord DAVEY—What is “Section 4 of the Revised Statutes of Canada”?

Mr. ROBINSON—That is in the Joint Appendix, page 3: “Has the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada?” That is the section which has been so often referred to.

Lord HERSCHELL—“The Minister of Marine and Fisheries may, wherever the exclusive right of fishing does not already exist by law, issue or authorise to be issued”—why is it said he cannot?

Mr. ROBINSON—I cannot understand that.

Lord HERSCHELL—I have heard the argument that where once granted away to somebody else he cannot; but I suppose the argument is this, that if the land is in the Province all the rights connected with it are the property of the Province—one of those rights is fisheries—and that the Dominion Legislature, though it has power to legislate with regard to fisheries, cannot so legislate for them as to interfere with the property rights of the Province. That, I suppose, is the argument.

Mr. ROBINSON—I suppose that is the argument, my

Lord. I was going to say, I think the answer to that is involved in the previous argument.

Lord HERSCHELL—Yes.

Mr. ROBINSON—I do not propose to deal with it separately.

Lord HERSCHELL—If your argument is right in saying they can do it, even where there has been a grant to a private person of an exclusive right, that is an *a fortiori* case.

Mr. ROBINSON—I should have thought, even if our argument is not right, we could do so under section 4. Mr. Justice Taschereau, who is against us on certain points, so speaks. Mr. Justice Gwynne has been in our favour throughout. Eleven is the same question, only relating to different lands, and practically those two questions go together. The next I need not discuss at length, because it is only asking whether the view which the Court take of the section in *The Queen v. Robertson* and in this case——

Lord HERSCHELL—That is the point you have already argued.

Mr. ROBINSON—Yes, my Lords, I need not argue it further, because I think I have said all I can say about it. Now “13. Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chap. 24, intituled, ‘An Act Respecting the Sale and Management of Public Lands.’” Your Lordships will find that in the Joint Appendix, at page 19, Volume IV. “It has been heretofore and it shall be hereafter lawful for the Lieutenant-Governor in Council to authorise 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.” I do not think I need discuss that at any length, that is involved in the previous argument as regards the property in the beds.

Lord SHAND—How is it possible you could authorise sales or appropriations which would not interfere with the general use and occupation ?

Mr. ROBINSON—That comes after, your Lordship will see, on the question which has been decided in our favour of our general jurisdiction of navigation and shipping. That is why I do not propose to discuss it here.

Lord SHAND—This point has been decided in your favour.

Mr. ROBINSON—In the power of the Provincial Legislature to grant lands.

Lord SHAND—It seems impossible to conceive a grant which is not an interference.

Mr. ROBINSON—Then we have a right to stop it, and say it shall not be done. If that is so, it is no use going back on the previous argument and trying to say, “We own the beds, and therefore the Province cannot grant it.”

Lord DAVEY—It is the same point over again.

Mr. ROBINSON—Yes, my Lord.

Lord HERSCHELL—Do you question that they would have power to grant these lands if it did not interfere with the use of the harbour ?

Mr. ROBINSON—The harbour is an exception.

Lord HERSCHELL—The soil of the river you say is in you and other navigable waters.

Mr. ROBINSON—That I say is an exception also.

Lord HERSCHELL—Supposing the soil of any of these is not in you, you would not then, I suppose, dispute that they can convey the land and appropriate it so as not to interfere with the use.

Mr. ROBINSON—Clearly not, my Lord. Subject, of course, to the question of the validity of the Act as to navigation and shipping. In our Act about navigation and shipping we have said no person shall put up any erection in navigable waters without our previous sanction.

Lord HERSCHELL—That is interfering with the use of the navigation.

Mr. ROBINSON—We think it is.

Lord HERSCHELL—Therefore, really and truly, the answer to this question depends upon your previous argument as to the harbour and river, whether the soil of them are in you or not?

Mr. ROBINSON—Yes, I think it does entirely.

Lord HERSCHELL—If the soil of them is not in you it still recognises that the sale and appropriation of the land must not interfere with any of your statutory rights of control.

Mr. ROBINSON—Yes, my Lord.

Lord SHAND—The judgment is in your favour as to the soil of harbours.

Mr. ROBINSON—Yes, my Lord.

Lord HERSCHELL—As to harbours, not rivers?

Mr. ROBINSON—Yes.

Lord HERSCHELL—The other waters include the navigable lakes?

Mr. ROBINSON—Yes, I need not argue that. Then question: 14 “Had the Legislature of Quebec jurisdiction to enact sections 1375 to 1378, inclusive, of the Revised Statutes of Quebec?” Now with the permission of the Board, and subject to the direction of the Board, I do not propose to go into those sections at length in our Joint Appendix, because I am quite sure that the answer I have submitted to the Court as to the extent of our jurisdiction under fisheries and under navigation and another question as to concurrent legislation will enable you to answer those questions.

Lord SHAND—It would be convenient to have the page in the Joint Appendix where the statement is.

Mr. LOEHNIS—Page 16 is as to the second part of question 13.

Lord DAVEY—On section 19 of that Act I am not sure that would not be within their jurisdiction as a mere protection of rights of property.

Lord HERSHELL—What is the reference ?

Lord DAVEY—Page 16.

Lord HERSHELL—Now you are going back to section 19 ; where is that to be found ?

Lord DAVEY—On pages 16 to 18.

Mr. ROBINSON—That brings up the question of the right of concurrent legislation practically. That may be a question of comparatively little importance, for this reason, that if any legislation on the part of the Provinces is subject always to be superseded by any legislation on the same subject which we think proper to pass, it would be of little consequence to the Dominion whether the Province in the meantime should legislate on the subject ; but we say, as a question of constitutional consideration, that these sections 6 to 13 are as clearly legislation for the regulation of fishing as any can be.

Lord HERSHELL—I should have thought so. It is difficult to say that that is not a matter coming within fisheries.

Mr. ROBINSON—But the contention of the Province has always been that until we legislate they may.

Lord HERSHELL—That is another question ; that is on the question whether it is within civil rights.

Mr. ROBINSON—I suppose they would put it within civil rights.

Lord HERSHELL—This Board has intimated that there may be legislation by the Province so long as the Dominion has not covered the ground. That is only because of the very wide words, “property or civil rights.” Unless you can bring it within property or civil rights, I do not think the Board has said that it would be so.

Lord DAVEY—This can only be justified on the assumption that the property is in them.

Lord WATSON—A good deal depends on the terms of each clause of sections 91 and 92. One of the cases in which it was held there was no interference was, if I recollect right, a certain provision applying to creditors

and debtors generally, and the question was whether that was to take effect in the case of insolvencies or bankruptcies ; and I think this Board held it must take effect as within the competency of the Provincial Legislature.

Lord HERSCHELL—If it came directly within one of the specified classes.

Lord WATSON—If it had been changed to bankruptcy the question would have been very different.

Mr. ROBINSON—Yes, my Lord.

Lord HERSCHELL—In the same way, if this is a provision which would apply to all persons, whether fishermen or not, you might say it was a good enactment till the Dominion Parliament have covered the ground. If it is a regulation relating only to fishing, it is very difficult to say it is not a matter within the class of fisheries.

Lord DAVEY—Section 19 is rather different, because that might be defended on the ground of legislation as to property, imposing a fine for persons taking fish from private property.

Mr. ROBINSON—That might be trespass. All I am concerned to point out to your Lordship is just what Lord Herschell has been kind enough to point out. I do not think that case comes within that bankruptcy case with which I am familiar. The legislation which was held valid there was really not necessarily bankruptcy legislation, and there was no general bankruptcy law ; and it was held that for one purpose, although it might afterwards be superseded by Dominion legislation, it was in the meantime good legislation by the Province. That may well be, but here we have it decided, and not disputed on any side, that the regulation of fisheries is committed exclusively to the Dominion Parliament. If so, how can legislation by the Province be good. You cannot ascribe it to anything else but the regulation of fisheries. If you could ascribe these sections to something else, and say they are not necessarily connected with the regulation of fisheries, and, therefore, although they might be suppressed by the Dominion they are good in the meantime as a sort of police or other regulation of the Province.

Lord DAVEY—Section 19 might be so described.

Mr. ROBINSON—Possibly, my Lord.

Lord DAVEY—It says in effect that any person who takes fish from private waters is to pay a fine of a dollar for every fish taken.

Mr. ROBINSON—I am not concerned in objecting to such legislation. I do not know what would happen if we passed a Statute saying that any person doing the same thing should pay twenty dollars. I dare say we could.

Lord DAVEY—Yes, it is one dollar for each fish.

Lord HERSCHELL—I suppose if you did that the Dominion Legislature would override it?

Mr. ROBINSON—Yes, I suppose it would. Then the next question is one I have spoken of, but from which I was recalled by your Lordship. It is a question in the Ontario Statute: "14. Had the Legislature of Quebec jurisdiction to enact section 1375 to 1378?" I pass this over for the present for the reason I have mentioned. I think if we got the information I indicated in the opening of my argument we can answer them without difficulty, and they can at all events remain now subject to anything that might be said. Then "15. Has a Province jurisdiction to legislate in regard to providing fishways in dams, slides, and other constructions, and otherwise to regulate and protect fisheries within the Province subject to and so far as may consist with any laws passed by the Dominion Parliament within its constitutional competence?"

Lord HERSCHELL—You say no, I suppose?

Mr. ROBINSON—I say no to that.

Lord HERSCHELL—Has it been held yes?

Mr. ROBINSON—Yes, my Lord.

Lord HERSCHELL—On what grounds?

Mr. ROBINSON—I think it is like the others.

Lord HERSCHELL—That looks very much like a matter within the class of fisheries.

Lord SHAND—Why is that word “has” instead of “had.”

Mr. ROBINSON—I do not know.

Lord WATSON—It would certainly fall within the class mills and their machinery?

Mr. ROBINSON—Yes.

Lord WATSON—Dams, slides, and other constructions are for the purpose of protecting the fish against the operation of persons who are not fishers and do not intend to protect the fish. They are provisions made in favour of fisheries.

Mr. ROBINSON—Yes, my Lord.

Lord WATSON—I suppose the Provincial Legislature could regulate the construction of mill-dams.

Mr. ROBINSON—They could, my Lord.

Lord WATSON—They could provide in favour of the fishers if milldam owners made certain regulations.

Mr. ROBINSON—I do not see how you could object to the competence of an Act which says all mill-dams shall be constructed in a particular way.

Lord WATSON—It is a natural enough provision to introduce into a fishing licence.

Mr. ROBINSON—Yes, my Lord.

Lord SHAND—The second half of that question raises it.

Lord WATSON—There is no doubt about the second half, it may be answered either way. Assuming that both have jurisdiction, the result would be that if the Dominion legislate as well as the Province the Dominion Legislation supersedes.

Lord HERSCHELL—Should you dispute, if there was legislation provided for the protection of fishing it might be in that case not within the Provincial power, because it is a fishery regulation exclusively. If, on the other hand, in an Act relating to dams, slides, etc., they incidentally provided the making of the dams, considering the interest of the fish, that would be a dam and slide

legislation and not a fishery legislation which might be within the Provincial competence.

Mr. ROBINSON—I think so.

Lord SHAND—So that the answer to that is, it depends on the measure?

Mr. ROBINSON—I think so.

Lord WATSON—It would be an odd thing if the Provincial Legislature could measure the erection of a mill and a mill-dam, and the only authority who could provide that there should be certain gaps, or that it should be open for a certain period, is the Dominion Parliament.

Mr. ROBINSON—I think, as has been stated in other cases, the first thing you have to look at in a measure like this is what was its scope.

Lord WATSON—It is really regulating another industry, the mill industry.

Mr. ROBINSON—I see no objection to their making regulations about mills to protect fish. The moment you come to direct legislation about fisheries, that being the main purpose and scope and object of the Statute, we say that is *ultra* the Provincial powers.

Lord WATSON—I do not suppose they would have power to do what is sometimes absolutely necessary for the purpose of fish protection. Could they prevent a nuisance from a distillery or manufactory coming into a river which poisoned the fish? Would that be in the power of the Province as fishery legislation?

Mr. ROBINSON—I feel a difficulty in answering these questions.

Lord WATSON—It is not difficult to find numerous instances where it might be to hold that the power vested in them.

Lord DAVEY—You can always find instances in which the jurisdiction overlaps. It depends, as Sir Montague Smith said, on the point of view from which you look at it.

Lord WATSON—Could you pass an Act for the prevention of the pollution of streams damaging fish?

Lord DAVEY—I will decide that when it is brought before me.

Lord WATSON—It raises a very great question.

Lord DAVEY—It is only an instance of what Sir Montague Smith said, in one aspect it is Provincial, in another it is Dominion.

Lord HERSCHELL—The Board went a long way in saying the Dominion Parliament could pass the Liquor Law, which they did; it is hardly going so far to say they could pass a law to prevent the pollution of rivers in which there are fish.

Lord WATSON—If you could find a better analogy I should prefer following it rather than the decision as to the Liquor Law.

Lord DAVEY—You might say: We can prevent the pollution of rivers and thereby regulate the mills and banks with a view to preserve fish and with a view to prevent factories fouling the stream. We can make regulations as to the factories.

Lord WATSON—Yes.

Lord HERSCHELL—It would depend very much whether the legislation was valid or whether the conclusion was arrived at that the object of the legislation was that it was a fishery. You could not, under the guise that it was fishery regulation, regulate factories and other matters not left to the Dominion. If, in truth and fact, the legislation was legislation for the purpose of regulating fisheries, it is difficult to say it was *ultra vires*. It might be extreme or extravagant. The people, then, to deal with are the members, and beyond that the electors.

Lord WATSON—No doubt it would be very difficult, without power to that effect, to preserve fish in some districts—in a manufacturing district.

Lord MORRIS—What would prevent the Dominion from interfering with the erection of a mill?

Lord WATSON—Unless it is the regulating of trade and commerce.

Mr. ROBINSON—If they erected a mill so as to destroy the fishery, I submit there would be some power.

Lord HERSCHELL—It would be very strange if power was given to you to legislate in all matters within the class of fisheries, and at the same time there was power given to the Provincial Legislature to authorise the destruction of all fish.

Mr. ROBINSON—Suppose we have a valuable salmon fishery, and the Province chooses to authorise a creation which prevents the fish coming up.

Lord WATSON—The Dominion Parliament might undertake superintendence in the villages and Provinces of Canada.

Lord HERSCHELL—I suppose you might say the fisheries have such a remote connection with the legislation that this cannot be said to be legislation on a matter of fishery possibly.

Mr. ROBINSON—It might be so, if you take that question of pollution, if the pollution which they endeavoured to prevent was a pollution which they were endeavouring to prevent for the purpose of health, nobody would doubt the fact that it tended to preserve the fish as well, and there would not be an objection to it; but if, on the other hand, the only object was something connected with the fish and no other purpose, it would be different.

Lord WATSON—In this country it has become a vital matter in the question of inland fishing—fresh water fishing—to regulate the disposal of sewage from whatever quarter it may come.

Mr. ROBINSON—We find with us great difficulty about sawdust from our mills.

Lord MORRIS—Is the great industry of the country to be stopped by the Dominion Parliament as less careful about the interests of the country, including the Provinces, as the Province is about itself? If you destroy the industry of the Province you destroy the Dominion. The whole basis of this is that the Dominion Parliament,

which consists of the representatives of people from every part of the Dominion, will have the interests of the whole Dominion at heart.

That is a very fine theory, but it depends upon what the majority would be. The majority of the Dominion Parliament might consist of another interest than that of the Province. You may sacrifice the particular Province for the well-being of the majority.

Lord HERSCHELL—Undoubtedly the Dominion Parliament can stop all trade and navigation; and when they have once done that——

Lord WATSON—No, they can only regulate it.

Lord HERSCHELL—No, they can stop it. When they have once done that they have done a good deal to stop trade throughout the whole Dominion.

Lord WATSON—Yes, if they put down all the ships in the country.

Mr. ROBINSON—If it is our object to ruin the country, of course we can do it.

Lord MORRIS—I think that power is given to you distinctly. I am only saying, under the guise of the word fisheries, are you to control industries?

Mr. ROBINSON—No.

Lord MORRIS—By insisting that they shall be carried on in a particular way?

Mr. ROBINSON—No, we are to legislate *bonâ fide* in the interests of the fishery.

Lord HERSCHELL—You may say, on the other hand, you being the only people who can protect fisheries, are you to allow the fisheries to be destroyed because in a particular Province they wish to favour a particular industry?

Lord MORRIS—It was only one way of putting it. The converse holds just as good. I was putting it from the Provincial point of view.

Lord WATSON—I have some difficulty, if legislation of that kind is within the powers given to the Dominion

Parliament, to see why both bodies may not legislate to the same effect.

Lord MORRIS—That may be the solution.

Lord WATSON—So long as the legislation is not superseded.

Mr. ROBINSON—The question is of importance to the Provinces. Speaking only for myself, I can conceive some cases in which, in the interior, in the remote districts, it might be desirable for the Province to have power to legislate until we interfere.

Lord HERSCHELL—It is rather difficult to say they can.

Mr. ROBINSON—Yes, very difficult.

Lord HERSCHELL—If all matters coming within the class of fishery are committed exclusively to the Dominion, although, of course, you may have legislation in the Provinces which under other heads affects fisheries, however desirable it may be. I see its possible desirability.

Lord DAVEY—The judgment of this Board in *The Queen v. Russell* justifies you in saying that there are such cases.

Mr. ROBINSON—Yes ; but your Lordships will remember I did not suggest they could do it. I said I thought it might be very desirable that they should have the power ; but I do not think they have the power, because it is inconsistent with our legislation.

Lord SHAND—I do not think it is for you to argue that.

Mr. ROBINSON—In the United States concurrent powers are granted. That is the distinction between them and us.

Lord SHAND—How do they regulate it in the United States when there is a conflict ?

Mr. ROBINSON—Congress supersedes. I ought to have called your Lordships' attention, on the question of concurrent powers, to section 95.

Lord WATSON—If you except the liquor question, and I do not wish to reopen discussion about that with

regard to the cases at the present moment, because some parts of them are not entirely satisfactory to my own mind, and I have a difficulty in reconciling them ; but, apart from that, there is no warrant for saying that both may act effectively, except in this case there is one exception, the general law of the Province relating to property and civil rights is subject matter of legislation by the Provincial Legislature ; and that general law, applicable to property and civil rights, governs a great many cases in which by section 91 exclusive power is given to the Dominion Government ; but until that legislation is enacted the general law rules. Bankruptcy is an illustration.

Mr. ROBINSON—Yes, bankruptcy is an illustration.

Lord WATSON—The Provincial Legislature may make laws as between the creditor and his debtor, but they cannot make a special law as between a bankrupt debtor and his creditor.

Mr. ROBINSON—No, that seems to be clear. I have read that case with great attention, but I ought to have called your Lordships' attention to section 95 of the British North America Act, which seems to furnish the only instance in which concurrent legislation is contemplated and permitted. There it is expressly permitted with regard to two subjects. Section 95 says : " 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."

Lord WATSON—There is another provision that the Dominion Legislature may assimilate the laws of the Provinces with this proviso that it does not take effect till the Provinces adopt it.

Mr. ROBINSON—Yes.

Lord HERSCHELL—I do not think that this Board has ever said they can, under section 91 and section 92, legislate within the same field. What it has said is you

may have legislation within the Provincial field which may be of such a nature that it might form a part reasonably of legislation in the Dominion field.

Mr. ROBINSON—Yes, my Lord.

Lord HERSCHELL—It is not legislation within the Dominion field. It does not necessarily touch it, but it is of such a nature that it may properly form part of legislation in the Dominion field; and when the Dominion has included that legislation, the statute, as far as the matter it had power to deal with is concerned, overrides legislation by the Province.

Mr. ROBINSON—I think that is all that has been said: I cannot express it more plainly than that. That is the view we take of it, and we say this is not a case which comes within that principle because it can be ascribed to anything but fisheries. If your Lordship will remember that question 15 has another branch from which we dissent, "And otherwise to regulate and protect fisheries within the provinces." That is just asking whether they have the general power which we certainly have conclusively.

Lord HERSCHELL—That covers all the questions.

Mr. ROBINSON—Yes, my Lord, except that there are two others, questions 16 and 17, submitted by a supplementary order. Your Lordship has them on page 4: 16 is involved in navigation and shipping, and that is the subject of the other question, and I do not speak of it. The 17 is merely an addendum to a previous question, which was answered in the same way by both of us.

Lord SHAND—It seems an academic question.

Mr. ROBINSON—It may be quite an academic question.

Lord HERSCHELL—Did the grant of the soil carry it with it?

Mr. ROBINSON—Yes. I cannot see how the question of the state of things before Confederation can bear on the question of the Act.

Lord HERSCHELL—Are you agreed on the answers to questions 16 and 17?

Mr. ROBINSON—No, not to question 16, because that has been answered in our favour and the other side appeal.

Lord HERSCHELL—Question 17 you are agreed upon?

Lord DAVEY—There is no doubt that the grant of the soil covered with water would give the exclusive right of fishing unless a separate fishery as a franchise had been created in the same river previously. Is not that so?

Mr. ROBINSON—I think so.

Mr. BLAKE—I think so.

Lord HERSCHELL—Then question 17 has no practical bearing?

Mr. ROBINSON—No, my Lord.

Lord DAVEY—You may separate the fishery as a franchise from the ownership of the soil?

Mr. ROBINSON—Yes, my Lord.

Lord WATSON—You put a question at the time when there was no Dominion in existence as to the rights of parties then?

Lord DAVEY—The Act makes the respective rights of legislation and property of the Province and Dominion depend upon the state of things at the time of the Federation. That is the excuse.

Mr. BLAKE—What was the condition on the day the Federation Act passed?

Mr. ROBINSON—I think I have said all that appears to me necessary and desirable to say in the opening of the case. I have gone over the questions without alluding to them all in detail; and I still adhere to the view that if we had the information which I indicated in the opening we should have been able to answer all those questions without difficulty. I think many of the questions run into one another, and that answering one is answering another.

Lord DAVEY—If you get the property in the rivers that carries you a long way?

Mr. ROBINSON—Yes, if we get the property in the rivers and the harbours that carries us a very considerable distance?

Lord DAVEY—The decision is in your favour as to harbours?

Mr. ROBINSON—Yes.

Lord WATSON—In the meantime you have got the property in the harbours?

Mr. ROBINSON—Yes, my Lord, in the meantime we have got that.

Lord DAVEY—The questions really are reduced to a very small compass by Mr. Robinson's assistance.

Lord SHAND—Classified in that way they come to a very few questions.

Mr. ROBINSON—I think there are only three main heads. First, the beds of the rivers. There are two small incidental questions as to harbours and rivers which depend on separate constructions. Then as regards the legislative jurisdiction, when we know what is our legislative jurisdiction upon navigation and shipping over navigable waters, and when we know what is our jurisdiction over all waters, fisheries, and so on, and the other heads I have mentioned, I think the questions can be answered.

Lord DAVEY—I have always felt a difficulty in answering these questions in the abstract.

Lord WATSON—So do I, but I do not know a more difficult question to answer than this. Given that a particular Legislature is vested with certain jurisdiction, what are the limits of its power? It is difficult to say. It may do any amount of injustice.

Lord SHAND—If you succeed on the matter of the rivers the fisheries drop out altogether.

Mr. ROBINSON—As far as the rivers are concerned. Then there would be lake fisheries still.

Lord SHAND—Yes.

Mr. ROBINSON—There would be the sea coast and also those streams which are not rivers.

Lord WATSON—It would cut away a large portion.

Mr. ROBINSON—Yes, but there are many streams not rivers which are available for fishing. As regards our trout, they are taken in Ontario; at all events in waters not rivers, but small streams. It would leave all those still, but that is, all I think.

Mr. HALDANE—My Lords, I shall not detain your Lordships for any length of time. There is one observation suggested by the concluding words of my learned friend, and that is that these questions are framed somewhat unfortunately. Throughout them there runs a reference to property as though in this question, between the Dominion of Canada and the Provinces, we were dealing with questions of property between individuals in one or other of whom the title might be. My Lords, I cannot help thinking that the frame of the questions and the suggestions that have given rise to the questions have been partly brought about by a too easy analogy to the Constitution of the United States. In the United States the Federal Governments of the States have the capacity of holding property. They are quasi-Corporations, and questions as to property between them arise in the natural fashion in which they might arise between individuals; but when the British North America Act was passed, a very different state of things was dealt with, and a very different Constitution was given to Canada. Before 1867 the various Provinces had responsible as well as representative government, and the Crown was the fountain of the executive power. All the property of these Governments was vested in the Crown as represented by the Governors, just as all the property of the State in this country is vested in the Crown as the natural receptacle of title. When the British North America Act was passed there took place a federal distribution of legislative power. There also was a distribution of property. My Lords, the property in no case was given to the Province as a Corporation capable of holding property.

Lord DAVEY—It is the administration by the Province?

Mr. HALDANE—It is purely the administration.

Lord DAVEY—That was pointed out in *Mercer's* case?

Mr. HALDANE—Yes, and it was pointed out even more fully later on in, I think, the *St. Catherine's* case, and in another judgment of Lord Watson's, of the *Mercantile Bank*.

Lord DAVEY—And the *British Columbia* case.

Lord SHAND—The frame of the questions rather assumes all that. It is always represented that the Crown holds the title; but the question is, which is to have the administration?

Lord DAVEY—The usufruct.

Mr. HALDANE—I scarcely like to take the expression usufruct as sufficiently accurate. Is it not a question of whose advice the Crown is to be guided by in the administration of this.

Lord DAVEY—That was the very question so much discussed in the *British Columbia Mining* case between the Attorney-General of British Columbia and the Attorney-General of the Dominion.

Mr. HALDANE—The question is, is it the property of the Dominion or of the Province?

Lord DAVEY—After all, it is only the language of the Act.

Lord WATSON—The Act uses the term.

Mr. HALDANE—Yes, but nobody would suggest, looking at the scope of the Act, it was intended that the property should be vested anywhere but in the Crown.

Lord DAVEY—In the Crown on behalf of the Province or Dominion as the case may be.

Mr. HALDANE—Yes, when the Federation Act was passed, bearing that in mind, a very important Federal distribution took place. In the first place there had arisen, probably they did not exist at first, very important international questions between Canada and the United States. My learned friend spoke of the questions which

arose with regard to the fisheries on the sea coast. Those were of great importance, but there are others of hardly less importance. For example, take the great lakes, take Lakes Superior, Erie, and the four great lakes which separate Canada from the United States. In all of those there are Canadian fishermen, and there are American fishermen, and in all of those it is necessary to maintain cruisers. They are maintained by the Dominion at the present time, to protect the interests of the Canadian subjects. In all of those the policy of the Government has been that no one who is not a British subject shall fish in Canadian waters, and the persons who fish, fish only in virtue of licences. In order to carry out the regulation which those licences impose there is a regular fleet of Canadian vessels.

LORD WATSON—What is the international rule—there is no rule fixed by convention as to a large inland lake which forms the separation between two great communities.

LORD DAVEY—I should say that there was not sufficient experience to create it.

MR. HALDANE—I think there is an imaginary line dividing the lake.

LORD SHAND—That is followed in practice, is it?

MR. ROBINSON—All that is regulated by law.

LORD MORRIS—I suppose there is some convention.

MR. HALDANE—Yes, there is a convention, there is an understanding, it is taken to be so.

LORD SHAND—Mr. Robinson says he thinks there is legislation in both countries with regard to it.

MR. HALDANE—And the fishing industry is very large. The value of the catch is something like twenty millions of dollars a year, and the four great sources of wealth are the cod fishing, which I think comes first, then the salmon, then the herring, then the lobster. The lobster fishing I take by way of illustration to show the state of circumstances in existence.

LORD WATSON—That is within the territorial limit.

Mr. HALDANE—That is within the territorial limit. There it may be absolutely essential (so the Minister tells me) that somebody should stop all lobster fishing for a period—it may be for a year or two years, the reason being that the lobsters are decreasing rapidly.

Lord MORRIS—And regulations as to size?

Mr. HALDANE—And regulations as to size and a close time; and it comes to this, whether you take the Maritime Provinces on the east, or whether you go to British Columbia, where the Fraser River has at its mouth enormous salmon fisheries, or whether you take the inland waters, the great Lakes or the Hudson, 100 miles of which is common to the United States and to Canada, questions of an international kind as to these fisheries arise and have to be dealt with by one Government or another in Canada. Now it was to meet that state of things that the British North America Act was passed, and of course it is an Act which makes distribution between section 91 and section 92 of the powers of Government. When you turn to section 91 you find what one would expect in that state of things, that the Imperial Parliament has made a choice between the Governments as to which to delegate the power of controlling these great fishery interests. To the Dominion is given exclusively fisheries and navigation. It is not unnatural to suppose that what was intended by that was that there should be full control, not only from an international point of view, but full control in the interests of preserving the fishing given to the Dominion Parliament as the Parliament which represented all the interests of all the Provinces, and was the most natural custodian.

Lord WATSON—I doubt whether your adversaries even would dispute that the power of regulating the fisheries was conferred upon the Dominion Government.

Mr. BLAKE—It is conceded in my case.

Mr. HALDANE—Then the question is what it amounts to once we get to that?

Lord WATSON—I notice beyond that there may be some question raised.

Mr. HALDANE—It is there that my learned friend suggested the controversy gets in. I venture to suggest when you have got so far you have got a considerable way towards solving it. Take the *Lobster Fishery* case, what must “regulation” mean? It must mean the power to suspend all fishing for a certain time.

Lord HERSCHELL—Do you admit that “regulation” has anything to do with it? Where the Legislature tries to regulate something it says so.

Lord DAVEY—It says all legislation connected with fisheries?

Mr. HALDANE—Yes.

Lord HERSCHELL—Where it is not said “regulation” what authority is there to bring in regulation, when a few lines before you find it put by the Legislature itself—if you are not to confine it to regulation the words are as wide as you can possibly conceive—all matters of regulation coming within the class, that is to say, as may properly be described under the heading of fisheries?

Mr. HALDANE—Yes.

Lord WATSON—We have held, I think, in more than one case where the legislative power is limited to regulation, that it implies the thing to be regulated, is to be preserved, and that it is not within the power given to destroy it.

Mr. HALDANE—In Lord Davey’s judgment in the *Hawkers’* case the distinction was drawn, and your Lordships adopted the same distinction in the *Liquor* case. They do not give trade and commerce *eo nomini*, but the regulation of trade and commerce. When you come to fisheries it is not “regulation,” but “sea coast and inland fisheries.” The whole subject seems to be confided to the custody of the Dominion Parliament.

Lord WATSON—I suppose it would be quite within the authority of the Dominion Parliament to abolish all bills of exchange within the Dominion, though it is not likely to do so.

Mr. HALDANE—No, but it is a sovereign Legislature.

There seems to have been a certain amount of reluctance on the part of learned judges in the Court below to acknowledge the extent of the powers of the Dominion Legislature and Provincial Legislature respectively.

Lord DAVEY—That is quite settled by this Board.

Mr. HALDANE—Absolutely.

Lord DAVEY—There is Lord Selborne's expression I forget the exact words, but it is all powerful within the ambit of its jurisdiction.

Mr. HALDANE—It is not inaccurate to say that sovereign power has been delegated by the Imperial Parliament.

Lord DAVEY—Within the ambit of its jurisdiction.

Mr. HALDANE—Within the ambit of its jurisdiction.

Lord HERSCHELL—Could they decline to take the Census at all, or is it only the regulation of the Census and the determination when to have it?

Mr. HALDANE—They might decline to have it.

Lord HERSCHELL—If so, except where regulation is used, these words cannot be held to exclude dealing with a thing in a manner which destroys it.

Lord WATSON—I should think they have power probably to abolish copyright.

Mr. HALDANE—Yes.

Lord HERSCHELL—Or to abolish patents.

Lord DAVEY—And to abolish bankruptcy.

Mr. HALDANE—Yes, just as the Provincial Parliament have a power to take away a man's land or impose a special tax.

Lord HERSCHELL—I cannot see that there can be a justification for some of these headings—the regulation by limitation. If you cannot do it in all, what right have you to do it in any?

Mr. HALDANE—Then when you come to subject matter such as fisheries, it is quite clear that in a case like that the jurisdiction over fisheries must be, to be effective, an extremely extended jurisdiction. It may

mean the absolute prohibition of this or that individual fisher. It may mean the necessity of his taking out a licence to fish in a particular spot. It may be to interdict anybody fishing for a long period, or to interdict everybody from fishing who does not come within a certain class or category of individual. On the other hand, there is no trace of any such jurisdiction being confided to the Provinces. If that is so, it would seem that the Dominion, whatever are the merits of *The Queen v. Robertson*—because that was a case far from the point we are discussing now—it would seem that the Dominion may legislate in the exercise of its control over fisheries in such a fashion as to authorise its Minister of Marine to grant licences which shall be exclusive, which shall say not only who is to fish, but who is not to fish. That would seem to be the natural interpretation of confiding to the Dominion Legislature the whole scope of the jurisdiction with regard to these matters. Then take another topic which has been discussed, territorial waters. It may be that it is not necessary to enter upon any considerations about the property within the territorial limits, whether there is such a thing as property of the Crown in right of the Dominion or Provinces of Canada in the soil which underlies these waters, it is enough if under such heads as “fisheries” or “defence,” or other matters confided to the Dominion there is a control.

Lord WATSON—The property in territorial waters must be represented in what may be called the exclusive interest of the community or the State in those waters—it cannot go any further.

Mr. HALDANE—It cannot go any further, it must be so.

Lord WATSON—That to a great extent depends upon the view taken by other States.

Mr. HALDANE—Yes, it is a matter of international convention.

Lord WATSON—It is a sort of No Man's Land, on which the adjoining State may legislate so long as it has power to see that its legislation is carried out.

Mr. HALDANE—It was a rule initiated in the interests of defence. One Italian writer quoted in *The Queen v. Keyn* says that the three mile limit was taken because by no possibility could it be imagined that a shot would reach a further distance.

Lord WATSON—There are a great many interests which are matters of exceeding doubt at this moment. Can fishermen be prevented, except by legislation, doing what they like in the territorial waters in the way of fishing?

Mr. HALDANE—Those matters have been regulated.

Lord WATSON—They have been regulated by public Statutes.

Lord MORRIS—Fishermen on the East coast of Scotland are always complaining.

Mr. HALDANE—They are always anxious to extend the territorial waters. If only foreign States would come in and join in a Convention, and approve of what has been actually proposed in the British Parliament, it would be the law that the territorial waters are to be extended to thirteen miles. But the foreign nations have not yet come in.

Lord WATSON—It depends on where the offenders come.

Mr. HALDANE—The origin of the three mile limit was that a very eminent publicist laid down that by no possibility would a cannon shot ever go more than three miles. It was laid down some time ago, and it has been quoted and adopted. Then, about lakes, I need not trouble your Lordships further than this. There is this distinction between lakes and rivers.

Lord DAVEY—I should like to hear how you make out you have the property in the bed of the lakes, if you care about it.

Mr. HALDANE—There again I do not care about the property in the bed of the lakes.

Lord DAVEY—Do you give it up or do you not?

Mr. HALDANE—The important thing as I interpret

and read these questions is, who has the exclusive control over these things? There are certain properties which it is declared are to be administered in right of the Dominion; those are the properties in the schedule, and it may be upon our reading that it is right to say that rivers come within that.

LORD WATSON—I must say it occurred to me more than once during this discussion to ask how far can the interests of a State in the ocean for three miles from its shores be described as lands, mines, minerals, or royalties belonging to that State. These are to constitute the property transferred to the Province by section 109, which is supplemented by the last part of section 117, that the Province shall retain all the respective public properties not otherwise disposed of by this Act. It is a right to administration and a right to property: Close in shore it may be a right to property.

MR. HALDANE—I do not want to trouble your Lordships by reference to *The Queen v. Keyn*. It is a long case, but in Sir Robert Phillimore's judgment in that case the matter is very elaborately examined; and he reaches the conclusion that there is no such thing as property of the State in territorial waters, that it is a certain thing over which the State has exclusive jurisdiction.

LORD DAVEY—The judges differed on that point. They were as nearly as possible equally divided.

MR. HALDANE—Yes, my Lord.

LORD DAVEY—If you quote Sir Robert Phillimore perhaps Mr. Blake will quote others.

MR. HALDANE—That is why I have not troubled your Lordships with *The Queen v. Keyn*.

LORD WATSON—There is a belt conceded by the consensus of nations; I do not know that any nation has ever, except under peculiar circumstances, claimed an exclusive right of way. It is a highway of nations: any portion of the English Channel is open to any nation, but you claim the right to exclude those who are neither friendly nor neutral from it during the time of war.

Mr. HALDANE—I think in the case of lakes to which Lord Davey referred, the answer to the question must be found in the distribution of the legislative powers and not in the schedule of properties.

Lord DAVEY—That does not give you property. I understand from Mr. Robinson that you claim the property in the bed of the lakes.

Mr. HALDANE—Your Lordship has heard my observations on that. Of course, I do not desire to trench on the contention of my learned friend Mr. Robinson.

Lord HERSCHELL—There is a good deal to be said for having property in it, but it is not more than a small part.

Lord DAVEY—It does not carry you very far.

Mr. HALDANE—There is only one other observation I wish to make about canals. It is extremely difficult to distinguish between canals and rivers. I am speaking of what is not in evidence—there is little evidence on it.

Lord WATSON—The one is clearly conveyed by the schedule and the clause, the others are open to construction.

Mr. HALDANE—Half of the canals in Canada are improvements of the rivers. The rivers wind about, and a canal is made at one point of the river.

Lord WATSON—One can account for it in fifty different ways if one tries to be ingenious. They may have thought improvements in a lake would probably constitute to some extent a roadway or waterway on the lake, and that in order to give a proper roadway it was necessary to give the whole river, which may shift at times in its current and in its channel.

Mr. HALDANE—Yes, my Lord.

Lord WATSON—The smaller boats take the shallower water and the bigger vessels follow the deeper water. I do not think the prohibition would be insensible if it were expressed according to either alternative in plain language.

Lord SHAND—That the waterway in many cases consists of a combination of river and canal?

Lord WATSON—All rivers and improvements and lakes would be quite intelligible. There would be no absurdity or anomaly about it.

Mr. HALDANE—There is just as much reason to include rivers as canals.

Lord WATSON—If there is no reason to give full effect to one part of the enumeration in the Act that the Legislature have not in connection with it given a little more under other parts of the enumeration or a little less.

Lord MORRIS—Are not all the subjects of schedule 3 property which is more or less artificial?

Mr. HALDANE—No, my Lord.

Lord MORRIS—It is a very curious thing that Sable Island is mentioned in section 91 by name.

Mr. HALDANE—Yes, it is, my Lord.

Lord MORRIS—Therefore it was rather a work of supererogation to put it into schedule 3?

Lord HERSCHELL—Schedule 3 contains the property. I suppose it is put in section 91 because it is part of the territory of the Province and to take it out.

Lord MORRIS—Once decide that it is for public purposes, it is the initial step of building or doing something or other on it.

Mr. HALDANE—It may be merely a reservation.

Lord MORRIS—I do not know.

Lord WATSON—There are two exceptions. I do not know whether they are public works or not, but they do not necessarily, on the face of them, apply here. They are Sable Island. For all I know to the contrary that may be a public work of a most important kind.

Lord HERSCHELL—We are told it is not. That is a fact on which we could be informed. I am told Sable Island is, more or less, barren rock.

Mr. ROBINSON—It is.

Mr. BLAKE—It is very barren, it happens to be sand, my Lord. In fact, that is the meaning of it—Sable. My friend, who is the Attorney-General of the Province, can describe it more accurately than I.

Mr. LONGLEY—It is nothing but a public work.

Lord MORRIS—It appears to me that all the words are works and artificial things: canals, public waterways, lighthouses, steamboats, railways, military roads, custom houses, armouries, drill-sheds, military clothing and munitions of war, and lands set apart for general purposes.

Lord WATSON—The only thing that would lead me not to construe the schedule as consisting entirely of public works is the fact that in the section which governs it, section 108, the subjects described in the schedule are described as consisting of public works and property, and it is declared that these shall be the property of the Dominion. I should infer that the Legislature, and those who drafted the Act and who passed it, were under the impression that both public works and other property were included.

Lord MORRIS—Might not property be to a certain extent merely a reiteration of public works—public works and property?

Lord SHAND—The heading of the schedule is of the same kind.

Mr. HALDANE—Provincial public works and property to be the property of Canada.

Lord MORRIS—The public works are their property?

Mr. HALDANE—Yes.

Lord WATSON—I do not see how that affects the construction you ask us to put on the word works.

Lord MORRIS—It seems so strange, “rivers” in the abstract, of all kinds, sizes, and qualities, are conveyed under this 3rd schedule.

Mr. HALDANE—Only such rivers as have been public property.

Lord MORRIS—They must all have been public property of the Province except small rivers—all the large rivers.

Mr. HALDANE—All the large rivers certainly.

Lord MORRIS—It seems a strange way, having them

mixed up with these subjects of an artificial character, and when you have lake improvements, it is an argument which strikes me as showing that "rivers" refers to improvements as well as to lakes.

Mr. HALDANE—The words at the beginning of section 108 may aptly cover both works and property.

Lord DAVEY—I should think they did.

Lord HERSCHELL—Essentially so, because all it was going to transfer was property of the Province and to make it the property of the Dominion

Mr. HALDANE—I take it all that was public property, that was the only thing—public property until it became property of the Dominion.

Lord WATSON—The observation made by my noble and learned friend on the right seems pertinent enough; to give rivers the true sense you must include that which was not public property and a good deal that was private.

Lord HERSCHELL—No, it is only public.

Lord WATSON—To the extent to which it is public.

Lord DAVEY—It is only rivers belonging to the Province.

Lord SHAND—Mr. Robinson saves himself a difficulty as to that, because it saves him referring to private rivers.

Lord HERSCHELL—Unless the thing is brought within the words that it is the public property of the Province you do not bring in the schedule at all. The public works the property of each Province enumerated in the schedule shall be the property of Canada.

Lord WATSON—Why is not improvements to be read with the word rivers?

Lord DAVEY—Why should it?

Mr. HALDANE—It is hardly English—"river improvement."

Lord DAVEY—I think river improvement would be a very odd expression.

Mr. HALDANE—Take the canals, which are river improvements, they are given especially.

Lord WATSON—Canals are public works.

Mr. HALDANE—They are part of the great water way which is constituted by them and the rivers.

Lord MORRIS—Then they form a part of the canal. The river *pro tanto* is a canal.

Lord HERSCHELL—Perhaps it would be more correct to say the canal is part of the river?

Lord MORRIS—I suppose there must be some embankment or something or other by the river; it is not left in a state of nature.

Lord WATSON—Take a river which is embanked at intervals; if there is a towpath along it would not make it a canal.

Mr. HALDANE—There is more than that, taking the St. Lawrence itself. I think I am right in saying the St. Lawrence has rapids on it, and these rapids are avoidable by means of canals.

Lord HERSCHELL—If the improvement covers it with regard to lake improvements a question would arise what is meant by transferring your property, that is to say improvements—whether if you have improvements in the river, all that part of the river which has been improved does not pass; you cannot pass the improvement by itself, it means the river, it may be in the same way that lake improvements pass every part of a lake which is affected by the improvements. I do not know; we have not to decide that: it is difficult to see what meaning you are to give to passing a lake improvement. It is a river improvement when the river is well dredged; we know it is a most important improvement; you give the river improvement, what do you mean by that?

Lord WATSON—If some bends had been cut and a new channel opened would not that channel pass?

Mr. HALDANE—It would as canal.

Lord HERSCHELL—Would it?

Lord WATSON—I do not think so; you do not make a canal by shortening a river or confining its banks.

Mr. HALDANE—I am told they are mostly introduced to get rid of rapids.

Lord HERSCHELL—It may be doubtful whether they would not come in under river improvements.

Lord DAVEY—Very few rivers in a state of nature without work executed on them would be suitable for navigation. If they are on a different level you must have locks. In Canada you must remove rapids and blow up the stones, or do something in most rivers; but in lakes you must navigate as much as you like except that you want embankments, and that sort of thing which would have to be described as lake improvements.

Lord HERSCHELL—Then the question would be whether the lake improvements did not mean that part of the lake which is affected by the improvements which have been made?

Lord DAVEY—They probably would.

Lord MORRIS—That may be so, but I say they should all be in the same boat, lake improvements and river improvements.

Lord DAVEY—The judges seem to have thought it was absurd that the soil of the bed of the river was vested in the Dominion and not the bed of the lakes. The absurdity does not strike my mind, I do not see it.

Lord HERSCHELL—I should have much more difficulty in understanding how they came to give canal improvements and not river improvements.

Lord DAVEY—However, we have got to hear Mr. Blake on this.

Mr. HALDANE—Yes, my Lord.

Lord HERSCHELL—The Board only hear two Counsel a side on the same question; therefore, of course, Counsel will arrange among themselves which Counsel shall address us.

Mr. BLAKE—My Lords, there are one or two separate questions in this matter. There is one question which my learned friend passed over which affects only the Province of Quebec. On that, appearing for Ontario, I have nothing to say; we have nothing to do with it. Again, although the Province of Ontario has vast water interests

it has no tidal interests. It has nothing to do with tidal rivers or sea coast fisheries. If there be any special distinctions on that subject I have nothing to say to them at all. The question which has been touched upon of the three mile limit I have nothing at all to do with. Speaking generally, I think these are the points on which it may be said there is any distinction between the different Provinces. For the few moments that remain at my disposal this afternoon I can best occupy your Lordships' time by pointing out the general principle on which I propose to argue the case. I quite agree that much may be done to diminish the labour which, at first sight, is imposed upon the Tribunal, by dealing with the large general principles which affect the case, and ascertaining afterwards how far these tend to a solution of all the questions; but, owing to the course which the case has taken with reference to some of these questions, your Lordships have not yet been possessed at all of what is to be said upon them, namely, those in which the decisions were against my clients of the Provinces. The decisions which are in favour of the Provinces, and from which, therefore, my learned friends have appealed are, broadly speaking, as we conceive, those affecting legislative and proprietary rights, but almost entirely proprietary rights in the beds of waters, the waters over the beds, and the fish in the waters; and one comes first to inquire what are the general considerations which apply to the creation of legislative and of proprietary rights, distinguishing legislative jurisdiction from proprietary rights, in these three subjects.

LORD HERSCHELL—Do you assert the proprietary right in the fish as distinct from the fish taken?

MR. BLAKE—No, the right is the same as here. You have no right in the fish uncaught, but if you are lucky enough to catch it you can eat it.

LORD DAVEY—It is property.

MR. BLAKE—It becomes property as soon as you have caught it. You can prevent anybody else taking it. You have to take it by your own skill, and then it becomes your property.

Lord SHAND—I suppose you agree with what Mr. Haldane said, although the word property is here used the property is in the Crown.

Mr. BLAKE—Certainly. In the discussion we have talked of the property of the Province and so forth, but it is thoroughly settled by decision that what is called the property of the Province or of the Dominion is property vested in the Crown in the interests of the Province or of the Dominion.

Lord WATSON—The “title” is in the Crown.

Mr. BLAKE—Yes, my Lord, the title is in the Crown; and what is sometimes called the administration, but what is really the right to the beneficial enjoyment besides of the property is subject to the control of the Province through its Legislature and Executive. What I was about to say was that legislative jurisdiction and public proprietary rights are dealt with in the constitution on quite different principles; and, as I observed to your Lordship, in the *St. Catherine's Milling Company vs The Queen* the residuum of legislative jurisdiction not comprised in the enumerations in section 91 and section 92 is expressly vested in Canada, but the residua of property and proprietary rights beyond those expressly vested in Canada are all generally vested in the several Provinces, save only for the qualifications of section 109 and section 117. My general argument is that the limits of legislative jurisdiction and of proprietary right are not identical, and no transfer to Canada of proprietary right in any subject can be inferred from the creation in Canada of a legislative authority over that subject. On the contrary, I argue that whenever it is intended to transfer to Canada—that is, to the Crown in the interests of Canada—a proprietary right, that right is expressly given, and is not left at all to implication from the grant of legislative jurisdiction. From that general proposition it follows clearly that the proprietary rights which are conferred on Canada depend on and are limited by the enumerations of the 3rd schedule to section 108. That being stated one proceeds to inquire what was the condition of things as to the various subjects of proprietary

right in question in this case at the time of the Union. And there is no doubt that the beds of lakes and rivers, of public harbours and other waters within the territorial limits of Ontario were at the time of the Union lands belonging to the old Province of Canada, and public property of that Province, within the meaning of section 109 and section 117.

Lord MORRIS—Of what Province are you speaking?

Mr. BLAKE—I am speaking of the old Province of Canada.

Lord WATSON—It was one, I think, from 1842 to the Act of 1867?

Mr. BLAKE—Yes, 1840 or 1841.

Lord WATSON—And then it was split into its original parts?

Mr. BLAKE—Yes. That being so Ontario gets these things, unless they are taken away and go over to Canada by express grant under the enumerations in the 3rd schedule. This is the state of the case.

Lord DAVEY—As regards property?

Mr. BLAKE—Certainly, my Lord, I was endeavouring to find what the distinction was between legislative jurisdiction and proprietary right. As to property, I say we get these things, or rather we retain them, because that is the language of the Act. They remain ours unless they are taken away from us by the Act; and none are so taken away save by the enumeration in the schedule to the particular section to which I have referred. I concede what my learned friend has stated, that substantially the rule has been adopted, at any rate in the Province of Ontario, though partly based upon the old French law which was held by the judicial authorities of the old Province of Upper Canada to apply as the basis of public and private right, that the large rivers and navigable lakes are to be governed rather by the rules which apply to *de jure* navigable rivers in England, and that as to grants couched in such a form as would, if applied to *de facto* navigable waters in England, produce a certain effect as to the soil

granted *ad medium filum*, and perhaps still more clearly with reference to non-navigable rivers, such grants are not interpreted as having that operation in the Province of Ontario nor, I believe, in the Province of Quebec.

Lord DAVEY—The practical result of that is that the beds of all *de facto* navigable rivers, whether tidal or not, are vested in the Crown?

Mr. BLAKE—Unless specially granted to individuals.

Lord DAVEY—Yes, just as the soil in the highways in Canada, I think I am right in saying, is vested in the Crown.

Mr. BLAKE—In a general sense. There are some provisions of comparatively late dates which vest some in the municipalities.

Lord SHAND—It comes to this: the test which in this country would be a tide flowing and reflowing you apply to the river whether navigable or non-navigable.

Mr. BLAKE—I think it comes for all practical purposes in this case to that; but not as to all things, because there is a distinction on the subject of the fishery, which I will refer to. But in a broad and general sense, the rule is very nearly the same as that which applies to *de jure* navigable waters.

Lord WATSON—You are at one on that point. The claim of the Dominion is based on the same footing; they are claiming rivers as covering their beds on the footing that the beds were in the Crown?

Mr. BLAKE—Yes, my Lord.

Lord DAVEY—That being so, the only question is the proper construction of the 3rd schedule.

Mr. BLAKE—On the subject of property, probably. But there is also, I think, a very important question which has been presented on one side alone to your Lordship, namely what is the proper construction of "fisheries" and the legislative jurisdiction over fisheries, which I do not propose to open to-night.

Lord DAVEY—That is as to legislative powers?

Mr. BLAKE—Yes, but the question is what is the meaning of "fishery," on which I have something to say.

Lord DAVEY—I only mean on the question of the word rivers.

Mr. BLAKE—Yes, my Lord. I might just say, with reference to the question of “fishery,” that my learned friend opened perfectly fairly, as one would expect from him, that there were two definitions of fishery—the art and industry of fishing, and the right to fish in a particular place; but his whole argument went on the view that the second construction was the construction to be considered and not the first.

Mr. ROBINSON—I ought to have said that in the dictionaries the second construction is always given as the construction in law.

Mr. BLAKE—I know the law books say that, but this Act is an instrument which is making the law.

Mr. ROBINSON—I am not arguing: I only point that out.

Mr. BLAKE—I may just add, before your Lordships rise, that my learned friend did not make, as I understand it, any point in argument as applicable to the inland water boundaries of the Province, which I represent, why the boundaries which consist of land covered by water should, on that account, be vested in the Dominion rather than in the Province. Something was said about the three mile limit—

Lord DAVEY—I thought all he said about that was that the control of navigation gave, he would not say necessarily, but reasonably, the soil in the lakes themselves.

Mr. BLAKE—Yes, my Lord; but that I did not understand specially with reference to international right. But on the question of the control of navigation I was making, all that I thought the moment at my disposal allowed me to make, the single observation, that I did not find any argument presented by my friend to the effect that there is a distinction as to some of these lakes and rivers, because they happen to be boundary lakes and rivers, which would operate in his favour beyond the rule which would apply in case they were absolutely

inland, entirely embraced within the limits of the Province. There are many in every Province.

Lord DAVEY—I did not understand Mr. Robinson to draw any distinction.

Mr. BLAKE—No, my Lord.

[Adjourned till to-morrow, at 11 o'clock.]

SECOND DAY.

Judicial Committee of the Privy Council.

COUNCIL CHAMBER, WHITEHALL,

Thursday, 29th July, 1897.

BETWEEN

THE ATTORNEY-GENERAL FOR THE DOMINION OF
CANADA

AND

THE ATTORNEYS-GENERAL FOR THE PROVINCES OF
ONTARIO, QUEBEC, AND NOVA SCOTIA;

AND BETWEEN

THE ATTORNEY-GENERAL FOR THE PROVINCE OF
ONTARIO

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF
CANADA;

AND BETWEEN

THE ATTORNEYS-GENERAL FOR THE PROVINCES OF
QUEBEC AND NOVA SCOTIA

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF
CANADA.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

Present—

THE LORD CHANCELLOR (LORD HALSBURY).

LORD HERSCHELL.

LORD WATSON.

LORD MACNAGHTEN.

LORD MORRIS.

LORD SHAND.

LORD DAVEY, AND

SIR J. H. DE VILLIERS.

[*From the Shorthand Notes of Messrs. CHERER, BENNETT & DAVIS,
8 New Court, Carey Street, W.C.*]

Mr. BLAKE—Pursuant to the intimation given by your Lordships yesterday, it has been arranged that my learned friend the Attorney-General of Nova Scotia will

follow me upon the general questions, though he will speak mainly upon one item, the question of harbours; and my learned friend, the Deputy Attorney-General of Quebec, will address your Lordships simply upon the fourteenth question, which has regard to Quebec only. May I ask whether I am correct in understanding that it was the wish of the Board that, in the course of my argument in answer to my learned friend's appeal, I should open also our appeals?

Lord HERSCHELL—Yes.

Mr. BLAKE—Then, my Lords, I have stated, what I understand to be practically conceded, that unquestionably, unless taken away by section 108 and the schedule, the old Provincial proprietary Crown rights in lake beds and river beds, in the waters above and in the fish in the waters, would remain in the new Province; and that unless legislative rights on these subjects are found comprised in section 91 the subjects would be in the legislative control of the Provinces under property and civil rights, as to both private and public subjects, and under the management of public lands besides as to those properties which were Crown properties in the hands of the Province. Therefore it seems to me the most convenient course is to inquire in relation to the proprietary rights, on which I propose first of all to speak, whether these rights are taken away by section 108 and the schedule. Now the general scheme of the British North America Act is that Provincial property remains Provincial. The general and governing object was, subject to the Provincial property as a rule remaining Provincial, to give to the Dominion proprietary rights in certain specified subjects, as incident to its grant of legislative power; and not at all to make it the proprietor of any portion of the public domain of the Province for sale or alienation. I do not mean to say that they might not sell or alienate some one of these subjects if they found it unnecessary for the public purposes for which it had been given to them. That is a minor matter. But I say if you contrast section 109 and section 117, which retain the proprietary

rights of the Province, with section 108 and the schedule, you find the main and governing intention of these to be that the proprietary rights capable of being alienated, sold and made available for public revenue, are to remain with the Province, and that what are to go to the Dominion are such things as are public and appurtenant to and belonging to certain subjects in respect to which they have exclusive legislative rights. That abstraction from the Provincial property is effected by section 108 and the schedule, and section 108 effects it by speaking of the public works and property of each Province enumerated in the 3rd schedule. "Public works" is thus at any rate the leading element; and as I shall submit, on an examination of the schedule, "property" when mentioned is mentioned because, as the nature of the subjects of the schedule shows, it is necessary in order to include a few minor objects of Provincial property, which had been the subject of Provincial public expenditure, but not strictly to be called public works, which objects appear in the schedule; for example, "dredges" and "soldiers' uniforms," and that sort of thing.

Lord WATSON—Neither section 108 nor schedule 3 profess to deal with public rights or private rights.

Mr. BLAKE—No, I do not think that is contended by the other side.

Lord HERSCHELL—Would not the effect have been the same if instead of the section with the schedule the section had run thus, "the public," and then all the things enumerated in the schedule and then gone on "of each Province shall be the property of Canada"?

Mr. BLAKE—Omitting "works" and property.

Lord HERSCHELL—Yes, if it had simply said "the public," and then enumerated everything in the schedule "shall be the property of Canada." Is not that really the effect of the legislation?

Lord DAVEY—It is necessarily public because the object of the section is to create a transfer or to assign the property as between the Dominion and the Provinces only. That is the only scope of the section.

Mr. BLAKE—Nobody has ever contended that either the sections which hand property over to the Provinces, namely sections 109 and 117, or this section, which hands property over to Canada, interfered with any private rights or interests whatsoever. In all cases we are dealing with public property. I find it is so hard to construe this Act as it stands that I am not quite sure that I am capable at a moment's notice of saying that it would be precisely the same.

Lord HERSCHELL—Is not that the construction of it when it says "The public works and property of each Province enumerated in the 3rd schedule to this Act shall be the property of Canada"? Then you have to look and see what is enumerated in the schedule. Then if you leave out the description and enumerate the things it must have the same effect if they are public works and property.

Lord SHAND—The schedule repeats the words.

Lord HERSCHELL—Yes, is not the effect of an enactment "Public works and property enumerated in the schedule" to take it from the schedule and incorporate it? If you like put it in this way: "The public works and property of each Province—property of each Province that is to say," and then put in the words.

Mr. BLAKE—The public works and property of each Province, hereinafter described and enumerated: that would be the same.

Lord HERSCHELL—You need not say "hereinafter described and enumerated," but "the public works, canals, etc., shall be the property of Canada."

Mr. BLAKE—According to the construction of my learned friend that would be an extraordinary view of the draughtsmanship; that would be as much as to indicate that these things were the Provincial works and property of each Province, whereas there is a great deal more—

Lord WATSON—The meaning of the section would have been precisely the same if the articles to which the schedule referred before had been enumerated.

Mr. BLAKE—I agree, if it had been put “as below,” it would have been the same thing; but I would not call them the public works, and property of each Province, because they are not. They are only some—

Lord HERSCHELL—I am only taking the exact words of the section: “The public works and property of each Province,” that is to say canals, etc., etc., “shall be the property of Canada.”

Mr. BLAKE—No, the section says “The public works and property of each Province enumerated in the 3rd schedule to this Act shall be”; that is to say those of the public works and property enumerated in the schedule.

Lord HERSCHELL—That would not assume there were no other public works and property which were transferred, if you were to say “the following public works.”

Mr. BLAKE—I agree; “following” makes the difference. Then to return to the elements of the schedule you find the first one to be public works and property belonging to those public works, “canals, with lands and water power connected therewith with the appurtenances.” And here it is to be remarked that while the canals, as far as I know (though I do not pretend to speak authoritatively, and in this matter we have not got a special case, and we have not got the facts before us), but as far as I know without exception, the canals that I am aware of, which are connected with rivers, which are not mere cuts like the Burlington Canal cut into one of the harbours, kept open by scouring and dredging, but all the canals connected with rivers are, not canals which involve canalisation of the whole river, but they are separated from the river, sometimes running inland for some distance and sometimes created by an embankment which elevates the level of the water, and separates a portion of it from the general and main current of the river. If the river were held to pass, that water and water power would be part of the river, and it would be quite unnecessary on that construction to specify it here. Next, “public harbours,” which I shall pass over,

if your Lordships allow me at present, because I have to deal at more length with that, public harbours being a special thing.

LORD WATSON—That question arises under your appeal?

MR. BLAKE—Yes, my Lord.

LORD WATSON—To what extent public harbours are concerned?

MR. BLAKE—Yes. "Lighthouses and piers and Sable Island," "Lighthouses and piers" being, of course, public works with the land belonging to them; and as to "Sable Island," upon which there has been some discussion without much information, I shall leave my learned friend, the Attorney-General of Nova Scotia, within whose Province that island is situate, to state the case upon it. "Steamboats, dredges, and public vessels," all items not, indeed, of public works, but items of public expenditure and of property connected, as are all these that we have dealt with up to this time, with "navigation and shipping," and incident to matters of that kind. Then I pass for the moment for the same reason, "Rivers and lake improvements," because I want to analyse the schedule generally. Then you get "Railways and railway stocks, mortgages, and other debts due by railway companies." These, of course, refer to the public works which were Government railways, and the railway stocks, mortgages, and "other debts due by railway companies" were debts and securities created in reference to some railway companies which had had monetary transactions with the Government, and some railway companies, if I remember right, which had been alienated by the Government. Then you get "Military roads," of course, in connection with the subject of "Defence." Then you get "Custom houses and Post offices" in connection, of course, with "Indirect taxation" and the "Post office." Then come "all other public buildings except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments," these being all items of public expenditure with their sites, the main

and specially specified purposes of which were connected with subjects of legislative jurisdiction of the Dominion Parliament. Then "Property transferred by the Imperial Government and known as Ordnance Property," upon which no information is before us in this case, and which from its name and description obviously relates to property which had been held by the Imperial Government as property for "Defence."

LORD HERSCHELL—That might be a great deal more than anything which would be called public works.

MR. BLAKE—Yes, my Lord, I am connecting it with "defence" from its title. We know nothing about it.

LORD HERSCHELL—I thought you were now on the point that all these were public works.

MR. BLAKE—No. I stated that the main bulk of them was "public works." Most of the items not "public works" were the objects of public expenditure, and that both the public works and the objects of public expenditure were directly connected with and belonging to certain specific enumerated items of Canadian legislative jurisdiction; and I was asking your Lordships to deal with this just as I dealt with military roads (No. 7), namely, to attribute it to the jurisdiction in connection with defence, of which I think it adequately appears to be part.

LORD SHAND—Would it disarrange your argument if you could state what the point you are arguing just now on the construction is, what is the point you are making; I have not quite followed it.

MR. BLAKE—The point I am making, my Lord, is that there is derivable from a general survey of this schedule this proposition, that the purpose was, after having handed over, or rather arranged to be retained by the Provinces, the mass of the public domain and all the property which might be the subject of sale or alienation, or the receipt of revenue in the ordinary sense by administering or dealing with it, to abstract from that mass a few specific items, to go to the Dominion, not at all with the idea of making the Dominion Government

the proprietor in the sense of being the administrator of a portion of the public domain to make a profit out of it by sale, but only in connection with or as incident to its discharge of its exclusive legislative powers.

Lord HERSCHELL—I confess I cannot follow. Take the canal. Do you say that it vested the property in the canal in the Dominion Government?

Mr. BLAKE—Certainly.

Lord HERSCHELL—All the property that there was or ever had been in the Province?

Mr. BLAKE—I think so.

Lord HERSCHELL—When they had this canal and the property in it vested in them, was there anything to prevent them doing anything they pleased with it which legislation authorised them to do?

Mr. BLAKE—No ; as my learned friend said a while ago, in large and sweeping terms, they might have abolished navigation.

Lord WATSON—They might have made it over to a private company doubtless.

Lord HERSCHELL—Yes, a railway might have become more convenient, and it might have become useless and they might have sold it.

Mr. BLAKE—Doubtless; after it had become useless.

Lord HERSCHELL—They might by either a proper or improper act do so, but what is the alternative you put on the property passing to them. I understand what you say about the reason why they transferred the property in these things being that they were works which had to be carried on; but I do not understand what difference it makes in the extent or degree of property which did pass.

Mr. BLAKE—I was not arguing that it made a difference in the extent or degree of property which did pass by clear words; I stated a while ago that I did not argue but that whatever they do acquire under this schedule they have the unquestioned power to alienate. But I stated that my point is that you find the

Provinces retaining all those portions of the public domain which are available for the purposes of sale and disposition, of which the normal characteristic is that they are to be sold and disposed of, or a profit or revenue is to be made out of them—

Lord HERSCHELL—They retain everything that is not given away, but if the thing given might be sold or disposed of they might have sold or disposed of the canal.

Mr. BLAKE—Yes.

Lord HERSCHELL—If transferred somebody else might sell it.

Mr. BLAKE—Yes.

Lord WATSON—They might dispose of the railways.

Mr. BLAKE—Doubtless.

Lord WATSON—Railway stocks and mortgages are open.

Lord MORRIS—I think Mr. Blake admits they might dispose of everything granted to them.

Mr. BLAKE—Yes.

Lord MORRIS—In seeing what is granted to them, it appears to me it is useful to see what the class of property was and the object.

Lord SHAND—I was anxious to get the line if I could follow it.

Lord WATSON—I suppose they could shut up a military road?

Mr. BLAKE—I never disputed but that they might use in the largest sense, even in a sense which many might call an abuse, their legislative powers in reference to such things as are conceded to them.

Lord HERSCHELL—If the thing is conveyed and the property in it is conveyed, it seems to me the person to whom it is conveyed can do anything on earth with it.

Mr. BLAKE—I am not arguing against that.

Lord HERSCHELL—Then I do not follow the argument.

Mr. BLAKE—The position I take is that the class of things given to Provincial Governments as contrasted with the class of things given to the Dominion Government—

Lord DAVEY—Section 108 must be read in connection with section 91.

Lord WATSON—I do not think it appears with the exception of canals, railways and some other items, there appear to be any subjects given to them of property which at that date were producing revenue.

Mr. BLAKE—Or were intended to be used as producing revenue.

Lord HERSCHELL—When you say intended to be used, that seems to me to be begging the question; you cannot say what is intended to be done under circumstances that might arise when a man sold the property.

Mr. BLAKE—The intention may change. I was speaking of the then intention and the then object; doubtless, the purpose for which they were acquired and created might have been changed, and could have been changed by the proprietor.

Lord HERSCHELL—Take the last one in that class, “Lands set apart for general public purposes.” Could you have anything wider than that?

Mr. BLAKE—I was just reaching it, my Lord. “Armouries, drill-sheds, military clothing, and munitions of war,” to which the observations I have made sufficiently apply. And “Land set apart for general public purposes,” as to which it is beyond my capacity to define what they are until I know them.

Lord WATSON—It would depend what the public purposes are.

Mr. BLAKE—Precisely. I am not going to argue that after they have acquired land set apart for public purposes they are not the masters of that land to the extent that they may declare that a general public work is no longer a useful thing—

Lord WATSON—I should think, for instance, they might pull down a jail and build the jail on another part of the property.

Mr. BLAKE—As it happens they have nothing to do with jails. “Jails” are Provincial, “Penitentiaries” are Dominion.

Lord SHAND—Would jails not come under section 8?

Mr. BLAKE—No, my Lord.

Lord SHAND—“Custom houses, Post offices, and all other Public Buildings.”

Lord HERSCHELL—They would have passed only they would be appropriated to the use of the Province.

Mr. BLAKE—Yes, reading the whole Act together it is perfectly clear the legislative jurisdiction of the Dominion was over the Penitentiaries, and they retained the Penitentiaries. The Provincial obligations were with reference to the Jails, and they retained the Jails.

Lord HERSCHELL—The jails would have passed but for the provision that the Government of Canada were to appropriate certain buildings.

Mr. BLAKE—Doubtless.

Lord SHAND—They get all the buildings, but Canada gives back some of them.

Mr. BLAKE—They had got the Provincial Legislative Chambers and the Provincial Government houses, except that it was understood at the time that they would appropriate them for the use of the Province.

Lord WATSON—It was left to the Dominion Government to apportion between itself and the Provincial Legislature the buildings necessary for carrying on the purposes of the Government.

Mr. BLAKE—Yes.

Lord WATSON—Everything under this section, in the first instance, goes to the Dominion.

Mr. BLAKE—Not everything.

Lord HERSCHELL—Everything which comes within

any of the descriptions. When you have once got the meaning of any of the things described, then you know what is passed, and that is only ascertained by finding out the meaning of the words used.

Mr. BLAKE—Yes, my Lord. I was desirous, first of all, of trying to see what light the characteristics of the schedule, as contrasted with the characteristics of the other sections, gave as to the interpretation of a doubtful and ambiguous word, which is the question in this case—

Lord SHAND—In short, you are drawing a line; but I have not been able to follow that line.

Mr. BLAKE—I am very sorry that I am incapable of presenting it more clearly.

Lord SHAND—You are making a sharp line between two things, and I cannot quite see where you draw the line.

Mr. BLAKE—My last observation was to have been with reference to “Lands set apart for general public purposes.” And it is to this effect, that it is an indication, no doubt, that there was in some Province of the Dominion of Canada some land which had been in some way specifically set apart, not for public purposes, but for some general public purposes. So much is indicated. But in what Province, what lands, and for what general public purposes we are entirely ignorant. Nor am I able to tell anything about it; and I am therefore not able to throw light, one way or the other, upon that point; nor do I conceive it would be possible in this case to draw an indication one way or the other from that item; for there must have been a specific setting apart of some land for some general purpose, and that is all we get about it. Then I take up the enumeration “Rivers and lake improvements”; and, of course, as my learned friend has said, everything turns on that crooked letter “s”; for no one can doubt that but for the “s” the construction would not have been very elegant English, it is true, but still very clear. But as to rivers and lake improvements, we contend that notwithstanding the letter “s” the true construction is “Rivers improvements and lake improvements.”

The LORD CHANCELLOR — Notwithstanding the letter “s”?

Mr. BLAKE—Yes.

The LORD CHANCELLOR—How do you get rid of it?

Lord HERSCHELL—It does not get rid of it.

Lord MORRIS—Notwithstanding the existence of the letter “s.”

Mr. BLAKE—I cannot eliminate it.

Lord WATSON—There would have been more to say if there had been an “s” at the end of lake also.

Mr. BLAKE—More to be said on my side, and less on the other.

The LORD CHANCELLOR—I am not certain, it strikes me both are intended to be plural, only it is a composite noun—lake-improvements; both are in the plural.

Lord WATSON—Yes, all improvements of a lake.

Mr. BLAKE—That construction is open.

Lord DAVEY—Lake is used as an adjective; you say river is also used as an adjective.

Lord WATSON—You say all improvements of lakes.

Mr. BLAKE—If we look at the translation, they are both in the plural.

The LORD CHANCELLOR—Which was the original? If the translation was later in point of time, that is the construction which it was thought proper to take.

Mr. BLAKE—I was speaking of the earlier translation, and I was not speaking of it at the moment as asking your Lordship to look at it —

Lord WATSON—Unless there is some very strong or urgent reason for it we must read those words in the Act of 1867 according to their natural and ordinary acceptance. If to be read by the context, the context must show that another meaning is required and what that other meaning is.

Lord SHAND—Rivers is one word and lake-improvements may be called one word also. Lake-improvements may be put as one word. Rivers is a substantive.

Mr. BLAKE—If “Lake-improvements” is one word, it is a very new one.

Lord SHAND—It is obviously one word. Lake-improvements: practically one word. It is not lakes that are given, but lake improvements.

Mr. BLAKE—Meaning improvements in lakes.

Lord HERSCHELL—It would not be English unless you treat it as a composite word. Lake-improvements is not English. It would be intelligible as a composite word, but it is not English.

Mr. BLAKE—I own it is not very good English even treated as a composite word.

Lord SHAND—It is intelligible.

Lord HERSCHELL—We are not so much in the habit as the Germans are of creating composite words; but it seems to me a very good composite word and to suggest a very definite idea.

Lord MORRIS—There is a good deal said about tenants' improvements.

Mr. BLAKE—There is an “s” there which makes it clear, because tenants' is in the possessive, as a great many people understand in Ireland.

Lord WATSON—I do not see anything in the reason of the thing; the division is a little arbitrary.

Lord HERSCHELL—Tenants' improvements are improvements made by a tenant. Lake improvements are not the improvements of the lake in that sense, because the lake does not make them.

Mr. BLAKE—No, it is quite a different case. Then it would seem a very curious association and collocation to put in the same enumeration “rivers” as meaning the absolute property in rivers, and “lake improvements” meaning “improvements in lakes.”

Lord WATSON—It gives them the whole waterway in one case which is available for navigation reading it against you. I mean, in the other case it gives those portions of the lake property which are deemed necessary.

Lord HERSCHELL—What does lake improvements mean ; what property does it pass, supposing that the bed of a lake near a landing stage or jetty has been improved by being deepened by dredging, what lake improvements would pass that portion of the bed of the lake which had been so improved.

Mr. BLAKE—I think that would be a very difficult question to answer, and it seems to me a question absolutely immaterial, because it seems to me that whether the bed of the lake remains in the Province or a portion of it passes to the Dominion, the right of the Province is absolutely subject to the servitude of the navigation.

Lord HERSCHELL—So is the public river subject to servitude as a possible explanation if “lake improvements” possess a portion of the lake that has been improved, which would be a portion near the border of the lake—there might remain many miles, one hundred miles in some cases, of a lake—that never would be improved at all, and therefore there was no reason to pass it. On the other hand, in the case of a river it would be very difficult to detach and define the improved parts as distinguished from the unimproved parts. Therefore it would be more convenient to transfer the whole. I do not say that was the reason, but it occurs to me as a reason which might make it not unintelligible that rivers should be passed and lake improvements should be passed. I do not know whether you follow that.

Mr. BLAKE—Quite, my Lord ; but I was anxious, after a very few words, to go to what the result of passing the rivers would be ; which is very much wider than anything which has been suggested by your Lordships this morning, and therefore requires a much larger construction and much greater consideration. I do not myself see that there was any necessity or object at all in passing a mere deepening of the bed of the lake, because I absolutely concede, as not a matter in contest, the right of the Dominion to deepen and to keep on deepening the bed wherever it pleases for navigation purposes, and the inability of the Province in any portion of the lake to create or to alien any obstruction

with power to create or to suffer to be created any obstruction to navigation.

Lord HERSCHELL—I will tell you what might arise. If it were only the property in the improvement that is in the deepened bed that passed, and they had only, as incident to their control of the navigation, the right to deepen, would it be certain that the stuff taken out of the bed when deepened would be their property? Might it not be the property of the Province, if there is nothing more than that?

Mr. BLAKE—I should have thought not, my Lord; but we never think of that, because the stuff taken out is *damnosa hereditas*; it has to be taken away into deep water at great expense, and put there where it will not interfere with navigation.

Lord HERSCHELL—It is not gravel.

Mr. BLAKE—No. One of the elements of expense in deepening is that you have to take away the stuff.

Lord DAVEY—There might be gold in the gravel.

Mr. BLAKE—Yes, but not in these regions, my Lord.

Lord HERSCHELL—There might be gold in the river.

Lord DAVEY—They are dredging the rivers of New Zealand for gold.

Mr. BLAKE—Yes. As far as I can learn from the papers, our Canadian gold is in the Arctic circle just now; there is never anything heard of it in connection with the rivers with which we have practically to do. I have thought, therefore, that what was present to the mind of the Legislature, and what is the construction which ought to be given to the Act, was the tangible, feasible improvements, such as embankments and breakwaters in rivers and lakes.

Lord HERSCHELL—Would they not have power over these? You say those were intended to be conveyed. One does not quite see why they should be conveyed, and it is difficult to speak of them as lake improvements. They do not improve the lake, and why

were they not conveyed as breakwaters and jetties? It is a curious thing, if that is all that was meant, to describe this thing as lake improvements.

Mr. BLAKE—Your Lordship has just asked me were they not conveyed under a general description. I think this was an attempt, perhaps not a happy one, to make a general description.

Lord HERSCHELL—I suggest this description is enough to cover a great deal more. If it was intended to be limited as you contend, it appears to me not apt: if it was intended to cover everything done in the improvement of the lake—the artificial thing done—every part of the lake improved, then one could understand the reason of doing it.

Mr. BLAKE—You have “lighthouses and piers” including lighthouses and piers which would be in lakes; and you have in addition lake improvements, and I thought that meant these other things. It may be it covers the bed, but it does not seem material: there it is.

Lord WATSON—I can conceive other things. You might have deepened channels, you might have walls confining the channels where the lake debouches into the river at its northern end; in fact, in the St. Lawrence there is a passage for ships.

Mr. BLAKE—Yes, vessels go down the St. Lawrence.

Lord WATSON—Part of that is an adaptation of the lake water.

Mr. BLAKE—In the particular example which your Lordship has given there does not happen to be anything of the kind.

Lord WATSON—I suppose you find probably the same sort of work at every pier or landing-place where a steamer calls.

Mr. BLAKE—I dare say.

Lord WATSON—I should think it also very likely that the regular navigation of the lake is a good deal confined to those channels and the line of those improvements—I mean of the steam traffic.

Mr. BLAKE—The discussion more and more leads one to the conclusion how extremely difficult it is to deal with this question without more facts than your Lordships have before you.

Lord MORRIS—Is not this sufficient, that lake improvements must mean something artificial.

Mr. BLAKE—Yes, I think that is agreed on all hands.

Lord WATSON—I should have guessed, but it may be ill-founded, that they were meant to denote improvements in the navigation in the interest of navigation.

Mr. BLAKE—Or having regard to the navigation of the lake.

Lord MORRIS—It is hard to know what is meant beyond that it was something artificial.

Mr. BLAKE—It was the work of man, not of nature ; it was an improvement on nature ; and what I say is that improvements in lakes, which is the meaning of lake improvements, and improvements in rivers would give the improvement in the river.

Lord HERSCHELL—If it passes in lakes, a part of the lake which has been deepened by dredging, if that part of the lake passes under lake improvements and that would apply also to river improvements, using it in your sense, then the legislation would be rather strange which left the property in the Dominion and Province so undefined. If you had to go into a question of fact at what point the improvements were so far Province and so far Dominion, that it seems to me would be somewhat strange legislation ; and yet if the lake improvements include those parts which have been deepened, and the river improvements include those parts of the river which have been deepened, that is the inevitable result.

Mr. BLAKE—And yet, as your Lordship says, it depends upon the facts of the case ; because, looking at the case we have generally in our minds in talking of this thing, the St. Lawrence, you have an enormous proportion of the mileage of the river without any deepened channel, without any artificial works, and you have a

comparatively small portion of very expensive canalisation, and a part where there is the deepening of a rocky channel.

Lord HERSCHELL—They come at different parts in the river.

Mr. BLAKE—Doubtless.

Lord HERSCHELL—There you would have a part of the river for the Province and a part Dominion, then part Province and part Dominion. That seems to me possibly why they may not in the case of rivers have been tempted to define and divide, and thought it best that they should be in one or the other.

Mr. BLAKE—My argument must needs seem very imperfect on this, until I am able to reach the point at which I point out the effect of the other construction. I am desirous not to divorce the question into fragments; and I have just this further suggestion to make, that improvements in rivers would embrace improvements where, by the operation of dams or otherwise, slack water navigation was created in the river, or a deepened navigation obtained in the river itself, and where there were breakwaters which would not pass under the name of “piers.” That it seems to me would be a natural and effective explanation.

Lord WATSON—If their Lordships were of opinion that it was the proper inference to draw, that “river” was intended to stand by itself, to mean what it says, and not to be associated with improvements; would it not require something very much stronger than any argument you have put before us to induce the Board to give a different meaning to “rivers”?

Mr. BLAKE—I have not yet completed my argument; and I respectfully hope your Lordship will not appreciate it till it is finished.

Lord WATSON—It must be something amounting to coercion which leads us to so read the word.

The LORD CHANCELLOR—Mr. Blake is endeavouring to coerce us.

Mr. BLAKE—I am endeavouring to explain it to

your Lordships. I was just arriving at the question of the effect of the other construction ; and I think if we are to enter into questions of strained constructions and unreasonable results, it will not be very many minutes before your Lordships will find that unreasonable results of a very extraordinary character would follow from the other construction.

The LORD CHANCELLOR—Would you mind telling me, Mr. Blake. I have not heard you before about it—what words would you substitute for those words which you are endeavouring to construe now. Supposing you were the draughtsman and had to put it into plain language, what words would you use to express your view?

Mr. BLAKE—I associate improvements with rivers.

The LORD CHANCELLOR—Would you mind giving me the words which you say you will read now. Supposing you were the draughtsman what words would you read?

Mr. BLAKE—My Lord, I would not have put it in these words if I had been the draughtsman.

Lord DAVEY—As it is in French : improvements in lakes and rivers.

Lord HERSCHELL—Would you put a comma after the letter “ s ” to show that it is plural?

Lord WATSON—It would suit you better to strike out the “ s ” and after “ river ” insert “ improvements,” river improvements and lake improvements.

Mr. BLAKE — River improvements and lake improvements.

Lord WATSON—That would fully express it.

Mr. BLAKE—And I say we can read rivers improvements and lake improvements.

Lord DAVEY—You mean it is improvements in rivers and improvements in lakes?

Mr. BLAKE—Yes.

The LORD CHANCELLOR—Do you say improvements in rivers is what you mean and would have there?

Mr. BLAKE—Yes, my Lord.

The LORD CHANCELLOR—Very good.

Mr. BLAKE—That or its equivalent. I would not have drawn it with either of these words.

The LORD CHANCELLOR—I understand you now.

Lord WATSON—In order to make the clause free from ambiguity you would propose to put a comma.

Mr. BLAKE—My opinion is that river and lake improvements is enough ; I do not say it would be essential to put it so.

The LORD CHANCELLOR—I did not ask you what you say would be essential, but I want you to give me in plain terms what you say is the meaning of the words.

Mr. BLAKE—Yes. When two constructions are proposed, one must see what the result of each construction would be ; and the first thing I say is that if you are to take “rivers” in the sense in which my learned friend suggests it you have no confining of it at all to navigable rivers, it applies to all rivers which are vested in the Crown in the interests of the Province.

Lord DAVEY—Would there be any rivers vested in the Crown except what you call navigable rivers ?

Mr. BLAKE—Why, certainly, my Lord, hundreds of them ; I daresay I should not over-estimate the fact if I said thousands of them.

Lord SHAND—Unless the word “public” comes in to control the whole section.

Lord DAVEY—You say there are public rivers which are not navigable.

Mr. BLAKE—What is the meaning of public in this sense—property of the Province ?

Lord HERSHELL—Yes.

Lord WATSON—Yes.

Mr. BLAKE—Property held by the Crown in right of the Province. There were millions upon millions of acres of land in each or most of the Provinces intersected by, cut up by innumerable rivers.

Lord WATSON—That is why, I take it, it was thought necessary by those who compiled the Statute to insert a schedule defining the specified public works and property which were to pass under it.

Lord HERSCHELL—Mr. Blake is saying that there were numbers of rivers. If they are public property, what is there extraordinary about it.

Mr. BLAKE—To divorce from the proprietorship of the Province, which is the owner of that public domain, which is to administer and manage, sell and alien that public domain, amounting, as I say, to millions of acres in each Province, all the small non-navigable rivers which intersect these acres, and which ordinarily pass, just as non-navigable rivers in England pass, under the same rule with reference to the riparian proprietor; which are, although absolutely useless for, and never dreamed of as being useful for navigation, yet of great importance with reference to the enjoyment by each proprietor of his own land, which have also a separate and independent utility with reference to the creation of water powers and mills—not in the least connected with navigation—to divorce, I say, from the proprietorship of that vast public domain the proprietary right in these innumerable small rivers—

Lord WATSON—Do you think it was intended, under section 108 or the schedule or section, that there was any property which had been granted out to the Crown together with the solum?

Mr. BLAKE—No, I have not said so.

Lord DAVEY—The unsettled lands?

Mr. BLAKE—The unsettled lands are the subject. Your Lordships had in *The Queen v. St. Catherine's* enough to tell you what there was. In that case, I think it was twenty millions of acres, and that was only a fraction of the land in that portion of the Province of Ontario.

Lord DAVEY—It would divorce the small streams from the unsettled lands?

Mr. BLAKE—Yes; from the lands through which they flow, and to the enjoyment of which they are useful

and necessary. You would set up two sets of Crown proprietors——

Lord WATSON—That was not Provincial land?

Mr. BLAKE—Yes.

Lord DAVEY—Yes.

The LORD CHANCELLOR—The point is, it seems forcible on the face of it, where you have Crown lands all over the place, some granted to individuals, some remaining in the Crown, you have, nevertheless, belonging to the Provinces large tracts of land; and yet, through them go non-navigable streams which are still to belong to Canada. That is your point.

Mr. BLAKE—Yes, that is my point.

Lord DAVEY—It would be essential, when settling these lands, to give rights to the settlers over these non-navigable streams.

Lord HERSCHELL—If the words used are capable of the construction you contend for, that would be a reason for so construing them, and not in the other way. I admit that; but supposing that is not the natural meaning of them, and not a meaning that can be put on them without doing violence; are we justified, because it would have been a very inconvenient arrangement, because we may think that if all this had been contemplated it would not have been done, in giving the words a meaning which they do not naturally mean. I mean it may have been overlooked. One does not know the number of what would probably be called rivers which have not been granted. Even if we did, it may be the Legislature did not contemplate and know of it. That is the difficulty I see.

Mr. BLAKE—Yes, my Lord.

Lord HERSCHELL—It only comes to this: it would have been a very inconvenient thing to have made the grant which, on the hypothesis against you, has been in terms made. To what extent is one justified in yielding to an argument on the construction of the Statute?

Lord DAVEY—If the words are ambiguous; but

you must not make your ambiguity in order to bring in the argument *ab inconvenienti*.

Mr. BLAKE—No, my Lord.

Lord HERSCHELL—I should quite admit if they were reasonably susceptible of one or other of the two constructions, your argument would be of great force.

Mr. BLAKE—If they are unsusceptible of my construction, then no matter what the consequence is you must, of course, take the other; but if they are susceptible of my construction it is an argument I will not say of great, but I humbly submit of absolutely overwhelming force—

Lord DAVEY—I think you are entitled to say “great.”

Mr. BLAKE—For this reason; consider what has been done—

Lord HERSCHELL—Some of these rivers not now navigable might be made navigable in some parts, and it might be a very inconvenient thing if the Dominion which had to deal with these matters had it out of its power, because it had not the rivers in it, to make such improvements as would make a non-navigable river navigable; that is another consideration.

Mr. BLAKE—Yes; but I have said, and I think it is impossible to argue against it, that the legislative power of the Dominion could operate upon and take the non-navigable river to make it navigable.

Lord HERSCHELL—They have power to operate upon a river which is not a navigable river?

Mr. BLAKE—And make it navigable.

Lord HERSCHELL—Yes.

Mr. BLAKE—Most of the learned judges of the United States have held that. They have taken non-navigable rivers for the purposes of making them navigable, and that has been the settled jurisprudence of the United States.

Lord DAVEY—You say they could do it under their exclusive power over navigation; they could pass an

Act to convert a perfectly non-navigable river into a navigable river by making embankments, locks, and quays, and so forth.

Mr. BLAKE—I have no doubt of it whatever.

Lord HERSCHELL—That I should have thought a very arguable point.

Lord DAVEY—Mr. Blake admits it against himself.

Lord HERSCHELL—To take a property not theirs, and over which they had no control, and turn it into a navigable river: we have not to decide that, but I think it can hardly be conceded.

Lord WATSON—It is one kind of ambiguity when you find on the face of the words themselves something doubtful, and an ambiguity is different in a case where the words are susceptible of an ordinary and natural meaning when you look at them; but then you are told if you consider the vast amount of different subjects they would embrace read in this way, you must come to the conclusion that it is doubtful whether the Legislature can have meant that. I do not know whether it is altogether safe to assume that the British Legislature, even though the channels from which they derive their information had every circumstance. I have no doubt they had some.

Mr. BLAKE—It is very difficult on a bald, naked statement of questions like this to deal with the subject before a tribunal, which necessarily has not the common knowledge of the country as to the physical conditions of which the judges in the country would take judicial notice.

Lord WATSON—I quite admit, in order thoroughly to understand the Statute, you must understand the words, and in the second place all the matters that are passed.

Mr. BLAKE—Yes.

Lord HERSCHELL—I do think you make out a strong case for thinking that the Legislature was not likely, if it foresaw and understood, to have transferred all the rivers;

and if it had transferred any possibly they would have been only the navigable ones. For that I think you make out a strong case ; therefore, if it is a reasonably possible construction to say it does not transfer the river, then there is strong ground for the argument. To my mind, I think you have made out your point so far, but it is a question whether that quite carries you.

Mr. BLAKE—I quite agree. I cannot ask your Lordships to adopt an unreasonable or impossible construction. You have suggested that I have given strong reason if there is a reasonably possible construction for its adoption ; I want to point out the results both to the Dominion and the Province. If this is the property of the Dominion, how is it to deal with the property ? Is it to establish the method of devolution of title ? Is it to prescribe the modes by which this particular property shall be transferred ? Is every lot which is cut by a non-navigable river to be sold in pieces, and not together ? Is the locatee to look to one Crown as to one part of his property which is essential for his enjoyment, or to the passage across from one part of his property to the other, and to another Crown for the other part of the property ? I maintain the position of the Province becomes unworkable if the river is in the hands of the Dominion. I take it that would be the view of everybody possessed of the common knowledge of the country as to the conditions.

Lord WATSON—For my own part, I must admit I am at this present moment in perfect ignorance of what is meant by a river in the Dominion of Canada. I know this only : that persons from the other side of the water speak very slightly of what we call a river in this country.

Lord DAVEY—Is not it possible that these words may have another construction which is not so wide as you suggest in argument, and which would be free from the inconvenience you suggest ; namely, it may mean the public navigable rivers ?

Lord HERSCHELL—Following that out, may it not mean the rivers in which there are public rights as dis-

tinguished from their happening to be a public body's ; because what is the property of the public body may not necessarily be in the sense of the Statute public property ?

Lord DAVEY—The property which the Provinces hold for the use of the public, not streams which they hold merely as part of the Crown Dominion of the soil—do you see what I mean ?

Mr. BLAKE—Yes.

Lord WATSON—Those parts of the property from which territorial revenues are not derived.

Lord SHAND—I understood the argument most used was that the line was to be drawn at the rivers. I understood that was the argument that smaller rivers did not go, but only the navigable rivers.

Mr. ROBINSON—Oh, no, my Lord.

Lord SHAND—You mean all the rivers ?

Mr. ROBINSON—Yes ; we see no possibility of the construction of its being only the public navigable rivers. We do not think that construction admissible ; that it is only the public navigable rivers.

Mr. BLAKE—No ; but, my Lords, I must say I think it much more difficult to import all that has now been suggested into this clause than to leave out one little “s.”

Lord DAVEY—“All rivers, tidal or non-tidal, navigable or non-navigable, ungranted at the time of the passing of the British North America Act.”

Lord SHAND—They claim that ; but I thought the other view was suggested as possible.

Lord MORRIS—Mr. Robinson said that refers to all the rivers.

Lord HERSCHELL—Supposing there had not been all these items, but take one of them, the public property of the Province, that is to say rivers and railways. Might not that mean not all the rivers, but the rivers in which the public had rights ? The public have no rights in a sense in the property generally which by virtue of the Dominion is vested in the Province. It cannot be said to be properly public property.

Lord DAVEY—All property held for the public use. Would it not mean that?

Mr. BLAKE—If your Lordship would have the kindness to refer to the provision in enumeration 5 of section 92. “The management and sale of the public lands belonging to the Province, and of the timber and wood thereon.” These are the public lands; the others are the public waters in the same sense.

Lord MORRIS—There seems to be no middle way between it.

Mr. BLAKE—No, there is no middle way.

Lord MORRIS—You must have everything.

Lord HERSCHELL—You do not want to find a middle way; but it may be ultimately to your advantage to find a middle way if we cannot see our way to go the whole distance with you.

Mr. BLAKE—It may be so; but at present my learned friend and I, if we differ about everything else, agree that there is no middle way.

Lord SHAND—I do not think your learned friend would put the more modified form; he desires to get the whole. We do not get assistance in reaching the medium from either argument.

Lord DAVEY—You desire to drive him to an absurd conclusion.

Mr. BLAKE—I do not drive at all, my Lord; my learned friend opened his case on that ground, I think perfectly rightly. I accede to that.

Lord DAVEY—You wish to show it leads to absurd results?

Mr. BLAKE—I wish to show that his view on this point, which I believe is correct, leads to absurd results.

Lord DAVEY—If we can see our way to avoid those absurd results, and yet give the words a fair meaning.

Mr. BLAKE—Your Lordships will have to make a much more revolutionary change in enumeration 5 than any change required to do what we want; so that the

"middle way" will not be that in which one may most safely go, I think.

Lord HERSCHELL—If you suppose the word "public" put before rivers, the word public is put before harbours in number 2, and not put before "rivers."

Mr. BLAKE—Yes, which makes a difficulty about the middle way again. It is "neck or nothing."

Lord HERSCHELL—Of course, Mr. Blake, there is this, that it has happened before now, and one has been obliged to say judicially, "We think this was not foreseen, and if the Legislature had seen the effect of the words they would not have used them; they have used them and we cannot help it." That is *not* infrequently said by the Judicial Bench.

Mr. BLAKE—I have read such decisions; but the Court does what it fairly can to avoid alleging that the Legislature has probably made a mistake, or acted as I am afraid Legislatures too often do.

The LORD CHANCELLOR—No, I do not think we ever allow that the Legislature has made a mistake; we strive to construe a statute because we have an idea that the Legislature does not make mistakes, and if a construction is supposed to lead to injustice we try to put a construction which will not lead to injustice.

Mr. BLAKE—Yes, my Lord, that is my contention; and I shall hope for your Lordship's best efforts on this occasion. That construction, then, which is proposed would be opposed to what I have suggested, the general notion with reference to the public domain. It would be of the most inconvenient and, as I conceive, absolutely unworkable character. It would give the Dominion in the end, as to the vast number of non-navigable rivers to which I have referred, simply the right to make money by the sale of the river to either the Province or the private proprietor.

Lord HERSCHELL—Supposing the other construction is the correct one, what would be the test as to whether it was a river? It cannot be merely because it was called a

river ; you could not say a certain stream or body of water within the banks, to use a neutral expression, in one region passed because it was called a river, whilst one exactly similar, of the same width, and depth, and character, did not pass because it had always been called a stream. What is the test of whether it is a river ? It is not all streams, but all rivers. What is the test to determine whether it is a river or not ?

Mr. BLAKE—I could not tell you, my Lord.

Lord HERSCHELL—Is it the possibility to test it by navigability.

Mr. BLAKE—No, because we know perfectly well many rivers are not navigable.

Lord HERSCHELL—That is true, but when you have a word used which obviously cannot be applied with reference to mere nomenclature, when you have a word which obviously is not intended to include all bodies of water within banks, there must be something that it means, you must show that there is a possible definition of it. If you can find no other, may it not be that on that ground you are driven to navigability, which is the ordinary test of public rivers, as the test, and to say that must be what the Legislature meant because there is no other way of defining “rivers.” You do not, as I suggest, find any way of defining it : it cannot be by the mere name, can it be by a certain breadth or magnitude ?

The LORD CHANCELLOR—I understand Mr. Blake to repudiate navigability having anything to do with public rivers.

Lord DAVEY—You intimated the inconvenience, and I can sympathise with you of arguing before a tribunal which has not local knowledge. Would you kindly tell us from your great local knowledge what the meaning of a river is in Canada ?

Mr. BLAKE—I can only say, my Lord, from my very limited local knowledge, that the phrase river is applied in Canada, to my knowledge, to enormous numbers of bodies of flowing water which are not navigable.

Lord HERSCHELL—Is it not so applied without any

reference? May not the same sized body of flowing water be called a river in one district and only a stream in another?

Lord DAVEY—Or a brook?

Lord HERSCHELL—Or a brook in another. If so, does it depend upon a name? Do all rivers in an Act of Parliament mean everything that people have called a river, or does it mean something which means the same thing, whatever people have called it, and wherever it is.

Lord WATSON—Is there any country in the world, where the English language prevails, where every stream running in a definite channel, whatever its size, is called a river?

Mr. BLAKE—I do not know. I am not arguing that every stream is a river—

Lord WATSON—I do not think there is.

Lord HERSCHELL—What is the test of a river; do you say the test can be merely the nomenclature?

Lord MORRIS—Is not that an argument for you that they would not have put in "river" by itself?

Mr. BLAKE—I think so.

Lord MORRIS—The more vague you get the word rivers the better it is, as it strikes me, for the argument.

Lord HERSCHELL—You might in many cases improve a non-navigable river. Yesterday I referred to a case of a non-navigable river running through a man's land. He spent a large sum of money in improvements so that timber could be floated down, and it was held the Statute had given the public the right to float the timber down. There was an improvement on a view. Do you say that improvement would have been within your construction?

Mr. BLAKE—I am not aware that in that case the Government made the improvement.

Lord HERSCHELL—No, a private individual made it.

Mr. BLAKE—Therefore it would not apply.

Lord HERSCHELL—All I used it for was to show

that you might have improvements in a non-navigable river.

Mr. BLAKE—Yes, you may have a milldam for a mill.

Lord MORRIS—You admit all improvements?

Mr. BLAKE—All improvements made in any kind of river. There you get your definition.

Lord MORRIS—If it is so vague, is not that an additional argument that it could not have been intended to be left so vague?

Lord HERSCHELL—My second question, which was to follow on that, is this: if it applies to improvements on non-navigable rivers, you have on your construction the same difficulty, because you have to answer the question what is a river for the purposes of improvement? You do not get out of the difficulty by saying that “rivers” is coupled with the word “improvements,” because you have to answer the question, given improvements in something or other, is it a river?

Mr. BLAKE—Yes, my Lord.

Lord HERSCHELL—Therefore you have to test the answer to what is a river.

Mr. BLAKE—I test it by applying a consideration of the reason and the common sense of the thing. If one is to conjecture, for the purpose of creating difficulties, that the Province has created public works and improvements on small creeks and little streams running through the country, which cannot by any fair construction be called rivers, and make a difficulty in that way, there is, of course, a difficulty created.

Lord HERSCHELL—Do you test the river by its size?

Mr. BLAKE—If I answer, then your Lordship will ask me next what size I take. I cannot tell you.

Lord HERSCHELL—What determines it. There must be a test which you would have to lay down and say this is the class of thing which is included in river, would you not?

Lord SHAND—It appears to me that these difficulties arise on both sides, whether the rivers are carried or the river improvements.

Mr. BLAKE—They may,

Lord DAVEY—Except Mr. Blake might say this, he is quite capable of arguing his own case, but I think he might say that any stream enclosed within banks flowing in a defined channel between banks, which is of sufficient importance to be improved, would be a river within the meaning of this Act.

Mr. BLAKE—Yes, it was in a negative sense I was trying to use the argument, but not as clearly as your Lordship has put it.

Lord HERSCHELL—Feeling pressed with the difficulty of getting out of words used and feeling pressed with the point you put, my mind addresses itself to the effort to find some way out of the inconvenience to which you allude, if I am driven by the stress of the words used to the construction you are contending against.

Mr. BLAKE—I think I see your Lordship's drift; but really, I endeavoured to say, though not so clearly as Lord Davey has put it, what I think is the answer to the argument; namely, that in point of practice I think it would be held that wherever a stream was improved, or where the Provincial Government had thought fit to spend public money, that would be held probably by any court to be a river within the meaning of this clause.

The LORD CHANCELLOR—Dr. Johnson describes a river as “a current of water bigger than a brook.”

Mr. BLAKE—I will not pretend to be wiser than Dr. Johnson; but what is the size of a brook?

Lord DAVEY—I think we had to construe in a Scotch case what was a stream.

Mr. BLAKE—If you take “improvements” you find a practical definition, wherever they have made improvements.

Lord HERSCHELL—I do not think anybody would have called a river that thing to which I have just alluded. In that case the word was “stream.”

Mr. BLAKE—I beg your Lordship's pardon, not merely was it a river, but a river by statute, the River Mississippi.

Lord HERSCHELL—Not in the case I allude to.

Mr. BLAKE—Yes, my Lord, I think so; it is a smaller River Mississippi than the great River Mississippi, but it is the River Mississippi.

Lord MORRIS—It is not “the father of waters.”

Mr. BLAKE—No, but if you get up high enough you find that it itself is only a rivulet.

Lord MORRIS—You must find improvements made on public waters.

Mr. BLAKE—Yes, and from public moneys for which they are responsible to Parliament: that would be practically a sufficient indication. We have in our country and in the French Province “floatable” rivers as well as navigable rivers. Some are called floatable, being sufficiently deep to be useful for floating down timber and logs; the others are fit for barges and vessels.

Lord WATSON—Non-navigable may not be the opposite sense to navigable.

Mr. BLAKE—No, my Lord.

Lord WATSON—There is a public easement in some rivers in Canada.

Mr. BLAKE—Yes, in some of them.

The LORD CHANCELLOR—When you speak of floatable rivers, is not that when you are speaking of rivers capable of floating down something?

Lord SHAND—Floating timbers.

The LORD CHANCELLOR—Floating timber or something of that kind. There it is a descriptive adjective.

Lord DAVEY—This case may resolve itself into a question of what is a river.

Lord HERSCHELL—Would not the difficulty you suggest apply in some measure to canals. Are not there probably canals running through parts of the Province where the land may still be the property of the Province,

and where the difficulty of parting with that land which is intersected by something which has passed to the Dominion would equally exist?

Mr. BLAKE—Such a thing is perhaps possible. I will not say it is not so. I have no knowledge of the existence of such an instance myself.

Lord HERSCHELL—It might well be

Mr. BLAKE—It is a minor consideration. All the property adjacent to that through which the canals pass has been granted long ago. The lands and water power connected with a canal pass to the Dominion. You could not give the water power without. If there is a little difficulty it is not the same kind of difficulty. The public work has cut the ungranted Crown lands on each side. If the Province retained the canal and the lands on each side it would still have to grant those lands subject to the disability that they are severed by the canal. This is a case of creating new severances by the Statute. Then let me take it from another aspect; we have been looking at it from the minor aspect and in respect of one element, but let me take it from another aspect. What of those great enlargements of rivers, which are sometimes called lakes, but which are really broadenings of the river? There are the Lake St. Louis and the Lake St. Peter in the course of the St. Lawrence. They are called that because the river broadens very much. Lake Ontario, Lake Erie, Lake Huron are spoken of frequently, and in one of the judgments in this case as being in fact broadenings of that one great river which under different names, and named the St. Lawrence at the end, are all parts of the Laurentian system. Are they to go? lakes which are broadenings of rivers, or broadenings of rivers which you might describe as lakes, under this clause absolutely? or are only the improvements in those portions of the rivers which have been dealt with to become the property of the Dominion? I understood your Lordships to agree with the argument as to boundary lakes, and I do not say anything upon that subject except to repeat—

LORD HERSCHELL—In the Statute in the case of *Caldwell v. MacLaren* they did not call any of them rivers, but streams.

MR. BLAKE—I thought it was the River Mississippi?

LORD HERSCHELL—Yes, but the whole question arose with regard to the streams above the point where the River Mississippi began. Everybody agreed from a certain point it was the River Mississippi; above that there flowed streams which below that form the River Mississippi. It was one of the upper streams, and the word in the Statute was “streams.”

MR. BLAKE—I beg your Lordship’s pardon for having inaccurately stated the thing. That is the beginning of the Mississippi River. I am not quite sure, if we have to deal with that which was unquestionably a river, at what point your Lordship would say that same thing had ceased to be a river and had become a stream—

LORD HERSCHELL—It arose as to a stream above.

MR. BLAKE—As to the phrase stream, they very frequently speak of “streams or rivers.”

LORD HERSCHELL—The word was stream only in the Canadian Act of Parliament.

MR. BLAKE—I do not mean in Acts of Parliament. The word stream is applied very often to what is also called a river. I think stream is frequently applied to very large bodies of water which are generally called rivers in the English tongue.

THE LORD CHANCELLOR—I have a curious passage, quoted from Locke, in which he says: “Streams when they run together create a river which runs into the sea.”

MR. BLAKE—And Lord Tennyson says, “A rivulet, then a river.”

LORD WATSON—In some of our legislation—the Rivers Pollution Act—the word stream is defined.

LORD SHAND—How is it defined?

LORD WATSON—It is defined “stream includes the sea to such extent and tidal waters to such point as may,

after local inquiry and on sanitary grounds, be determined by the Local Government Board"; and then, again, "save as aforesaid, it includes, rivers, streams, canals, lakes, and water-courses, other than water-courses at the passing of this Act, mainly used as sewers and emptying direct into the sea."

The LORD CHANCELLOR—That is for the purpose of that Act, but I am afraid we cannot apply that.

Lord WATSON—Oh, no, I do not know what was in the mind of the average British legislator as to what a river meant.

Lord DAVEY—Mr. Blake suggests the same difficulty occurs in saying what is the distinction between a lake and a river where the river broadens into what is popularly called a lake.

Mr. BLAKE—It, no doubt, is treated both ways. It is called popularly a lake, but is really a part of the river.

Lord DAVEY—You say the Lake of Geneva is only a broadening of the River Rhone?

Mr. BLAKE—I do not know. It is a question of degree.

Lord MORRIS—There are two rivers.

Lord DAVEY—It is the Rhone above and the Rhone below.

Mr. BLAKE—Upon the whole, I submit that, having regard to all these considerations, the easiest, the best, the plainest, and the most obvious construction is that which we suggest; namely, that there is an association between the two limbs of this enumeration, and that rivers in the connection in which the word is found here does mean improvements in rivers.

Lord SHAND—Was the decision in that case as to rivers a great many years ago?

Mr. BLAKE—In 1882. I do not think that is the only one.

Lord SHAND—I put the question whether the actings on that decision have been of any consequence?

Mr. BLAKE—The question has been raised several times, and the difficulty was that the Courts always laughed at any other construction ; there was a concurrence on it.

Lord SHAND—I wanted to know whether there had been any actings on it.

Mr. BLAKE—I have no doubt there have been. I am now going to turn to the question of harbours, upon which I said my learned friend, the Attorney-General for Nova Scotia, will speak to your Lordship at more length than I shall trouble you. I have also the greatest difficulty in dealing with this matter on the bald question : I made an attempt in drawing the case to distinguish between two points which seem to be material, in order to an intelligent decision of the question. In my case, at page 3, your Lordship will find what I thought was proper to say about it, and I pointed out there, as I ask your Lordship to agree here, that to intelligently grapple with the question one wants to know what is the meaning of “public harbours” as the words appear in the schedule. That is really the first question ; and secondly, what interest or right in such public harbours as you define or determine to be within the schedule passed. Now we have nothing before us at all as to the different kinds in existence of havens, harbours, ports, and places of refuge existing throughout the Dominion, and as to which questions may arise whether they be or be not public harbours within the section. We have no description, either general or special, of the nature of these different harbours. If you call them harbours or havens you have got something found—something suggested in my case as to what they are or may be at the top of page 4 in the paragraph numbered 3, and a suggestion that there were many “natural havens convenient and capable of being used without improvement for harbour purposes, some of which were unimproved, others of which had been to some small extent improved by private persons or by municipal authorities, in some cases at their own charge exclusively, in others with the aid of subsidies or of dredging by the Govern-

ment. It is submitted that such havens were not included in the description, though any piers therein, if constructed by and the property of the Province, might pass by another and distinct enumeration in the schedule." That was a statement which I endeavoured to extract and condense from the factum in the Court below. But I feel the greatest difficulty in asking your Lordship to accept that view, or to make a statement of the case as to what is a public harbour, based either upon the statement of counsel at the Bar or on their statement in their case on appeal. And when one reflects upon the extent and variety of the subjects which may be contained in "public harbours" within the schedule, and how differently the enumeration may operate upon these different subjects, I own it appears to me to be an extremely difficult thing for me to ask your Lordships or for the Court to decide what interest passes, whether or no the beds passed with reference to public harbours. I think the first thing to be done, in a word, would be to find what public harbours mean within the schedule; and I suppose if there be, for I can only put it hypothetically, though I have no doubt it represents the fact——

Lord HERSCHELL—Do you mean the bed might pass in some things which come within public harbours and not others?

Mr. BLAKE—Yes, take for instance a small artificial harbour; as there are many made of a couple of piers, one longer than the other, and just room between the two piers, I could well understand in those circumstances what was below would pass as accessory to the piers. While, if you take a great natural haven with a coast line of perhaps fifty miles with its various indentations, not a circle of fifty miles which would perhaps present enough room for a little rough water in a gale, but a coast line with great indentations, with no public work on it, with no declaration of the Crown in the right of the Province that it was a public harbour——

Lord HERSCHELL—But it is not a harbour unless it is a place where ships have been in the habit of resorting.

It may be a bay, but it is not a harbour. It is not properly so called unless there have been some public works, something to fit it, and it has been in use by ships as a place of resort.

Lord DAVEY—To which ships have a right to resort.

Lord WATSON—Within the meaning of Maritime Law an open roadstead may be a harbour or a port.

Mr. BLAKE—I should have thought the right to resort was the test, not the extent or degree of the actual resort, if it is part of the public water—

Lord HERSCHELL—The question is whether that is the meaning here when they are referring to public harbours.

Mr. BLAKE—Quite so.

Lord HERSCHELL—If there are no artificial works, if there has been nothing done to enclose it, that assumes that the property goes below water mark.

Mr. BLAKE—I am not discussing tidal harbours at all.

Lord HERSCHELL—Not tidal, but any harbour on these shores.

Mr. BLAKE—I mean harbours where the tide ebbs and flows. Although they be deep water our lakes have no appreciable tide.

Lord HERSCHELL—You are speaking of harbours in lakes?

Mr. BLAKE—Yes. I do not intrude into the domain of the sea, which will be referred to by my maritime friend.

Lord HERSCHELL—You would not call any part of a lake a harbour on which there had been no works, on which there was no loading and discharging by vessels. Do you mean because there is an indentation which a vessel might go into at some time or other?

Mr. BLAKE—Or did go into, or into which many vessels went. I say there must be some public work on it, or it must be in some way or other signified by the Crown that it was a public harbour.

Lord HERSCHELL—If there had been habitual use possibly without anything further it might do.

Mr. BLAKE—How would it be more consecrated *qua* harbour?

Lord HERSCHELL—Whatever there is within the word harbour passes, does it not?

Mr. BLAKE—That is the question.

Lord HERSCHELL—A question must arise: Is this a public harbour, or is that a public harbour; but whatever is a public harbour there is so.

Mr. BLAKE—My difficulty is how intelligently to argue to your Lordship what is the interest which passes in respect of public harbours until I get to the subject, until I know what a public harbour is.

Lord HERSCHELL—Then you might have twenty different descriptions of subjects?

Lord SHAND—What is the question put that has to be answered on this point?

Mr. BLAKE—It is a portion of the first question, “Did the beds of all lakes, rivers, public harbours, and other waters.”

Lord SHAND—There is no proposal that this Board should define public harbour.

Mr. BLAKE—I quite agree.

Lord SHAND—Surely, with reference to each case you need put the special case.

Lord WATSON—Mr. Blake only suggests we ought to know what it means before we decide.

Mr. BLAKE—No, you are not asked to settle what it means.

Lord SHAND—We know roughly what it means, I should think.

Mr. BLAKE—Well, my Lords, perhaps your Lordships can administer rough justice.

Lord WATSON—You are in a difficulty as to what is a harbour?

Mr. BLAKE—Knowing a little, as I do, of some of the great harbours in the country, I have felt a difficulty in arguing it without any statement before the Court.

The LORD CHANCELLOR—I suppose its primary meaning is a place of refuge for ships.

Mr. BLAKE—How is it to be decided to be a place of refuge for ships—a place where they may go or do habitually go?

Lord HERSCHELL—Certainly not a place where they may go, unless it has been artificially made. Every indentation in land is not a harbour. That is an impossible contention.

Mr. BLAKE—No, every indentation in land does not possess the elements of a harbour.

Lord HERSCHELL—No, but every indentation which may possess the elements as being a place of protection would not be a harbour in any ordinary sense of the word.

Lord WATSON—It must be resorted to and used by shipping for the purposes of a harbour; for instance, loading and unloading and taking in ballast.

Lord HERSCHELL—Or artificial works: either of those, I think, would make it a harbour. It cannot mean a natural condition of things which might afford a protection, but has not been used for the purpose of affording protection to ships.

Lord DAVEY—Is not this sufficient. I see in your factum in the Court below it is contended that the proprietary right of the Dominion in public harbours under the British North America Act consists only in such harbours as were the property of the Provinces at the Federation. Is not that sufficient?

Mr. BLAKE—Yes, but the question is what is a “public harbour.” I have endeavoured to state in my case here the question what is a public harbour within the meaning of the clause; and secondly, what interest or right in such public harbours as are within the meaning of the clause passes.

Lord WATSON—I should think whether the particular place was or was not a public harbour must be a question of fact dependent upon the circumstances.

Lord DAVEY—The object of that clause is merely to allot property existing at the date of Federation between Provinces and Dominion, and therefore is it not sufficient to say that any harbour which was the property of the particular Province in which it is found at the date of Federation became by this Act the property of Canada in exactly the same sense, neither more nor less, in which it was the property of the Province.

Mr. BLAKE—It does not say any harbour.

Lord DAVEY—A public harbour.

Mr. BLAKE—A public harbour, and the question is what is a public harbour within the meaning of the section.

Lord DAVEY—Whatever was a public harbour before the Act is a public harbour after the Act for the purpose of this section.

Mr. BLAKE—I agree. The question is what were public harbours at the date of the Act. "As the tree falls so it lies."

The LORD CHANCELLOR—I should think some elements could be ascertained from that. In the first place there must be a public right to go there.

Mr. BLAKE—Yes.

The LORD CHANCELLOR—It is not every accidental projection of land which might form a refuge for ships that would make a public harbour within the meaning of the Act.

Mr. BLAKE—The ships have a right of navigating the lake.

Lord HERSCHELL—But you can understand a particular part would afford very good refuge for ships. The shore might be owned by private individuals, and there would be no right to land. You would not call that a public harbour, although it might be a very convenient place for ships.

Mr. BLAKE—No ; if the shore was owned by private individuals it might not be possible, without expropriating their land, for the Province to create a public harbour out of that indentation ; because one of the incidents of a public harbour, unless you are to use it merely as a place where you can moor in distress and not land, is the right of access.

Lord WATSON—One would require to know the use made of it.

Mr. BLAKE—Yes.

Lord WATSON—There must be use as a matter of navigable right. Can any other question be put on that branch of the Act? If there were such things as public harbours vested in the Crown, on behalf of the Province, at the date of the passing of the Act, did the solum of these harbours pass or did it not pass under the Act to the Dominion Government?

Lord DAVEY—There may have been certain harbours which by Acts of that Province had been vested in the Province for the use of the public.

Mr. BLAKE—Yes, there are many instances which are shown in the factum below of harbours vested for the use of the public, and harbours which had been handed over to corporations and individuals, and some which had been resumed, and some which remain in corporations, with which the Province has nothing to do. I was just going to explain, without enlarging on it, because my learned friend will deal with it, that we contend that it is the public work if any and the land under and appurtenant to it in the harbour, which would be what passed under this clause.

Lord WATSON—Your contention is, in substance, the solum does not pass, that it remains with the Crown for the Province ; and that the Province is entitled to dispose of that solum, and to grant such rights over it as do not interfere with the use of the harbour.

Mr. BLAKE—Not interfering in the slightest degree with the use as a harbour, just as we contend as to the lakes.

Lord WATSON—It would be a larger ambit than required for all the ships which would go there. The ships may go to part of it, and might easily be berthed together in one corner of it.

Mr. BLAKE—The proportion of it which is used by ships, compared to the whole harbour, is infinitesimal in many cases. Then you have the foreshore and the bank, or the shallow part where they never go at all—all those parts.

Lord WATSON—The question might arise under these circumstances, in a particular case, as to what was the area of the harbour and what constituted the harbour.

Mr. BLAKE—Still, if you get a large area it gets its quality of a harbour from the fact that it is surrounded by hills or land. It is difficult to cut a piece out of it by some artificial line, and say “there is your harbour.”

Lord WATSON—There are some harbours where there is a harbour proper, and where a great part of it is anchorage, and some of it in the waterway.

Mr. BLAKE—Yes. I would rather, then, without further enlarging upon it, rest on paragraph 12 and the following sections of my case, which indicate our view of what the right transferred is.

Lord SHAND—What page?

Mr. BLAKE—Page 4 of my case, on our own Appeal, paragraph 12 and the subsequent paragraphs.

It may perhaps be convenient that I should take here the other branch of our Appeal, which is with reference to the rights of the Dominion Parliament to pass the Act relating to works on navigable rivers. The questions 2, 3, and 16 of the questions put are those which have to do with that. They are put together at page 3 of my case; and the suggested view upon the subject which I desire to advance for the Appellants is to be found at page 5 of my case, paragraph 15. There are two main questions: first, “whether the Act referred to, chap. 92 of the Revised Statutes, is an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part”;

and if not, a question arises, which I will not consider at the moment; and then 16, "Has the Dominion Parliament power to declare what shall be deemed an interference with navigation, and require its sanction to any work or erection in or filling up of navigable waters?" I rather understood my learned friend, Mr. Robinson, to say (I do not know whether I was quite right) that question 16 had been inserted in consequence of a doubt, which I think is a very well grounded doubt, whether the real question which the Government of Canada desired to raise could be held properly to arise under the Act; because the Act, it may well be argued, and I intend to argue, has for its dominating condition as to the acquisition of power by the Dominion Parliament, the proposition that the work is an interference with navigation.

Mr. ROBINSON—I think that was the reason.

Mr. BLAKE—My learned friend agrees with me that it was because they thought there was a well-grounded doubt whether the Act which has been passed did not prevent the decision of the question of the power in consequence of the limitation in that Act which applies this peculiar jurisdiction only to the case where the thing is an interference with navigation, and leaves that subject to be determined by the Courts of the country. I think, under those circumstances, and having regard to my learned friend's statement, in which I quite concur from our point of view, that it is unnecessary to give a specific answer, but only to state the principles which are to be applied, as your Lordship did in the Prohibition Liquor case. I think, in view of that statement of his, one may pass from the Act, which he agrees is so doubtful.

Mr. ROBINSON—Excuse me, Mr. Blake, I did not say it was because there was a well-grounded doubt. I do not know anything of that; I think it was because they thought that that doubt might be raised.

Mr. BLAKE—We raise that doubt, and we get to the marrow of the matter under question 16. Have they the power to do it? If they have the power to do it, whether they have done it under this Act or not is immaterial.

Lord WATSON—I suppose that means, in other words, under the right to legislate for shipping has it a right to prohibit certain things as being interference?

Mr. BLAKE—The view we suggest is this, that it is certain that the owner of land covered with water is not entitled to commit the nuisance of interfering with navigation in any way whatever. Such is the law; but subject to that restriction, his violation of which restriction is to be tried as a matter of fact, he may do what he likes with his own.

Lord WATSON—I suppose against the Province is one thing. Have the Dominion the right to determine whether he has committed an obstruction to navigation?

Mr. BLAKE—That is the point I am inviting attention to.

Lord DAVEY—You mean whether the Dominion Government may pass a law enabling itself as an executive act to say so and so is an interference with navigation.

Mr. BLAKE—Yes, I have stated what the law is.

Lord DAVEY—Or whether they can do more than say, “You shall not interfere with navigation,” and leave it to the ordinary Courts to say what is navigation?

Mr. BLAKE—If your Lordship would have the goodness to note page 7; at the top of the page it states my argument as your Lordship put it. (1) “The 16th question should, it is submitted, be answered in the negative, because, as already argued” —I argued from section 15 on page 5—“Property and civil rights and the administration of justice would be unconstitutionally interfered with by the suggested legislation. (2) The owner of land covered with water is not entitled to commit the nuisance of interfering with navigation. This is, as heretofore suggested, a question of fact to be tried. Subject to this restriction the owner may do what he likes with his own. (3) But to allow the Parliament of Canada from time to time to declare arbitrarily what is to be deemed an interference with navigation, and thus from time to time to limit the

rights and affect the property of the owner, is to allow it the power to destroy the rights and property of the owner. This is beyond any fair or reasonable interpretation of "navigation and shipping."

Lord HERSCHELL—Supposing the Provincial Parliament legislates to define what amounted to an interference with navigation, would that legislation be good? would it not be said no, this is a matter coming within the class "navigation," and that is committed exclusively to the Dominion Parliament? If they could not have done it, does it not follow that the Dominion can? Or do you say that nobody can define what is an interference with navigation?

Lord DAVEY—Except the Courts.

Lord HERSCHELL—No, Legislature.

Lord WATSON—I am afraid you must argue it on this footing. I do not see any difference between the Canadian Parliament, or the Provincial Parliament, or the Parliament of Great Britain and Ireland; they have plenary legislative jurisdiction. What is the limit to their right to declare what shall be treated as an obstruction, and prohibit it in navigable rivers? If it belongs to one, of course it does not belong to the other; but if either of them has exclusive legislative jurisdiction in the matter, how are you to limit their jurisdiction? They are a paramount authority on all matters connected with navigation.

Mr. BLAKE—This is what is proposed to be done, that they shall have power to declare from time to time what they shall deem an interference with navigation to be such and such; and to require their sanction to any work or erection in, or filling up of, navigable waters. We contend that under the law no man can interfere with navigation, and no man can make any work or put in any erection or fill up any navigable waters in a way which will interfere with the navigation. That is the law.

Lord HERSCHELL—Then why cannot you settle that? They are matters which would lead to constant litigation, whether it was interfering with navigation or

not. Surely some Legislature must have the power of settling that, and preventing all the controversy by saying that the navigation shall not be interfered with in such and such a way. Then if there does exist that legislative power, it must exist somewhere either in the Province or in the Dominion. How can it be said in the Province when all matters——

Mr. BLAKE—We do not contend it is in the Province; I do not think we could.

Lord DAVEY—You say it is nowhere.

Lord HERSCHELL—No; but is there any subsequent legislation which is in neither?

Mr. BLAKE—What we contend is, that under the guise of exercising their power in reference to navigation they are taking upon themselves the function of a Court, and interfering with property and civil rights arbitrarily.

Lord HERSCHELL—Is that so? Might you not say that in every case where rights coming within the Court's function are dealt with by the Legislature?

The LORD CHANCELLOR—Would not that assume the question coming within their jurisdiction? You might contend that they cannot, by binding contrary to the fact, give themselves jurisdiction on a matter which can only be within their jurisdiction, if it does in truth come within it.

Lord HERSCHELL—That would be a question that in each particular case you would have to see the provisions and judge on. Your proposition is that everything which says the navigation shall not be interfered with by doing so and so is *ultra vires*, that it cannot be done by Dominion or Province.

Mr. BLAKE—No.

The LORD CHANCELLOR—You hardly argue that.

Lord HERSCHELL—Yes; I understand that.

Mr. BLAKE—Nothing which is an interference with navigation can be done as it is; but the question is whether they shall have power to declare that this, that, and the other thing, which is not an interference with

navigation, is an interference so as to conclude the question.

Lord HERSCHELL—If you assume that this is assuming the whole thing.

Mr. BLAKE—If it is an interference with navigation the law prevents it now.

Lord HERSCHELL—The law may prevent it now ; but it may be an expedient thing to define it so as to prevent trouble and litigation.

[Adjourned for a short time.]

Mr. BLAKE—My Lords, I now proceed to trouble your Lordships with what I have to say upon the subject of fisheries. One of the contentions which deals with and affects, of course, the question of construction of that article 91 upon the subject, and which also deals with and tends to answer the question in my learned friend's favour, is the contention that the rivers, being the property of the Dominion, the Provincial fishing rights passed to the Dominion because of the grant of property in the rivers, and thus the Dominion became the proprietor so far as those fishing rights were public property ; and then, under the enumeration in section 91, the Dominion would have exclusive power to deal with that public property. That argument adds very greatly to the inconvenience and difficulty of adopting the construction as to rivers which has been referred to. I omitted to mention it earlier because I thought I had better mention it at this stage. It follows from the construction as to rivers which is suggested, applied as I have suggested it must be applied, if applied at all, that the fishing right is to be divorced unnaturally, contrary to custom, reason, and convenience, from the proprietorship of the bank.

Lord HERSCHELL—There are many cases in England in which it is divorced from the proprietorship of the soil.

Mr. BLAKE—There are such cases ; but I am not aware of any case in a non-navigable river—I am speaking, of course, in my own country—in which there is

anything but a union, unless the proprietor of the lake may possibly have sold a separate right of fishery.

Lord HERSCHELL—Do you allude to the right of fishing in the sea?

Mr. BLAKE—No.

Lord HERSCHELL—That does not depend on the ownership of the soil.

Mr. BLAKE—I have failed to make myself intelligible. I say the construction which makes the Dominion the proprietor of the rivers, and thus makes the Dominion the proprietor of the fishing rights in the rivers, adds to the inconvenience of that construction of the word “rivers.”

Lord HERSCHELL.—I see all that you say about the inconvenience of putting the proprietorship in the river in the Dominion in certain cases; but I do not see how it matters, when you have once done that, whether the fishery is in them.

Mr. BLAKE—It is an additional argument against the construction of “rivers” as giving the proprietary right, because you have in the small as well as the large rivers the Dominion, the proprietor, from which flows the right of fishing in the Dominion, from which results the divorce of that which has invariably gone with the grants of the non-navigable rivers, the several and exclusive right of fishing in the proprietor.

Lord WATSON—That is a question that can only arise under section 91, where legislative power is given.

Mr. BLAKE—I am dealing once again with the question of the vast domain of unsettled and ungranted lands at the time of the Confederation.

Lord HERSCHELL—If your former argument is not heavy enough to turn the scale this addition seems to me a very small addition to it.

Mr. BLAKE—It intrudes in the middle of a man’s farm somebody else to use these fishing rights.

Lord DAVEY—Without any right to go upon the bank?

Mr. BLAKE—I do not know.

Lord HERSCHELL—He would not have a right to go anywhere but upon the river, and it is a non-navigable river, so that that right would not be of much use. Your other is so strong an argument that this seems to add hardly anything to it.

Mr. BLAKE—I am so much indebted to your Lordship's tribute to the other argument that I will not trouble your Lordships further with this one; but I ask your Lordships to observe that in dealing with the question of the construction of "rivers" it involves the divorce of the fishing right.

Now, apart from that question, which does not, of course, apply to the sea coast fisheries or the lake fisheries, the legislative power is all we have to do with, and that legislative power is given by the enumeration, "Sea coast and Inland Fisheries." The latter applies, of course, to all inland waters, and thus its solution raises very important questions which depend, according to my submission, greatly upon the meaning which in this particular you are to give to the word "fisheries." As I stated yesterday, and as my learned friend stated in his argument, two meanings are given in the dictionaries to the word fisheries: one being the business of catching fish, the fishing industry, the other in law a right of fishing in certain waters and places where fish are caught. I am quoting from the Century Dictionary.

Lord SHAND—In England the fishery may be a right separate from the land, but I am not certain it is so in Scotland.

Lord WATSON—Salmon fishing may be separate.

Lord SHAND—Have you the same law in Canada?

Mr. BLAKE—Subject to the question who is to mould the law, as far as I know, the law has been that the fishery may be separated from the land. I do not think there is any prohibition. It is subject to the changes made by our Statute.

Lord WATSON—The substratum is English law.

Mr. BLAKE—The substratum is English law ; and if we have put in any prohibition we can repeal that prohibition, and consequently we can sever. You have got these two distinct interpretations in the dictionary, of which the first is “the business of catching fish, the fishing industry” ; then there is the other in “Ogilvie’s Dictionary” : “Fishing : first, ‘The business of catching fish’ ; secondly, ‘The place where fish are regularly caught or other products of the sea or river taken.’” In Johnson : “The business of catching fish. A place for fishing or where fish are caught.” So that we have got two constructions, and you may read the word here according to either one of those constructions ; or, as Lord Herschell, I think, suggested yesterday, you may read it as meaning both. It has to be read, at any rate, as including the first, because that conforms to the general scope of regulations, which is the function of the legislative power of the Dominion, and it does effectual work. That construction dealing with it as “the fishing industry and the business of catching fish,” and so interpreting it, gives the fullest power of regulation and of conservation and of provision for improvement. Exclusive legislation for improvements within the meaning I have suggested gives every power which is required to do all these things which it can be suggested should be done, and to prohibit all those things which it can be suggested should be prohibited, in order that the fishery may be conserved and developed, by close times, by fish ways, by the setting apart of rivers for the propagation of fish, by anything which in the widest view involves the conservation and improvement and development of the fishery. It has been suggested that it leaves the Dominion unable to raise from the industry the expenses of administration ; but that, of course, is not so at all. Licence fees may be imposed, I should conceive, even for the express purpose of paying this particular portion of the public expense ; but, as was said yesterday, and conceded at once by me, under its general powers of taxation the Dominion Government can impose upon the fishing industry not merely enough taxes to pay the expenses, but as much more as it thinks that industry can bear. It is the sole

judge of the extent of the taxes it shall impose. And therefore, so far as the industry will bear the imposition of burdens in the judgment of the Dominion Parliament it has full power to levy the expenses incident to conservation, improvement, and development. Therefore I submit the construction I have given to the word "fisheries" is an adequate construction to answer all the purposes of the case. But what the Dominion maintains is that your Lordships should adopt the construction that it has exclusive legislative powers as to the property right in the fishery; not as to the industry, but as to the property right in the fishery.

Lord HERSCHELL—I do not know that I understand what you mean by the property right in the fishery. I do not understand that it claims to vest in itself or in any individual the property right in the fishery, but it claims to give the right of fishing.

Mr. BLAKE—That is that it has power to deal with the property right and, as was said, to confiscate it. Your Lordships said we cannot suppose there will be an abuse. I admit I cannot argue that the one Legislature will be more confiscatory than the other Legislature.

Lord HERSCHELL—Do you say that the Legislature has the power to give persons the right to fish?

Mr. BLAKE—I suppose it has the power to give A. the fishing of B. I do not say it has the right.

Lord HERSCHELL—If the Legislature legislated, and gave any member of the public a right to fish in a certain fishery upon payment of a certain sum, could that be said to be otherwise than a matter coming within "sea coast and inland fisheries"?

Mr. BLAKE—If that is an act done by the Province it must be either as an act of confiscation of the right of a private person, or because the Legislature thinks it is a public matter. In the latter sense it could not be done.

Lord HERSCHELL—Take this case. A man has a private fishery which has been granted to him. He has never used that private fishery, that which would be of

great advantage to the public he has never used; there-upon legislation that any member of the public upon paying a certain sum may fish there. That would be proper legislation. Can that be done by the Province or by the Dominion? That is not regulation.

Mr. BLAKE—I should venture to say, if anything, that is regulation. I would say that is testing the Act by the method of a suggested case which is of little value, and affords little ground for argument. Your Lordship suggests that I have a valuable fishery from which I can make money, and that I choose to leave it untouched wantonly; not, of course, as a prudent proprietor, who thinks it would be better to leave the fishery unfished for a year or so, but wantonly, and to the public prejudice. My own interest is supposed to be a sufficient protection to the public in that regard. I do not think that it is by such an extreme, and what I venture to suggest is such an improbable case that the language of the Act is to be construed.

Lord DAVEY—Assuming it might be legislation which most people would reprobate, still would it fall within Dominion or within Provincial? I can understand you to say that is dealing with a question of property, and therefore would fall within the Provincial legislation.

Lord HERSCHELL—Your only answer is it is an impossible case; but that is not an answer.

Mr. BLAKE—Not my only answer. I am not proposing to close the discussion there.

I aver that, upon the only theory upon which you can contemplate such legislation, namely, that the Parliament may pass it, deeming it is for the public interest that this fishery should be used for the benefit of the public, and may for that purpose provide whether with or without compensation that it shall be so used, that is regulation.

Lord HERSCHELL—Why do you say it is regulation? In this same schedule, when they mean it is to be confined to regulation, they say so. Why do you

interpret all these matters as being within the class of regulation?

Mr. BLAKE—I interpret “fisheries” as being “the art or industry of fishing or the fishing business”; and I say all matters within the class of the industry of fishing or the fishing business, not all matters relating to the rights of property in fishing, but all matters relating to the fishing business, constitute the proper sense of the word.

Lord HERSCHELL—Where do you get the phrase “the industry of fishing or the fishing business”?

Mr. BLAKE—The Century Dictionary gives these interpretations. The first is “The business of catching fish, the fishing industry”; the second, “In law a right of fishing in certain waters”; the third interpretation is, “A place where fish are regularly caught.” I am showing it is capable of one of those constructions.

Lord DAVEY—You say that the right of fishing as an element of property is within the Province?

Lord HERSCHELL—You must remember that in a dictionary they give all the meanings which a word may derive from the context in which it is found. I should doubt whether “fishery” describes a certain industry if found alone.

Mr. BLAKE—I find it so in the Century Dictionary; I find it so in Ogilvie; I find it so in Johnson, as the first interpretation.

Lord HERSCHELL—I should doubt whether the word “fishery” standing alone could be understood to mean the industry of fishing.

Lord SHAND—I suppose a number of the sea coast and inland fisheries, when this Act was passed, were not given out.

Mr. BLAKE—Numbers probably were not given out in the sense that no licence had issued. In some of the Provinces there was a system of licences. They were not being made productive at the time.

Lord HERSCHELL—The word is “fishery”; but I do

not think, whatever a dictionary may say, that anybody has used the word "fishery" in the sense of the industry of fishing.

Mr. BLAKE—I assume that the first meaning that the dictionary gives is the most general and popular meaning.

Lord HERSCHELL—I respectfully say that may have been the meaning a century ago or in Dr. Johnson's time.

Mr. BLAKE—I am reading from this Century Dictionary.

Lord HERSCHELL—I know it may be copied from Dr. Johnson; I do not believe that anybody has heard the word used in that sense.

Lord SHAND—I suspect it is a common meaning of the word in the popular sense, not in the legal sense. We are accustomed to deal with the legal sense.

Lord DAVEY—I never heard it so used in my life.

Lord HERSCHELL—I never heard it used in my life in that sense standing alone.

The LORD CHANCELLOR—I think if a man advertises a house with water attached to it you will find "fishings."

Lord DAVEY—Yes.

Mr. BLAKE—That would be the fishing right.

Lord DAVEY—I have never heard such a word used, speaking from memory, to describe the industry of fishing.

Lord HERSCHELL—You may find it stated in a text-book that the word has that meaning, but it depends upon the context.

Lord WATSON—I think the word generally involves the idea of the prosecution of the business.

Mr. BLAKE—That is exactly what I am desiring to put.

Lord HERSCHELL—If you say so-and-so is its fishery, that does not mean the business.

Mr. BLAKE—Where you are talking of the right of fishing I acknowledge the word "fishery" is used.

Lord WATSON—I have often heard the expression used “salmon fisheries,” and always used with reference to the provision made for fishing for commercial purposes, using men and boats and nets. I have never heard that catching salmon with a fly rod, or what you call a pole on your side, was called a fishery.

Lord SHAND—Lawyers would so understand it.

Lord HERSCHELL—The question is whether when used in a statute of this sort it does not include all meanings?

Mr. BLAKE—That is another question, and that involves numerous considerations.

The LORD CHANCELLOR—You cannot suppose that a Legislature is giving a fishing business to somebody.

Mr. BLAKE—No, but it is giving the exclusive legislative jurisdiction over the fishing to somebody. It is not handing the business over.

The LORD CHANCELLOR—I do not think the fishing business would be included in such words as these.

Mr. BLAKE—I cannot be wiser than the dictionaries.

The LORD CHANCELLOR—The dictionaries do not say so; you have got in the dictionaries the meanings of which the word is susceptible.

Lord HERSCHELL—And here you have it coupled with “sea coast and inland.”

Mr. BLAKE—Which would mean the industry of fishing on the sea coast and inland waters.

The LORD CHANCELLOR—You introduce the word “industry,” but I do not see why you should.

Lord WATSON—I have no doubt it includes that.

The LORD CHANCELLOR—I have great doubt whether it does.

Lord SHAND—Take herring fishing.

Lord WATSON—Take the question of prescribing the sizes of the net.

Lord SHAND—We have got away from a clause

dealing with property to a clause dealing with administrative legislation.

Lord HERSCHELL—The provision about the size of a net would apply just as much to a man who is fishing with nets for pleasure as it would to a person who is carrying on a fishing industry.

Mr. BLAKE—I agree it would apply.

Lord WATSON—The greatest grievance that is probably inflicted upon salmon fisheries in Scotland is insisting upon their using a net to land their fish instead of a hook.

Lord MORRIS—Or a gaff.

Lord WATSON—That is again regulating the implements of warfare.

The LORD CHANCELLOR—That is a limitation upon the right of fishing.

Mr. BLAKE—And any regulation will be a limitation on the right of fishing.

Lord DAVEY—But according to your own theory, if I understand it right, it goes beyond fishing as an industry, because those regulations as to a close time, for example, and not using a net with a larger mesh, and not using a gaff, but using a landing-net, would be equally applicable to the fisherman for sport as to the fisherman for business.

Mr. BLAKE—It applies to the idle fisherman as well as to the man who makes money by it. That is the extent of that criticism.

Lord DAVEY—Yes, so that it goes beyond the fishing industry.

The LORD CHANCELLOR—Those restrictions would be applicable whether I have a right of fishing or not.

Mr. BLAKE—The question is whether the exclusive legislative power of the Dominion under this clause is of such a nature as I have described, or is with reference to the property in the fish or the fishing right; from which latter construction it would follow that the whole devolution of title to fishing rights is there and there alone—

that while a person owns his property with the stream passing through it and so forth, there may be a different Legislature making provision as to the method of devolution.

Lord HERSCHELL—I am not sure that follows. It may be a question of property which is incidental to the right of fishing, but it does not follow that the Dominion could not give people a right to fish at certain times and under certain circumstances and upon certain conditions. That is the difficulty of all these hypothetical cases. It seems to me myself, that I might answer one in the one way and the other in the other—that the one would not necessarily follow from the other.

Mr. BLAKE—I do not know if your Lordship gives this the construction, that “fishery” means the fishing right, the property right in the fishery; and if I find that the Dominion has got exclusive powers of legislation with reference to that property I do not know where else to look for a legislative power as to that property right.

Lord HERSCHELL—It does not follow that they would have power to alter what I will call the laws of conveyance because the property was of this nature.

Lord DAVEY—You seem to think we must select between those two dictionary meanings; I am not at all disposed to do that. On the contrary, to give the word “fisheries” as I find it in this clause the largest possible meaning—everything connected with the catching of fish.

Mr. BLAKE—I am not quite certain what the meaning is—whether everything connected with the catching of fish includes the property right.

Lord DAVEY—If you read it only as a question of property, speaking off hand I should say it was in the Provincial Legislature; but the Dominion are not to be prevented making laws respecting the modes and conditions and so forth of catching fish because they incidentally interfere with property. For example, to explain what I mean, I can conceive it would be perfectly within the competence of the Legis-

lature (whether it would be wise or not I do not say) to declare that every owner of a salmon river shall, upon payment of a certain prescribed fee, give a licence to other people to fish there. That does incidentally interfere with his property in the salmon river, no doubt, because it makes use of other property, but still that would come within the power to regulate the right of catching fish.

Mr. BLAKE—I agree.

Lord DAVEY—But if you put it merely as a question of the right to catch fish, probably that would be within the Provincial just the same as a title to land.

Lord HERSCHELL—It does not follow that you cannot legislate about it.

Lord WATSON—In giving the Dominion Government legislative power to deal with the matter of fisheries they have used language which reserves to the Province the right to deal with the right of fishing.

Lord DAVEY—Whether the right of fishing would or would not pass by a particular conveyance—whether or not the fishing would go to the heir or to the executor—all those might be questions to be dealt with by the Province.

Mr. BLAKE—Would your Lordship allow me to suggest that the largest proprietor is the Crown, in right of the Province? The custom is to lease: they are not all leased, they are not all occupied—there is a progressive improvement and development going on. But there we get the question, which is all important, what is the line with reference to proprietary right under this power? We are not dealing now with theoretic instances of abuse, nor do I say that what I am going to refer to was a designed instance of abuse. We believe it was done under the erroneous impression that the Crown, in right of the Dominion, had the fishery right. But the law which is the subject of discussion here, the main clause your Lordships are asked to interpret, is a clause which says that the Dominion may grant a nine years' lease of the fisheries. It is not a question of a tax or a toll, but it is a question of the assertion of the right to the property.

Lord HERSCHELL—It may be a very grave question whether that is legislating in the matter of sea and inland fisheries, to authorise the grant of a lease of something that does not belong to them. I mean there is always a question of its being *ultra vires*. You may legislate on something which you assume to be within a matter committed to you, but there is the question whether it is *ultra vires*.

Mr. BLAKE—As I conceive this case, that is the substantial question which is at issue. I concede the most absolute and unqualified powers of regulation, using the word in the largest sense, including all the instances that have been given, although I say they are abuses. I concede that they exist in the Dominion. What I do not concede is that the Dominion can assume it is the proprietor of the fishing rights, and lease them to A. and B. as an exercise of proprietary power.

The LORD CHANCELLOR—Does your opponent contend that it can?

Mr. ROBINSON—No; section 4 does not authorise it.

Mr. BLAKE—“The Minister of Marine and Fisheries may, wherever the exclusive right of fishing does not already exist by law, issue or authorise to be issued fishery leases and licences for fisheries and fishing where-soever situated or carried on; but leases or licences for any term exceeding nine years shall be issued only under authority of the Governor in Council.” That is upon page 3 of the Joint Appendix.

Now that was the right, substantially, which in the old period of the Provincial jurisdiction, when the Province was proprietor, and with reference to those fisheries of which it was proprietor, it accorded to the Governor in Council. The Act says: “The Governor in Council may grant special fishing leases and licences, on grounds belonging to the Crown, for a term not exceeding nine years.”

Lord HERSCHELL—I can conceive quite well that although there were private fisheries, the passing of a statute authorising the authorities to grant fisheries within a certain time might be a dealing with fisheries within

the section. It might not be a matter within that clause if it were simply a provision authorising the Dominion to grant away that which belongs to the Province.

Mr. BLAKE—I am not asking your Lordships to limit it in any way as to what may come within the suggestion of the Board as to utility and propriety, that the Dominion Parliament is the judge of; but I do quarrel with the proposition that they have the right to treat the property as their own and to lease it as such, although they have power to take a tax or grant a licence. That is the measure of their right, not a right to take the corpus as a rent, but the right to take a toll or tax out of it. I am not going to enter into the various provisions of this Act, which may be fairly comprised within the most extensive view of their power to act according to their own judgment, good or bad, as to what is necessary in the case of restraint or prohibition, even in the extreme cases put by the Board, that they might take A.'s property for the public good. If it comes within that line of dealing and legislative jurisdiction we cannot complain, and we must trust to the justice of the Dominion Parliament.

Lord WATSON—You say they have power to make Acts which will affect the owners of the fisheries, those affected including the Provinces; but that they are not entitled to proceed to make enactments upon the footing that they have had already transferred to them the property.

Mr. BLAKE—Yes, my Lord.

Lord DAVEY—In fisheries where the public have a common law right to fish, and there are such—for instance, in any navigable river the public have a right to fish—can the Dominion say that the public shall only exercise that right, according to your view, by obtaining a licence? That would be no infringement of private property, you know.

Mr. BLAKE—No, I do not know anything which would make that common law right paramount to the power of the Dominion to do anything relating to the regulation of the fishery. If you give them the power to

say it is for the public good that this right shall be restricted for the preservation or conservation of the fishery, I do not see that the common law right is to come in and undo it.

Lord DAVEY—If you admit that with regard to a public fishery, can they ordain a close time in a private fishery, including in private fisheries fishing in waters belonging to the Province.

Mr. BLAKE—I think so.

Lord DAVEY—But is not that interfering with the right of property?

Mr. BLAKE—Doubtless. All legislation interferes with property?

Lord MORRIS—So-and-so's several fishery is taxed. That is interfering with property.

Mr. BLAKE—And the great Scottish grievance of compelling a man to use a net instead of a hook is interfering with the rights of property.

Lord HERSCHELL—The Act has passed from the Province to the Dominion certain property, and has left in the Province certain other property; and although it was not intended to include the transference to the Dominion from the Province of property left in the Province, although under the general legislative powers it may be that rights may be given in property left in the Province, it would interfere to a large extent with the enjoyment of the property so left.

Lord WATSON—I can quite understand that the Dominion Legislature have not been authorised and were not meant to be authorised by anything which is in section 91 to take away from the Provincial Government and vest in their own Dominion Government property which was assigned by the Act of 1867 to the Province.

Mr. BLAKE—That is my argument.

Lord WATSON—I doubt if that will be contended seriously.

Lord SHAND—It was pressed by them.

Lord DAVEY—I put this hypothesis to you to test your argument. Supposing that the Board should be of opinion that the beds of the rivers are vested in the Dominion, then I suppose you would admit that the fisheries go with the beds of the rivers?

Mr. BLAKE—I do not see how I could resist that construction. That is the reason why I pointed out that one inconvenience of that construction would be that the fish would go. I thought I had tacitly admitted that by arguing that there was an inconvenience. There is the whole thing, my Lord.

Lord WATSON—You say they are disturbing the division of property which was sanctioned by the Act of 1867, and that there is no power to do that conferred by section 91.

Mr. BLAKE—Such an interpretation must be given to section 91 as will not extend it so far. I know of no method of drawing the line. This Board will not do it. It rests in the sovereignty of Parliament. I say they go beyond that when they do a thing which is not regulation, but the seizure or appropriation of property; and say, “What you leased yesterday we shall have the exclusive right to lease to-morrow, and to take the profits from you.”

Lord HERSCHELL—You say it is not a piece of fishery legislation to transfer property left to the Province or Dominion?

Mr. BLAKE—Yes. And I say the same principle would apply to the private proprietor. It is not fishery legislation, it is not to be justified as something done for the public good, giving A.'s property to B. It is treating themselves as the proprietors by virtue of legislation, which only enables them to conserve and preserve for the public good. The rights may be curtailed, they may be hampered, and yet we have no right to complain of excess of jurisdiction; but the moment it is said by them they have the right to deal with this as their own property then we protest. I have no doubt this clause was passed under the idea that they were the proprietors of the fisheries; and the moment your Lordships declare

that is not so I should be very sorry to suppose there will be any persistent attempt to do those things. They will be remedied if your Lordships should be pleased to declare that the jurisdiction of the Dominion Parliament was not intended to extend so far.

Lord WATSON—They are here because they so maintain.

Mr. BLAKE—They are here because they so maintain; but I do not suggest that it was a wilful act of confiscation, which it is according to my view of the relative rights as to the property. It was done because they thought that they were proprietors.

Lord HERSCHELL—If the rivers passed to them, all the rights of the Province in those rivers have gone.

Mr. BLAKE—But your Lordships must remember that our lake fishings are more important than our river fishings in Ontario, and it is not pretended that lake fishings passed.

Lord HERSCHELL—Have they purported to include also lake fishings?

Mr. BLAKE—I am speaking of the Act, “leases and licences for fishings wheresoever situated or carried on.”

Lord HERSCHELL—That may mean only where it has the property.

Mr. BLAKE—Will your Lordships give it that interpretation? The words are “may wherever the exclusive right of fishing does not already exist by law, issue and authorise to be issued leases and licences for fishing, wheresoever situated or carried on.” No doubt they entertained the belief then that they were the proprietors of this fishing. Once it is found they are not, no doubt a remedy will be applied.

Lord HERSCHELL—There must be some limitations, because, according to that, they could ten miles out at sea lease fishing rights.

Mr. BLAKE—They have no jurisdiction there. They might lease a right of that sort in the German Ocean.

Lord HERSCHELL—I mean you must put some limit upon it.

The LORD CHANCELLOR—I think what the noble and learned Lord suggests as a hypothetical possibility has taken place, for certain Scotch proprietors have given fishing rights nine miles from the Tweed.

Lord HERSCHELL—We must have the exact thing they have done, not what they might do.

Mr. BLAKE—The question of the validity of this clause was raised. The position at the time of the Confederation was, that the Province could grant the licence for fishing as it pleased, and that the Legislature could deal with it. At the time of Confederation, which is the crucial time, the Province could grant the right of fishing in ungranted waters as it pleased. Magna Charta did not apply to these waters, but if Magna Charta did apply it could be repealed by Provincial legislation; and there was a Provincial Statute as to fisheries in existence at the time. So that I ask the Court to adopt the harmonising construction which I have explained, and not to agree to the view that the Dominion has the power of making itself the proprietor of Provincial property, or of the property of private persons created at Confederation or since Confederation.

Then it seems to me it is hardly necessary to enter into the details of these other questions, because the general observations I have made I think cover the ground in answer to them all; and, therefore, I shall relieve your Lordships from listening to me further. My learned friend tells me that I was asked whether the Dominion Government had issued licences since Confederation in Ontario; and I find that the Fisheries Act of 1886, chap. 95, in the Revised Statutes of Canada, provides: "Nothing contained in this section shall preclude the Minister of Marine and Fisheries from authorising by special fishery licences and lease the capture of salmon by nets in fresh water streams, provided that no one shall fish with swing nets in any of the waters of Canada." So that lease and licence are expressly provided for in another Act besides that to which I referred.

Mr. LONGLEY—If your Lordships please, in the argument of these various questions in the Court below

we were hampered on a very important question that has been considered to-day, by previous decisions of the Supreme Court of Canada. For instance, the moment my learned friend commenced to argue upon the fishery question the Court said "We are bound by *The Queen v. Robertson*," and when we attempted to open the question of the ownership of the beds of harbours they said "We are bound by *Holman v. Green*." Now my learned friend on the other side has opened very fully his case of *The Queen v. Robertson*, which has also been dealt with very fully by my learned friend who has just taken his seat. The question of the ownership of beds of harbours is a question in which, to a great extent, the Province of Nova Scotia, and, to a certain extent, the Province of Quebec is concerned. Nova Scotia is practically an island—it is a peninsula with an isthmus of seven or eight miles, and from end to end it is filled with harbours—I was going to say public harbours, but I think your Lordships will have enormous difficulty in dealing with that word "public." Every harbour in Nova Scotia is a public harbour.

Lord HERSCHELL—When you say it is surrounded by harbours what do you mean? Places where ships resort?

Mr. LONGLEY—Places where ships, in fact, resort, and where they may resort.

Lord HERSCHELL—You may anchor anywhere?

Mr. LONGLEY—Where they have perfectly calm water and shelter against the storm. For the purpose of my argument I want to deal with it in all these aspects, because I wish to reduce, if I possibly can, the judgment of the Supreme Court in *Holman v. Green* to a *reductio ad absurdum*.

Lord HERSCHELL—You do not reduce it to a *reductio ad absurdum* except by assuming that all these are harbours. They may get out of the *absurdum* by the true construction being that all these are not harbours.

Mr. LONGLEY—The true construction is that what the Dominion Government take under this word.

Lord DAVEY—We are not asked what is the construction of the words “public harbours,” but we are asked the question upon the assumption that everybody knows what a public harbour is.

Lord WATSON—The question which is put to us assumed that there is a public harbour by the terms of the Act. Does the solum of that harbour pass to the Dominion under the Act, or does the solum remain with the Province in which the harbour is situated, the Dominion having merely a right of conservancy over the harbour—the property in those parts of it which are used for the harbour, or which are covered with harbour works, and a right to appropriate whatever may be necessary for the use of the harbour as such? That seems to be the only question that has been discussed and decided by the Court below against the Province. The words of the Act they say convey the whole property, whether it is actually used or occupied by works covered with the harbour or not. Of course, this Board is not in a position to judge how much was harbour at the date of the Act; but we must assume that such as there was was in such a condition that there is property, which reading the Act otherwise than the Supreme Court have done must remain the property of the Province and the conservancy of the whole passed to the Dominion.

Mr. LONGLEY—The particular point that I am anxious to get decided—that is the contention that I am going to make—is that no part of the soil or of the bed went except that which was actually covered by the works; and I will endeavour to point this out, very largely on the lines which were used in respect to the argument in relation to the rivers. I am going to show, or to endeavour to show, and I would like for a few moments the opportunity, as strongly as I can of showing what enormous difficulties will ensue if your Lordships undertake to decide the ownership of land.

Lord WATSON—It really turns upon the construction of the Act. Assuming it was a harbour, what interest is transferred?

The LORD CHANCELLOR—Now, Mr. Attorney, we want to hear what you have to say.

Mr. LONGLEY—What I am respectfully submitting is that in constructing the British North America Act, and there has been an enormous wealth of learning in the Courts, and especially by the Board in the construction of that Act, it will not do to talk about absolute abstract meanings of words. Every single clause is merely a skeleton, into which the Board is to breathe life and give an interpretation to the words. If, although the expression is one which is surrounded with doubt and difficulty, an interpretation that will work fairly, reasonably, and successfully, and interfere with none of the common rights can be found, then that interpretation should be put upon it, and not a forced interpretation that would lead to interminable difficulty.

Lord HERSCHELL—Is not that a strong reason for the Board not answering an abstract case, but only answering a concrete case with regard to a particular harbour, what rights passed? One might come to a different conclusion upon the facts of a particular case. There seems to be great danger in giving an abstract answer without defining “harbours”; but then we are not asked to define “harbours,” and I do not see how we could define “harbours” upon the information we possess.

Lord WATSON—Your argument is an argument against the policy of the Act under which these questions come before us.

Mr. LONGLEY—That may be. I am going to suggest an interpretation which, in my judgment, sweeps away all difficulties.

Lord WATSON—You say that these cases will be prejudged by what has been decided against you.

Mr. LONGLEY—No, I do not assume that. What the difficulties are——

The LORD CHANCELLOR—I should like to hear what your interpretation is.

Mr. LONGLEY—In *Holman v. Green* the Supreme Court of Canada decided sixteen years ago that the beds of harbours passed under the expression “public harbours.” The result of the judgment has been that it has been

practically ignored ever since it was delivered, because it is opposed to the common sense of the people.

Lord DAVEY—Perhaps our judgment will be so treated?

Mr. LONGLEY—I, as Attorney-General of the Province of Nova Scotia, know that.

Lord HERSCHELL—Do you mean that it has been ignored in Nova Scotia?

Mr. LONGLEY—It is chiefly applicable to Nova Scotia, and not to the inland Provinces.

Lord HERSCHELL—New Brunswick?

Mr. LONGLEY—New Brunswick, the same way. I will tell your Lordships why it has been ignored.

The LORD CHANCELLOR—Would you mind first giving in a dogmatic form what is your proposition.

Mr. LONGLEY—My proposition is that not a foot of the beds of harbours went under the words “public harbours,” except that part which was covered by the work itself. If a large pier or wharf exists for the use of the public, that pier or wharf and the land upon which it goes. As was stated a few minutes ago, by my learned friend, Mr. Blake, with regard to the fisheries, we do not seek to limit in any sense the most absolute power of the control of navigation. They can remove anything that stands in the way of navigation, they can dredge; but it will lead to enormous difficulty if you undertake to get land—not water—not the right of navigation, not everything which pertains to the public administration of the port: but if you undertake to get land conveyed by those words into the Dominion, your difficulties are absolutely enormous. Let me point out what the difficulties are.

Lord SHAND—I suppose that is much the argument we have had about the fisheries.

Mr. LONGLEY—I shall submit it is clearer and stronger. My learned friend did not deny that the foreshores were in the Provinces.

The LORD CHANCELLOR—What do you mean by “foreshore”?

Mr. LONGLEY—By foreshore we mean that part

which is between high and low water, or, if need be, extending out to the three-mile limit. They admit that is in the Province under the word "land."

The LORD CHANCELLOR—Will you allow me to ask you one question? Do you admit that every artificial work which is used as a harbour is in the Dominion?

Mr. LONGLEY—If it is an artificial harbour and a public work as such.

Lord WATSON—Take quay walls for ships lying aside for the purpose of loading and unloading, and take a breakwater?

Mr. LONGLEY—There is no trouble about those.

The LORD CHANCELLOR—You admit that those do belong to the Dominion?

Mr. LONGLEY—Yes.

The LORD CHANCELLOR—In proprietary right?

Mr. LONGLEY—In proprietary right; but it does not take land generally.

Lord HERSCHELL—If there were a breakwater and pier thrown out here, and another three miles off so as to make a harbour, you admit that, although every artificial work would pass, the soil covered within that ambit would not pass?

Mr. LONGLEY—Yes.

The LORD CHANCELLOR—That is your proposition?

Mr. LONGLEY—Yes, my Lord. If the foreshores are in the Province, clearly, then, we continue on. If it is quite plain that that tremendous language in the section giving the Province all its lands, conveys the foreshores all along the shore to the Province; and if by these words, "public harbours," you are going to convey the soil of all the harbour and put it into the Dominion, then we would have this beautiful proposition that when it was rough and boisterous and tempestuous enough, when the waves dashed up against it, it was Provincial, and when it was quite calm it was Dominion. And I want a Court to test it thus—a degree of placidity that will put it in the Dominion, and a degree of boisterousness that will put it in the Province.

Lord HERSCHELL—I do not follow you.

Mr. LONGLEY—If it is harbour they say it is in the Dominion, that is if it is calm and placid.

Lord HERSCHELL—You are speaking of a place not artificially created—a harbour?

Mr. LONGLEY—There is not a place that is artificially created as a harbour in Canada. Halifax Harbour is one of the finest harbours in the world, and is a natural harbour; and under *Holman v. Green* the whole bed of that harbour has gone to the Dominion.

Lord HERSCHELL—Halifax, being a harbour, would in nobody's mind depend upon placidity or roughness. I do not see how the harbour depends upon placidity or roughness.

Mr. LONGLEY—The harbour is a place of refuge.

The LORD CHANCELLOR—I think you might go further, according to that view, and say it would be either Dominion or Province according to which way the wind was.

Mr. LONGLEY—That is it. What I mean is that the question in *Holman v. Green*—your Lordships will find the full report in the Joint Appendix.

Lord HERSCHELL—I follow your first proposition, but I am not sure that I follow this. In your second proposition do you not assume, about the placidity and roughness, that everything is a harbour which, at certain times of the wind, may afford protection to ships? That is not why Halifax is a harbour—Halifax is a port where they load and unload.

Mr. LONGLEY—It is a natural harbour.

The LORD CHANCELLOR—If your first proposition is right, a harbour in the sense in which you understand the word in that section means an artificial work created for the protection of ships. That you do not shrink from. Then you say Halifax is not within that description because it is not an artificial work.

Lord WATSON—Even when you admit it is a harbour you say it only passes to the Dominion in so far as it is artificially created.

Mr. LONGLEY—*Holman v. Green* says the harbour of Summerside, in Prince Edward Island—

The LORD CHANCELLOR—Never mind about that. We are listening to you.

Mr. LONGLEY—Listening, I hope, for the purpose of getting for ever rid of *Holman v. Green*.

Lord WATSON—I suppose one of the most splendid harbours in the world is at Melbourne.

Lord MORRIS—I believe that Halifax is about one of the finest harbours in the world; I have always understood so. I never was there, and never shall be.

Mr. LONGLEY—What I want to point out is my interpretation of what passes under the words “public harbours.”

Lord HERSCHELL—I feel the force of all you say upon that. You say that Halifax is a very fine harbour, and every one would call it a harbour, although it has no artificial work in it. Then you say that nothing passes to the Dominion.

Mr. LONGLEY—That is not what *Holman v. Green* decides.

Lord HERSCHELL—According to you, if there are no artificial works, nothing passes.

Mr. LONGLEY—That is the way I want the question answered—that nothing passes.

Lord HERSCHELL—Can that be so? If this passes all public harbours, according to your construction you exclude the passing of one public harbour.

Lord DAVEY—You include only the artificial works.

Mr. LONGLEY—The artificial works is all I include.

Lord HERSCHELL—But the difficulty is this, that you exclude by that means from a statutory conveyance of all public harbours a particular harbour altogether, because there are not artificial works in it.

Lord SHAND—The fisheries come under the clause about jurisdiction.

Mr. LONGLEY—Precisely.

Lord SHAND—We have to deal here with a clause

which deals with property, and the words "public harbours" describe the property. I have not seen how you limit that term.

Mr. LONGLEY—I do not limit it at all. I think it means all harbours, and that nothing in the shape of beds pass.

Lord SHAND—If it includes all harbours, why does it not include the soil of the harbour?

Mr. LONGLEY—I am pointing out what enormous disadvantages would arise from that.

Lord SHAND—Then you will limit the words "public harbours" so as to show that they mean only the works.

Mr. LONGLEY.—Yes.

Lord SHAND—I may see that when you come to it, but at this moment I do not see the room for that.

Lord HERSCHELL—May not the true construction be, that when you are speaking of a harbour you do not necessarily comprise within the idea the ownership of the soil covered with water which is within the land lock or within the artificial work; but that the idea conveyed by the word "harbour" is everything which goes to make it, and every right which the public have connected with it—it is a place for the discharge of ships.

Mr. LONGLEY—That is my argument. I stated as explicitly as I could at the beginning that we have formed no limitation whatever of what passes to the Dominion if your Lordships give it that construction.

Lord WATSON—Does it consist entirely of water space?

Mr. LONGLEY—It consists entirely of water, according to my contention.

Lord WATSON—That is putting it more unfavourably to you than I intended to do.

Mr. LONGLEY—We have great tidal rivers. At one time the "Great Eastern" can sail over one of them; and a few hours after you can walk across it in your boots; and water, therefore, becomes enormously essential to a river.

Lord WATSON—I can quite understand that.

Lord MORRIS—If artificial work is to be a governing factor one can understand what it is, but if you take that away you ramble about and are in interminable difficulty.

Mr. LONGLEY—Quite so.

The LORD CHANCELLOR—In ordinary speech I think we speak of something not improved by the hand of man as a natural harbour if it performs the same functions, but “harbour” absolutely without that word “natural” does import artificial.

Mr. LONGLEY—I must ask your Lordship to bear in mind that in the judgment in *Holman v. Green*, which it is one of the purposes of this case to have reversed, there was no evidence that public money had been expended upon the harbour at Summerside.

Lord WATSON—They have given an opinion, and that I suppose is binding in Canada.

Mr. LONGLEY—Until it has been reversed by a Higher Court.

The LORD CHANCELLOR—I have not poisoned my mind by *Holman v. Green*.

Mr. LONGLEY—I am trying to poison your Lordship’s mind in respect of *Holman v. Green*; I mean I am trying to prepare your Lordships to have a proper and suitable reprobation of the principles enunciated in *Holman v. Green*.

My next point to a great extent has been covered by my learned friend, Mr. Blake, and I do not intend to dwell upon it more; but it seems to me the more the 3rd schedule is discussed the more it seems to me the difficulty will vanish if these words “provincial public works and property” should be the property of the Dominion.

Lord HERSCHELL—A canal, it cannot be disputed, owns the soil which is covered by water.

Mr. LONGLEY—That is so. It says “with lands and water power connected with it.”

Lord HERSCHELL—Take a railroad.

Mr. LONGLEY—A railroad is a public work; but the

very instant you get outside of public works the difficulties will be overwhelming.

The LORD CHANCELLOR—You will insist upon that as an argument in your favour that the railroad would carry the subsoil; and here you say in terms the Legislature has given the subsoil too.

Mr. LONGLEY—I have heard some difficulty about Sable Island. That is a part of the Province of Nova Scotia, and it is only a very short distance from Halifax. Sable Island has no right to exist except that, being surrounded by a shallow piece of water, ships coming to Halifax are liable to be wrecked; and the Legislature have, for humanitarian purposes, erected a refuge where professional wreckers are kept, that is people to go to the assistance of people who are wrecked.

The LORD CHANCELLOR—We understand “wreckers” in a different sense.

Mr. LONGLEY—Wreckers was not a happy word to use.

Lord SHAND—You had better call them “rescuers.”

Mr. LONGLEY—Quite so, my Lord. They made a large establishment where their officers, equipped with lifeboats and life-saving materials, live; and when Confederation was formed, naturally, as the Dominion had control of navigation, that institution on Sable Island for the protection of life followed, but there is nothing in it.

Lord SHAND—I think that is quite intelligible, because it is put with lighthouses and piers; and Sable Island, with its rescuing apparatus—it treats it as a large lighthouse.

Mr. LONGLEY—Yes.

Lord HERSCHELL—So far as Sable Island was a place for carrying a light it was passed already.

Lord SHAND—Yes.

Lord MORRIS—I guessed it would be something of that sort, seeing that everything else in the connection dealt with works.

Lord HERSCHELL—Except the last words.

Mr. LONGLEY—I heard my learned friend, Mr.

Blake, struggling with those ; but if there was any such land existing in any Province of Canada at the time of Confederation none of us can understand it. All the public lands were retained by the Province as Crown lands. I suppose if it had been required to erect a post office in Halifax, and we had acquired a piece of land for that purpose, although it was not built upon it, it was intended to convey that particular piece of land for that purpose ; but unless it has that meaning it has no meaning, because all the public lands were retained in the Province as Crown lands and given out as Crown lands since. I make the same statement in regard to public harbours as my learned friend made in regard to river improvement, that whenever you read these words as meaning that public works were included you will have no difficulty.

Lord HERSCHELL—The difficulty that occurs to one is why they use “public harbours” when they mean works in harbours.

Mr. LONGLEY—Will your Lordship permit me to read the judgment in *Holman v. Green*?

Lord MORRIS—You are making better way yourself than challenging *Holman v. Green*.

Lord DAVEY—Is *Holman v. Green* in the Supreme Court of Canada?

Mr. LONGLEY—Yes, I think it begins on page 70 of the Joint Appendix.

Lord HERSCHELL—I should have expected to find “public works” in connection with “harbours” if your contention is right, but why say “public harbours”?

Mr. LONGLEY—With deference I say the words should be read “public works and property in public harbours,” and I say the true interpretation of that word “property” is “public works and property.”

Lord HERSCHELL—That is not what it says.

Mr. LONGLEY—I think every part of that is coloured and shaded by the words “public works.”

Lord WATSON—They are described as public works and property, you say.

Mr. LONGLEY—Yes, my lord.

Lord HERSCHELL—Can you say when you convey public works and property that each one must be both a public work and property? Do you say that each one class must necessarily refer to the word of description?

Mr. LONGLEY—I do not say that in literal interpretation it is free from that difficulty, but what I am endeavouring to point out is that as it is so surrounded with doubt this Court is bound to supply the flesh and the blood; that this is merely a skeleton word, and that in supplying that it should be supplied, as in thousands of interpretations of this Board, in such a way as will give a fair, intelligible reading. If you attempt to convey a large body of land without any reason at all under such vague words as these you lead to interminable difficulty.

Lord HERSCHELL—I am not sure that I see the difficulty referred to, because if it is part of a harbour, as you admit, its main purpose and use is the purpose and use the Dominion have the right to regulate. They have full power of dealing with the soil and making erections upon it, and I do not see whether it can much matter whether those are in them.

Mr. LONGLEY—It will.

Lord HERSCHELL—Why?

Mr. LONGLEY—Here the tide rises to a considerable height. At medium tide it is in the Province under the common law. The tide recedes and we have a space of dry land. In certain placid portions of the harbour that is by some magic to get into the Dominion.

Lord HERSCHELL—Is it certain that you would draw the line according to where it was at the time? It may still be a harbour with a boundary which shifts from time to time. What is conveyed is the harbour.

Mr. LONGLEY—Land covered with water and land are precisely the same in all their characteristics.

Lord HERSCHELL—Quite so, except what is referred to is a harbour.

Mr. LONGLEY—What I say is not only in relation to the point in which the two ownerships in land

differ in regard to the going out of the sea, but where does the harbour stop on the shore?

Lord WATSON—In this country very large limits were fixed for a harbour simply for the purpose of protecting the harbour authority in the enacting and levying of dues. For all mercantile purposes these limits would be sufficient, for the purpose of insurance or for the purpose of charter party.

Lord SHAND—The learned Attorney concedes all that, but he says the land does not go.

Mr. LONGLEY—I say it would lead to interminable confusion.

Lord HERSCHELL—I do not see that you admit all that comes within the word “harbour” is so far delivered over to the Dominion dealing that for the purpose of navigation the Dominion can remove the soil or can build upon it, or can do any works necessary for the purpose of ascertaining where they can do that, you must ascertain the limits of the harbour. I quite saw Mr. Blake’s point about the rivers, but I do not see in your argument the *ab inconvenienti*. Suppose they adopt in the harbour all the powers you admit they possess, what is there left except the ownership of the soil?

Mr. LONGLEY—I would answer that as head of the Land Department in the Province of Nova Scotia. The Crown land is attached to the Attorney-General’s office for the sake of economy, and for eleven years I have been administering the Land Department. Notwithstanding *Holman v. Green* the people are applying to the Provincial Government for grants of the foreshore. Beyond doubt and question we can grant the foreshore in all places except in public harbours, but they come to us in the case of public harbours.

Lord HERSCHELL—Is it at all certain that granting the harbour even on the view that it carried the soil would include the foreshore?

Mr. LONGLEY—Very few wharves, as your Lordship may know, are built by the Government; they are built by private individuals. Mr. Smith wants to build a

wharf in the Harbour of Halifax. He comes to us and gets the soil, and then goes to the Dominion Government. The Act says that before any structure shall be put up he must get the assent of the Minister of Public Works : he must get him to send his engineers and pronounce it a suitable class of public work.

Lord WATSON—You must have warehouses in a harbour as well as water.

Lord DAVEY—I do not see the inconvenience of their having to go to the Dominion after coming to you.

Mr. LONGLEY—The true policy of the Act is to give the Provincial Government the power to vest land. If you give land and enable the Dominion Government by some artificial work to seize a little bit of land you cannot tell at what moment that may jar with the right to land ; whereas if you let the Province have the land and let the Dominion have jurisdiction over the navigation you have no difficulty.

Lord HERSCHELL—You admit, I gather, that the conveyance of harbours, with the right to legislate about navigation, gives them power to take possession of the soil.

Mr. LONGLEY—When they put a public work upon it.

Lord HERSCHELL—That rather conflicts with the argument upon another point, because then out of the power of navigation you take away the property which you say is left in the Province.

Mr. LONGLEY—My learned friend, Mr. Blake, freely conceded at once, as I concede, that the Dominion, by virtue of their control over navigation, can execute such public works over a river as shall take it from the non-navigable and put it into the navigable class ; and in the same way I say it is necessary that they should have the control and well-being of the port, and that they should authorise the putting up of structures. If you undertake by some species of magic to vest in them some hundreds and thousands of acres upon which there are no public structures then difficulties do arise, difficulties which seem to me inconsistent with the proper administration, and so we must look to the Courts to make this British North America Act workable at all.

Lord HERSHELL—The Supreme Court of Canada decided the question eighteen years ago, and there has been no difficulty arising out of that decision between the Dominion and the Province.

Mr. LONGLEY—There has been some, but the common sense of the people has prevailed.

Lord SHAND—Why should not that common sense now prevail?

Lord HERSHELL—They have to go to Ottawa to get permission, as I understand, to build a wharf there.

Mr. LONGLEY—Yes. They have to apply to the Department of Public Works.

Lord SHAND—As I follow you, you say it conflicts with common sense that they should go to one Government more than the other.

Mr. LONGLEY—They all go to the Province to get the land, and they all go to the Dominion to get the water. The land from us, the right of navigation from them. According to their argument, the moment you undertake outside public works, by a species of magic you vest thousands of acres of land, because there are tens of thousands of acres of land in the Harbour of Halifax, and I see nothing in these words “public harbours” to limit it to any special definition—public harbours, as far as I can see, are harbours if you take them in the sense in which any vessel can come in and shelter themselves there.

Lord HERSHELL—It is a matter quite open to discussion, to say the least of it, whether when you speak of transferring a harbour from one body to another you do mean to include in that the land within the harbour. That is what is here in question. The exception is a perfectly possible one of the harbour- as distinguished from the land within the harbour.

Mr. LONGLEY—Quite so ; that is the point.

Lord SHAND—Then you say the rest of the articles in the schedule are for you?

Mr. LONGLEY—Yes.

Lord SHAND—You have no other land given in the schedule?

Mr. LONGLEY—With the limitation of public works and property, I say nothing passes in that except that public property which was being administered by the Provincial Government; when the Confederation came into operation that was handed over, but it could not have taken the beds of rivers or harbours out of the Province, because it had no such intent.

My Lords, I wish to draw my observations to a conclusion to-night, and perhaps it will be sufficient for me to say that in respect to the ownership of the beds of rivers, the Provinces of Nova Scotia and Quebec entirely follow in the lines of and uphold the argument of my learned friend, Mr. Blake, and all that he has said in relation to the fisheries and the administration of the fisheries we are in entire concurrence with, and we adopt that precise line: that is, we say the supreme control of the regulation of fisheries is in the Dominion under section 91, and in respect of rivers and lakes improvements we say they are given for the purpose of navigation; but we say that neither was property in anything given by section 91, except for "Provincial public works and property." I also ask your Lordships to bear in mind that our contention is that the word "property" is considerably shaded, coloured, and hued by the words "public works"—that it means property of the character and nature of public works. That is what was intended to be conveyed in this section.

Lord HERSCHELL—You might say it has the same effect as if it had been "public works and property therein."

Mr. LONGLEY—Yes. We say that full control for all the special purposes which are assigned to the Dominion is given to them; but actual property, which is defined by the words "property and civil rights," which is in the Province, is not affected at all.

My learned friend, Mr. Blake, mentioned that Mr. Cannon, the Deputy Attorney-General for Quebec, desired to be heard for a few moments in reference to clause 14, which specially affects the Province of Quebec. I presume that he will be heard in the morning?

Lord HERSCHELL—Yes.

Lord SHAND—You are not interested in the rivers, are you?

Mr. LONGLEY—Yes.

Lord SHAND—I mean in regard to the extent to which you are affected?

Mr. LONGLEY—We are affected; but not quite as widely as some of the other Provinces.

THIRD DAY.

Judicial Committee of the Privy Council.

COUNCIL CHAMBER, WHITEHALL,

Friday, 30th July, 1897.

BETWEEN

THE ATTORNEY-GENERAL FOR THE DOMINION OF
CANADA

AND

THE ATTORNEYS-GENERAL FOR THE PROVINCES OF
ONTARIO, QUEBEC, AND NOVA SCOTIA;

AND BETWEEN

THE ATTORNEY-GENERAL FOR THE PROVINCE OF
ONTARIO

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF
CANADA;

AND BETWEEN

THE ATTORNEYS-GENERAL FOR THE PROVINCES OF
QUEBEC AND NOVA SCOTIA

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF
CANADA.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

Present—

THE LORD CHANCELLOR (LORD HALSBURY).

LORD HERSCHELL.

LORD WATSON.

LORD MACNAGHTEN.

LORD MORRIS.

LORD SHAND.

LORD DAVEY, AND

SIR J. H. DE VILLIERS.

*[From the Shorthand Notes of Messrs. CHERER, BENNETT & DAVIS,
8 New Court, Carey Street, W.C.]*

Mr. CANNON—My Lords, on behalf of the Province of Quebec, concurring as I do in the argument which was submitted by the learned Counsel for the Province

of Ontario and for the Province of Nova Scotia, I have but very few remarks to submit to your Lordships on two or three special features which present themselves in this case, in so far as the Province of Quebec is concerned. The first point to which I wish to draw your Lordships' attention is that in matters of property and civil rights in the Province it is the old law of France which prevails. This Board has defined what the law of France is, and the distinction to be made between navigable and non-navigable rivers, in the case of *Bell v. The Corporation of the City of Quebec*.

Lord DAVEY—That was about a right of way.

Mr. CANNON—Yes. At page 93, after stating several French authorities, such as Daviel and Dalloz, the judgment proceeds: "These general definitions of Daviel and Dalloz show that the question to be decided is, as from its nature it must be, one of fact in the particular case, namely whether and how far the river can be practically employed for purposes of traffic. The French authorities evidently point to the possibility at least of the use of the river for transport in some practical and profitable way, as being the test of navigability."

The next point to which I wish to allude is that this question of the ownership of beds of navigable rivers, of the foreshores, and the beds of harbours seems to me to be a question of property and civil rights. My Lords, in support of that argument I would wish to cite Article 400 of our Civil Code, which reads as follows: "Roads and public ways maintained by the State, navigable and floatable rivers and streams and their banks, the sea shore, lands reclaimed from the sea, ports, harbours, and roadsteads, and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the Crown dominion." These principles establish to my mind that this question of the ownership of beds of rivers, of beds of harbours, and of foreshore is a question of civil right or property.

Lord HERSCHELL—The question here is as between which of two public Governments the property is in. It is a question of ownership of property. It can hardly

be said to be a question of property and civil right. It cannot affect the determination of the question in which of two representatives of the Crown the property is vested.

Lord DAVEY—I have always thought, in construing these two sections, the general should give way to the particular; and if there is a general power to deal with civil rights in the Province, but a particular power in the Dominion, such as in fisheries and in bankruptcy, they may deal with the particular in a way that may trench upon the general.

Lord WATSON—The question of what steps shall be taken to secure a patent raises a question of civil rights, and yet they are given expressly to the Dominion Parliament. I do not think it is seriously disputed by Counsel for the Dominion in this case, that dealing with the properties in fisheries is a civil right; but they say by implication, having a right to legislate for fisheries the Dominion Parliament has the power to deal with these questions. There is a question between you upon that.

Mr. CANNON—I will now turn to the last point upon which I wish to address your Lordships.

Lord WATSON—Upon that point we have heard arguments, but you are quite right to refer us to the authorities.

Lord HERSCHELL—You will refer to any speciality affecting the case.

Mr. CANNON—Yes. I will now refer to the Quebec Statutes, which interpret the question in this case as to their validity. It is the 14th section I think, my Lord, I am now reading from Volume III. The text of these articles which are attacked is to be found at page 61 of Volume III. These articles, as printed here, do not contain the heading of the section to which I wish to draw your Lordship's attention. The heading reads as follows: Section 7, "Fishing in non-navigable rivers and in lakes." So it is saying by this heading, as also by the articles when read through, that these dispositions of the law only apply to non-navigable rivers and lakes, not to navigable rivers.

Lord SHAND—Where does that title come in?

Mr. CANNON—Immediately before article 1374.

Lord HERSCHELL—That seems to be founded upon a basis, which may be a good basis, that navigable rivers are in one category, and non-navigable rivers and lakes in another; or is there any heading which deals with navigable rivers?

Mr. CANNON—No, but in navigable rivers the Quebec Legislature may have found that fishing was a public right, whilst in non-navigable rivers, forming part of the Crown domain, they thought it was proper to make certain regulations as to fishing.

Lord HERSCHELL—Under the law of Quebec fishing rights in navigable rivers are public.

Mr. CANNON—They belong to the Crown.

Lord DAVEY—They belong to the Crown for the use of the public.

Mr. CANNON—Yes.

Lord WATSON—Are they enjoyed by the individual inhabitants of the community, or do the Crown let them out?

Mr. CANNON—I think in certain rivers the Crown has let out the fishing right.

Lord HERSCHELL—The river and the fishing in it have not passed with the grant of the land bordering on the river.

Mr. CANNON—No, my Lord. Referring to the Dominion factum upon the point of constitutionality of the Quebec Statute I find at page 22 in the same volume, "It is submitted that sections 1376, 1377, and 1378 are *ultra vires*, as legislating upon the subject of inland fisheries." In this part of the Dominion factum article 1375 is not mentioned at all.

Lord WATSON—Does not the reply to be given to this question 14, which you are now dealing with, depend upon the fate of question 1?

Mr. CANNON—To a certain extent, my Lord. These sections of the law only apply to Crown property on conceded lands and lakes. We claim that the Government

of the Province of Quebec, the same as any other proprietor of land or landowner, when granting lands, can make any reservations which it sees fit to make, and this is merely what the article 1375 enacts, that, when granting lands bordering upon non-navigable rivers and lakes, the Government of Quebec will reserve a certain depth of land, three chains, for fishing purposes.

Lord HERSCHELL—You say that is not a legislation as to the fishing, but as to the land which it is assumed the Province owns?

Mr. CANNON—Yes.

Lord WATSON—They are not bound to sell the rights out and out, you say?

Mr. CANNON—Yes.

Lord DAVEY—I do not see there can be any doubt about 1375, because it deals with the lands bordering rivers, not with the rivers and lakes themselves.

Mr. CANNON—No, and I would submit the other articles merely carry out the principles laid down in 1375; they make certain regulations to be followed for fishing in this reserve of three chains mentioned in article 1375.

Lord WATSON—I understood it to be admitted that the Dominion can exact a close time and so on.

Mr. CANNON—It only applies to a certain territory of which the Crown in right of the Province is proprietor.

Lord WATSON—They claim under section .95 the right to regulate all fisheries within the Dominion in any water?

Mr. CANNON—Yes.

Lord HERSCHELL—You say that does not apply to all of them; 1378 seems a clear regulation of fishing.

Mr. CANNON—I admit that.

Lord WATSON—They cannot fish without a licence.

Mr. CANNON—If the Dominion succeeded in all its pretensions, and especially in the pretension of the ownership of non-navigable rivers.

Lord HERSCHELL—Assume the ownership is in the Province, it is said this is an exercise of power vested in the Dominion to make general regulations in all fisheries throughout the Dominion.

Lord DAVEY—And it makes a differentiation between persons having their domicile in the Province of Quebec and those domiciled outside the Province; whereas one would suppose that the legislation of fisheries in the Dominion was for the benefit of all persons who may be living in the Dominion.

Mr. CANNON—A distinction is made as to taking out a licence.

Lord HERSCHELL—If that is a licence for the purpose of raising a Provincial revenue you might have it; but we have said a Province cannot, because it has power to grant a licence for the purpose of Provincial revenue use that power so as to trench upon the powers which are committed to the Dominion legislature. If by Provincial legislation you seek to regulate the fisheries I think you are wrong.

Mr. CANNON—The only distinction made is that non-residents of the Province have to take out licences, and I do not think that entrenches in any way upon the regulation of fisheries which belongs to the Dominion.

Lord HERSCHELL—I do not know about that, if that is a scheme for the purpose of limiting the fisheries to those resident in the Province. Suppose you put a very high fee, which might be a prohibitive fee which nobody would pay, to take out a licence, you would limit the licence to a certain area.

Mr. CANNON—I think the object of the disposition is to raise revenue, because the Government of the Province of Quebec does all it can to induce strangers to come and fish in the lakes of the Province. Fish is so abundant there that I do not think there is any object in limiting it to residents.

Lord HERSCHELL—I see in this case it is only ten dollars.

Mr. CANNON—Yes, my Lord. With these remarks I submit the case on behalf of the Province of Quebec.

Mr. C. ROBINSON—My Lord, I shall detain your Lordships a very short time in what may be usefully said in reply. I may perhaps say first the few words I have to say upon the two subsidiary questions of rivers and harbours. I was struck by the suggestion of Lord Davey that rivers might, upon a possible construction of this section, be confined to public rivers. I had not thought so, and for this reason: rivers in the general sense are not public works, and they therefore must come within the term “property.”

Lord HERSCHELL—There is another possibility I should ask you to consider. It is this. In the whole of section 108 and the schedule the governing idea is public works; but then it may be that it is only public works rivers which are included, that is to say rivers in which there have been public works.

Mr. ROBINSON—There would be very serious difficulties in that; there would be almost an absurdity in giving a river 200 or 300 miles long because there is a public work at its source.

Lord HERSCHELL—That is so: on the other hand, there would be considerable convenience in giving a river where there were public works. I mean there are inconveniences both ways.

Mr. ROBINSON—There are.

Lord SHAND—Then there is the question of the lake improvements.

Mr. ROBINSON—I will dispose of one at a time.

Lord WATSON—You cannot avoid inconvenience.

Mr. ROBINSON—You cannot avoid inconvenience.

Lord WATSON—I do not see that the Dominion or the Province have any great interest in maintaining the floatable character of a river.

Mr. ROBINSON—The floatable character of our inland small rivers is a matter of vast importance to the lumber district.

Lord HERSCHELL—You would hardly say that comes within navigation.

Mr. ROBINSON—No, but it is part of the use of the

river. They lumber for hundreds of miles north of Ottawa, and it is of vast importance that the rapids of those streams should be got over by means of public works.

Lord HERSCHELL—Do you deny the public convenience which Mr. Blake suggests?

Mr. ROBINSON—Yes.

Lord HERSCHELL—What is your answer to that?

Mr. ROBINSON—My answer to that is I do not know any way of considering an Act of this sort better than by trying to put yourself in the position of the delegates who framed it. Suppose it had been decided by the delegates to give the public and large rivers to the Dominion, or to give all the rivers; and one had said, "It may be right to give the large rivers, but I do not see the object of giving the small rivers." Suppose another had said, "I do not see what difference it makes"; and it had been said you would prevent the riparian proprietor getting to the middle of the stream—it would be said "What does he want to get to the middle for? For the purpose of fishing?"

Lord HERSCHELL—Would they have a right to make a bridge from one side to the other?

Mr. ROBINSON—Will your Lordships allow me to state the way in which it struck me. He would have said it involves the right of fishing. But the Dominion have the control of fisheries, therefore that would make no difference.

Lord DAVEY—They have power to legislate as to fisheries. They have not got the property.

Mr. ROBINSON—We do not claim the property in the sense that it is property. If our legislative right extends to deal with the property, it is of no importance. If our legislative right extends to interfering with the fish it would be of very little consequence.

Lord DAVEY—I do not see anything which gives the property in the fisheries to the Dominion.

Mr. ROBINSON—That I am coming to as a separate question. I was desirous of getting rid of the question of rivers and harbours. I will take it in any order your Lordships please.

Lord HERSCHELL—Take your own order.

Mr. ROBINSON—Suppose he said, “It is very desirable to keep these rivers,” the answer is you have that by public law. With us every river that is floatable and boatable is used by the public.

Lord HERSCHELL—Do you say he could not throw a bridge across?

Mr. ROBINSON—He could not throw a bridge across that interfered with the boating or floating. I do not think that question would ever come up.

Lord WATSON—Upon that the observation I made applies with equal force. Maintaining the great highways of the country, whether railway, canal, or lakes, is a matter very appropriate to the Dominion of Canada. On the other hand, the boating upon a little stream is an intensely local matter, to my mind.

Lord DAVEY—Do you say the public have the right to boat, or to float timber upon rivers that are not navigable, and are enclosed by private lands?

Mr. ROBINSON—I understand that rivers which are floatable are vested in the public.

Lord HERSCHELL—If so, they need not have passed the Statute to say you may pass timber down the stream at certain times.

Mr. ROBINSON—They did that for the regulation of the water.

Lord DAVEY—Do you say that by the common law of Ontario any person has a right to put a boat on a private and non-navigable river enclosed by private lands?

Mr. ROBINSON—No, I think that is secured by Statute. So much for that. Then your Lordship suggests that the Statute may be construed to mean public river works. All that can be said is that rivers cannot *primâ facie* be called public works.

Lord DAVEY—To make a river navigable usually requires some public work upon it, does it not?

Mr. ROBINSON—I would have said usually not. Take the Ottawa: there are large stretches of the

Ottawa which are unnavigable. It is an eminently navigable river, but there are large stretches unnavigable.

LORD HERSCHELL—Do you know any navigable river in which there have not been public works?

MR. ROBINSON—Yes, I was thinking of the River Niagara; but that would not do, because it would be called the River Niagara up to Lake Erie, and there are public works there. My impression is there are rivers without public works, but I cannot say. But the fact that there is a public work in some particular river some hundreds of miles long does not make that river a public work. Therefore, if the Statute had said the following property shall become the property of the Dominion, namely rivers, I should have seen no authority for confining it to public rivers.

THE LORD CHANCELLOR—What do you say a river is?

MR. ROBINSON—I have read definitions.

THE LORD CHANCELLOR—I do not want a dictionary definition.

MR. ROBINSON—I can only give your Lordship a dictionary definition.

THE LORD CHANCELLOR—What do you say a river means in this Statute?

MR. ROBINSON—It means what is a river in ordinary language.

THE LORD CHANCELLOR—A river means several things in ordinary language.

MR. ROBINSON—I am really unable to assist your Lordship.

LORD HERSCHELL—I see that the Statute I was referring to does not treat floating as a right conferred by Statute, because it begins, "That it shall be lawful for all persons to float," and then it provides that in so doing they are not to injure dams and so forth.

MR. BLAKE—I think it provides for compensation also.

LORD HERSCHELL—No, it does not.

Mr. BLAKE—There was another Act that did.

Lord HERSCHELL—I think there was a subsequent Act.

Mr. ROBINSON—Possibly I may have gone wrong there from confounding the regular use of the rivers I spoke of which are not mere private rivers. They are generally in uninhabited districts and are fit only for floating; and I know in the United States they have altered their riparian rights, and they have said they shall not have the right to the middle of the stream. I have nothing more to say upon that. I could not have seen how by any inference or arguments you could have confined rivers to public rivers. It is the most entirely subsidiary question whether we own the beds of those internal rivers or whether we do not. It will make no difference in the riparian property, and as to saying it will make unworkable the lands of the Province, I think that is purely imaginary. But, however, the Statute must be construed as it ought to be construed.

Then, my Lords, the only word I have to say with regard to harbours is this: I have never heard, until I heard the Attorney-General for Nova Scotia say so, that this case of *Holman v. Green* had given such offence. We have never heard of it in Ontario. We have several public harbours there, as, for instance, the Harbour of Toronto and the Harbour of Kingston. It seems to me it is almost impossible to administrate with any reason if you say this bit belongs to the Dominion; because it has a wharf there, and then the water between that and another place belongs to the Province. You must, for the continuity of administration, have the whole harbour in one or the other.

Lord MORRIS—Do you claim a harbour which has no works in it?

Mr. ROBINSON—Yes.

Lord DAVEY—Do you claim what I will call natural harbours; that is to say, harbours such as the learned Counsel described, which, from their being land-locked and the character of their shores, do not require any public work to be made available for ships using them?

Mr. ROBINSON—Yes, we claim them because the

decision in *Holman v. Green* gives it to us. Let me suggest a harbour which is giving at this moment great trouble to the Dominion Government. I never thought that I should be asked to define what a public harbour is, because we do not ask the question.

The LORD CHANCELLOR—Perhaps you object to define that as much as you do “river”?

Mr. ROBINSON—All we have ventured to ask is, you own or you do not own public harbours; whether a thing is a public harbour is a question of fact to be determined upon the circumstances.

The LORD CHANCELLOR—Is it to be assumed in your public harbour that you necessarily own the whole land surrounding the harbour works?

Mr. ROBINSON—That is the reasoning in *Holman v. Green*.

The LORD CHANCELLOR—But what do you say with regard to it?

Mr. ROBINSON—I say the reasons in that case are sound, that there are reasons why it is necessary to have the bed of the harbour as well as the water for the purpose of the administration of the harbour.

The LORD CHANCELLOR—Does not that depend upon what you call a harbour? You might have a large body of water with two cliffs which would form a natural harbour. Would that be a harbour or not in your view?

Mr. ROBINSON—If ships have a right to resort there.

Lord WATSON—Take a range of warehouses which are occupied for harbour purposes. What do you say to that?

Lord HERSCHELL—One can conceive a public harbour to be a natural or possible subject of conveyance, without including in the idea of public harbour all the land covered by water.

Mr. ROBINSON—I think you can. I would put the case which would be strongest against me of the water being shallow for the first hundred yards from land, where vessels could not go. Would that be part of the

harbour? I should say not. I should think the harbour would be confined to that depth of water where vessels could lie.

Lord MORRIS—Is not the natural meaning of the word “harbour” where there has been some artificial construction?

Mr. ROBINSON—I can only say I should submit not, and I should have thought there are some of the finest harbours in the world which are natural.

The LORD CHANCELLOR—That arises from the loose use of the word “harbour.” It might be a roadstead.

Mr. ROBINSON—There might be a roadstead not within the harbour.

The LORD CHANCELLOR—I want to know how a roadstead differs from a harbour?

Mr. ROBINSON—A roadstead might extend to water outside the harbour.

Lord HERSCHELL—You may have a roadstead where there is no harbour. Nobody could call a roadstead a harbour. To make it a harbour, does it not involve the idea of convenience or arrangement for loading and unloading?

The LORD CHANCELLOR—That was what I was rather pointing to—how a roadstead differs from a harbour.

Lord WATSON—If a roadstead is simply resorted to by ships in their passage to avoid a gale, that is one case. Another is whether a harbour is resorted to by vessels for the purpose of taking on board and unloading their cargoes by means of lighters. Sometimes that is the only way of getting a cargo of a ship ashore.

Lord HERSCHELL—In that case if you have a roadstead which is used for their purpose, it can only be used for those purposes in connection with some artificial works which renders it possible to load and unload at harbours.

Lord WATSON—There are places which I should not like to say are not harbours at the mouth of the Danube, where the cargoes are brought down by lighters ten or a dozen miles.

The LORD CHANCELLOR—It does not follow they are harbours. I want you to tell me what is the difference between a roadstead and a harbour?

Mr. ROBINSON—I think there may be a piece of water that is properly termed a roadstead which does not form a harbour.

The LORD CHANCELLOR—Why?

Mr. ROBINSON—You may say a vessel is lying outside in the roadstead; she is not in the harbour.

The LORD CHANCELLOR—I want to see, in view of your argument, what you say is the difference between roadstead and harbour. If you do not like to answer the question I will not put it again.

Mr. ROBINSON—I am most willing to answer.

Lord HERSCHELL—You are not prepared, you say, to give an exhaustive definition of the distinction; that is what you mean?

Mr. ROBINSON—I have tried to point out the distinctions which occur to me.

The LORD CHANCELLOR—You have not pointed out any distinction.

Mr. ROBINSON—The distinction is this: a roadstead may be a piece of water outside a harbour.

The LORD CHANCELLOR—Then you get the use of the word “harbour.”

Mr. ROBINSON—It may be a piece of water where there is no harbour.

Lord HERSCHELL—What is a roadstead?

Mr. ROBINSON—A roadstead is a place where vessels may not be in safety in rough weather.

Lord HERSCHELL—There are many places which are ports, where the only place in which a ship can lie is a roadstead. Perhaps you would call it a port and not a harbour.

The LORD CHANCELLOR—The Port of Dover extends from Beachy Head to St. Margaret's Cliff. The port is a place where fiscal jurisdiction is exercised. The Port of London, for instance, extends ninety miles from London Bridge.

Lord HERSCHELL—I do not think there is any legal notion connected with “harbour.” There is with “port,” and there are all sorts of fiscal regulations, but I do not think there is with reference to a harbour.

Mr. ROBINSON—A harbour is a place of refuge, as I understand.

Lord DAVEY—Is it a place of refuge or a place for loading and unloading cargo?

Mr. ROBINSON—Both, because you cannot load and unload unless you are secure from bad weather.

Lord HERSCHELL—There is a certain class of harbours which are called harbours of refuge. Those are, no doubt, harbours, and if there had been made artificially a harbour of refuge that would possibly pass as a public harbour; but when you speak of a public harbour, is not the idea necessarily associated with it that it is a place used for shipping purposes?

Mr. ROBINSON—I think so.

Lord WATSON—One of the oldest definitions of a harbour is described as that part of the beach where mariners draw their ships out of the water. That was decided in an old case in the House of Lords.

Lord DAVEY—It must be an old case.

The LORD CHANCELLOR—The tide rises in the British Channel sixty-two feet.

Lord WATSON—That would be a tidal harbour.

Mr. ROBINSON—I was going to call your Lordship's attention to the great harbour at Vancouver. My idea of a public harbour is that it is a place where vessels have a right to resort. At the time of Confederation there was no Vancouver. Now Vancouver is a place frequented by ships from all over the world. You can get timber there which you cannot get elsewhere.

Lord HERSCHELL—“Public harbour” there can hardly mean public as distinguished from those which are private property, because it is in connection with a clause which is only dealing with that which is public property; when they say “public harbour,” must you not consider that they do not refer to all harbours but

that public harbours is intended as a limitation, and may not that throw light upon the fact that it was only intended to include those where there were public works?

Mr. ROBINSON—That is possible; I do not pretend to say there is only one construction to be given to this, and that the various suggestions are not sound and so forth. I am only pointing out the views we take, and it is not a matter of importance to us.

Lord HERSCHELL—Whatever the interpretation, there cannot be any doubt that under section 91 all that is necessary is any harbour. Whether the soil is in the Province or in the Dominion, it cannot be doubted that everything that is necessary to facilitate navigation, everything that can be called a public harbour is in the Dominion.

Mr. ROBINSON—Now, Vancouver having come into existence since Federation, the Canadian Pacific is running there, and there is a good deal of value attached to the water lots, and the Municipality is coming to the Dominion and saying, "Give us these water lots." On the other hand, people are coming to the Dominion and wanting to buy them; and the Dominion is in a difficulty. The question is upon whose advice is the Crown to act in granting these water lots. The public will get the benefit of it in either case. The Dominion feel that the Harbour of Vancouver is more plague than profit to them in that particular sense. They wish the water lots to be disposed of in the way best suited to the public; but they have great difficulty in dealing with them. Now, I need not repeat what must be plain, that it is quite impossible to confine those words to property upon which public money has been expended, or to public works. It is worth while calling your Lordship's attention to the remark of Mr. Justice Fisher in the Court of New Brunswick. I think sometimes the most dangerous people to go to upon the construction of a statute are the people who framed it. Mr. Justice Fisher says he knows why that was introduced. He says the Dominion assumed the debts of the Province. Those debts had been contracted for public works, and it was necessary to give the Dominion those public

works. You cannot reconcile giving them half a dozen things that are here upon that principle. Take Sable Island.

Lord SHAND—Sable Island has been explained to us.

Lord DAVEY—There was what the learned Counsel called a Wreckers' Institution there.

Mr. ROBINSON—If you look at the map you will see Sable Island.

Lord DAVEY—There may be something in the remark you made, for it is provided that Canada shall be liable for the debts of each Province existing at the Union. That may explain it. You are entitled to look at the old Act; it may throw some light upon it. Without going into what Mr. Justice Fisher knew or thought, upon the face of the Act that may be so.

Mr. ROBINSON—That will form a reason for giving them public works, but it cannot form a reason for giving them ordnance property; I do not know of anything else that occurs to me as regards that. What they point out in the judgment it seems to me almost impossible to answer in that sense—I mean impossible to confine it to public works; and if it had been only public works I cannot see why they should add the word "property." I submit they meant something more than public works when they said public works and property.

Now we go to what is really the one important question here, namely, our jurisdiction over fisheries. When I say the one important question I do not quite mean that, because the question of our jurisdiction over navigation does not seem to be in dispute; but our jurisdiction over fisheries is of vast importance and the view suggested on the other side would make our powers perfectly useless.

The LORD CHANCELLOR—I cannot see why.

Mr. ROBINSON—Before Confederation the Provinces exercised all rights over fisheries in the public lands. They gave licenses to fish; in other words, they sold grants of fishing rights on the lakes: they said to A., "You may throw your net on this portion of the lake, and

you shall pay us so much." They appointed police to see that the fishermen were looked after. Fishermen are not a class that any one will get on well with without the assistance of police.

Lord DAVEY—Without legislation can the Executive Government give an exclusive right of fishing in a place where all Her Majesty's subjects may fish?

Mr. ROBINSON—Probably not without legislation.

Lord DAVEY—I thought you meant the Government did it.

Mr. ROBINSON—It was done by Orders in Council, and for this reason, that from time to time the various requirements changed, and it would not do to pass various Acts of Parliament from time to time, and they regulated it by Orders in Council.

Lord DAVEY—I suppose the Colonial Legislature could overrule Magna Charta if they liked.

Mr. ROBINSON—I suppose so. After Confederation we have always assumed that we succeeded to the rights with regard to fisheries which had been formerly exercised by the different Provinces; in other words, that in public lands of the Provinces and public waters of the Provinces it would be more accurate to say.

Lord HERSCHELL—Where is Sable Island?

Mr. ROBINSON—It is a long narrow island. I am told it is merely sand.

Lord HERSCHELL—Can you say what the size is?

Mr. LONGLEY—It might be fifteen or twenty miles long, and half-a-mile wide, and sometimes the water flows over it. It is not land at all, it is merely a shoal.

Mr. ROBINSON—After Confederation we, until this decision in *The Queen v. Robertson*, have always exercised the rights which the Provinces exercise and have never thought it was open to doubt. We have granted exclusive fishing rights in particular areas to particular people, and we have maintained them on the lakes by a system of police, just as upon the seaboard; and our view of the British North America Act has been that when you give to the different persons by sections 108 and 109 all

lands, and so on, for the public works of the Province you give it to them subject to our jurisdiction over fisheries. I venture to suggest it is a mistake to talk of property in connection with this matter. Neither is it the owner of property; they seek to administer property for the benefit of the public, and they are both in a sense the same Government acting for the public.

Lord HERSCHELL—Take rivers and lakes apart from any legislation which has excluded the rest of the public from the right of an individual, is there any limitation upon the public because it is in the Dominion?

Mr. ROBINSON—No.

Lord HERSCHELL—Anybody can fish as he pleases in a lake or in a river?

Mr. ROBINSON—Yes.

Mr. BLAKE—In the Province of Quebec and in the Province of Ontario there is a Provincial law that gives that.

Lord HERSCHELL—As long as the common law existed I take it that in matters in which the Crown has the dominion the public have a right to take any fish they can get.

Mr. ROBINSON—So the judgment expressly says. I never thought that was open to doubt.

Lord DAVEY—Would that be so in regard to lands which are held in property and not for the use of the public?

Mr. ROBINSON—All these Crown lands are held in that sense for the use of the public.

Lord DAVEY—For the use of the public for the purpose of raising a revenue.

Mr. ROBINSON—Yes.

Lord DAVEY—Not for the physical use of the public?

Mr. ROBINSON—No.

Lord DAVEY—There seems to be a distinction between the right of taking fish in a lake and the right to take fish in a river which the subject has no right to fish in without a licence.

Mr. ROBINSON—That would be an unnavigable river.

Lord DAVEY—It would in substance.

Mr. ROBINSON—That would confine us to the navigable rivers and the lakes.

The LORD CHANCELLOR—Did Sable Island ever go by any other name?

Mr. ROBINSON—Not that I have heard of.

Lord HERSCHELL—It is a good many miles from Halifax.

Mr. LONGLEY—Yes, one hundred; I think it is part of Halifax County.

Mr. ROBINSON—Now if we are right in that, the land granted to the Province by this British North America Act was granted subject to our right of fisheries. The Crown administers the sale of the land under the advice of her Provincial Ministers; she administers the fisheries under the advice of her Dominion Ministers. The property is not changed by the Dominion Act. It always was and is now in the Crown. The question comes up, is the Crown to be governed by the advice of one set of Ministers or by the advice of the other set of Ministers? We thought it advisable that the whole question of fisheries should be controlled after Confederation by one central power to the same extent to which it had been controlled by the different Provinces before. We thought that was an advantage of Confederation—that we had one central Government. In the exercise of that, acting in good faith and for the purpose of administering the fisheries, we think, and have always acted on that idea, that we are entitled to interfere with private property just as much as in our judgment is desirable or necessary. Now the Minister of Marine tells me that giving the Dominion the power of regulation without giving them the power of granting exclusive rights to fish in particular areas would be utterly useless—that the one thing is an essential and vital part of the other.

Now let us see whether that is so in reason. I do not know that I need detain your Lordships with reading

if I give you the page—page 98 of the Record of Proceedings, from about line 21 or 22 down to the first ten lines of the opposite page. That is the definition by the learned Chief Justice below, from which we appeal, of the power of the Dominion. Substantially it amounts to this. The licence which he says the Dominion has the power to grant over the public lands of the Province or over private lands is very analogous to what is called a shooting licence here; in other words he says, You may authorise anyone to fish, but before doing that he must have his own water, and he must get a licence.

Lord DAVEY—Where does he say what you refer to?

Mr. ROBINSON—First he says: "I do not doubt that it is within the power of the Dominion Parliament, in the exercise of its authority, to superintend, regulate, and conserve the fisheries, to require that no person shall fish in any public waters within the Dominion without having first obtained a licence from the Minister of Marine and Fisheries or any other officer of the Dominion Government, and to require for such personal licence the payment of such fees or duties as may be imposed by Parliament, and to prohibit all persons who may not have taken out such licences from fishing in any way; and also to prohibit particular classes of persons, such, for instance, as foreigners, unconditionally from fishing. Such licences must, however, be purely personal licences, conferring qualification, and any legislation going beyond this and assuming to confer exclusive rights of fishing is (subject to exception as to waters belonging to the Dominion and waters within the confines of unsurrendered Indian Reserves) unconstitutional and void."

Lord WATSON—In fact, he came to the conclusion that the power given to the Dominion to legislate for fisheries by section 91 does not necessarily require to be read as involving the power to deal with rights of property.

Mr. ROBINSON—That is it exactly.

Lord WATSON—Whether he is right or not in his conclusion, I do not venture to say; but I think he is

quite right in his construction. You must show there is an exception, as he says, and he says you have not shown that. I think his observations are very much suggested by the form of legislation which the Dominion Parliament thought proper to adopt, because the effect of their legislation was to substitute themselves for the Province. They substitute themselves as owning the fishery and then profess to let it.

Mr. ROBINSON—Yes.

Lord HERSCHELL—May there not be a distinction between those rights to fish which exist in the public in all lands held for public uses by the Crown and rights of fishing which are merely a use of a right of property, one mode of using a right of property? As regards the fishing in a navigable river, and in all lakes where the Crown has the Dominion, the whole thing is vested in the Crown, the property is in the Crown; but there is a right of free fishing, that is to say, everybody has a right to fish. That right is quite unconnected with any property. The property is still in the Crown. It may be that as regards those where you give the legislation with regard to fisheries to the Dominion, you give them the right of dealing as to the places with all such fisheries, because their dealing with them is only a means of saying how in the public interest those fishings may be best administered. It may be all said to be a mode of administering the fisheries which were always public. When you come to rights of fishing which are derived merely from the ownership of the soil and not from a public right, it may be if the ownership of the soil is left in the Province, the Dominion Legislature would not have the right in administering fisheries to deal with that fishery as if it were conveyed to them by the Act. There may be that distinction. ✓

Mr. ROBINSON—There may be.

Lord DAVEY—In the second case you require a licence from the owner of the foreshore, in the other you do not.

Lord HERSCHELL—One is an incident of property, the other has nothing to do with the property and is a use by the public.

Mr. ROBINSON—I think that forms the most excellent reason for our dealing in a very different way with the two classes of fishings, but I submit it forms no ground for limiting our power. You would have the administration of one class of fisheries under one Government and the other under the other.

Lord HERSCHELL—No, that would not follow. All I was suggesting was that in the case of those fisheries where the fishing was incidental to the right of property you might have everything in the Dominion Parliament to control the fishing, but that nevertheless they could not assume the right of property.

Lord DAVEY—You may prescribe the conditions upon which licences or leases shall alone be granted, and you may even curtail the right of fishing by the owner himself, but you cannot substitute yourself for the owner of fishing and grant the licence yourself. That may be so.

Mr. ROBINSON—Anything may be. But let me ask what would then become of the illustration which was given yesterday by one of your Lordships. Suppose there is an absentee owner who owns a valuable fishing and will not exercise it.

Lord DAVEY—It would be quite within your limits to say we will have that fishery utilised for the benefit of the State.

Mr. ROBINSON—And we will let A. B. fish there. That is all we claim.

Lord HERSCHELL—You claim more than that, because you claim to grant a lease of a fishery the exclusive use of which has already been given to a private person.

Mr. ROBINSON—Suppose that private person is an absentee?

Lord HERSCHELL—Then it would well come within the administration of fisheries. You might say you have the right; but if you do not exercise it we, as regulating that department, we shall give it to the public.

Lord DAVEY—It may be you are not to be prevented

from utilising the fishery to the best of advantage because a man has beneficial property in it?

Lord HERSCHELL—I do not say it is so, but I do not think that would be an unreasonable distribution.

Mr. ROBINSON—It would require legislation of one kind with regard to fisheries from the Province, and legislation of another kind with regard to the other from the other, if we grant the licences as we please.

I do not know that we have anything more to ask.

Lord DAVEY—We are dealing now with abstract proportions?

Mr. ROBINSON—Yes. What I venture to find some fault with in the discussion of the thing in some quarters is, that they seem to think that giving the right of administering the property has in some way or other conferred the property.

Lord MORRIS—Suppose there was a grant of the right of the fishing given to the Dominion, would it not go to the Dominion?

Mr. ROBINSON—It would.

Lord MORRIS—And if it were given to the Province it would go to them.

Mr. ROBINSON—Yes; but the public get it just the same either way.

Lord MORRIS—In one case it is all Canada, and in the other case it is only the local place that benefits by it. You might say it is the same thing if the money is spent in Kent or Cumberland. I do not follow you. You say it is a mere matter of administration as to who are to be the Ministers, and who is to give the advice. One may spend the money derived from it in a different way to that in which the other would spend it.

Mr. ROBINSON—Of course, if you attribute to the Dominion the possibility of their exploiting the fisheries for the purpose of expending the money upon other things, there is an end of the thing. It must be assumed that in both Legislatures we should administer the fisheries for the benefit of the public.

The LORD CHANCELLOR—Not one more than the other?

Mr. ROBINSON—Not one more than the other. Take the suggestion of banks. It was suggested by this Board, that if you allowed the Province to touch banks, the Province might put a tax upon banks which would drive them out of existence. I do not think you can assume they would do such a thing.

The LORD CHANCELLOR—I do not think that these observations are very relevant.

Lord DAVEY—We have to say whether this section is *ultra vires* or not.

Mr. ROBINSON—Take the Fraser River, or take the fishing stations down the St. Lawrence.

Lord DAVEY—Those are on public waters.

Mr. ROBINSON—Those are on public waters. If you look at the abstract of what has been done by the different Governments and the view taken, if I am not mistaken, you will find there is a letter from the Dominion offering to give the Province the control of their small inland fisheries. You have still to see what our rights are. It is not a matter we care about. The expense of taking care of these small rivers is rather more than they are worth; but these great fisheries are very different. Take the mouth of the River Fraser and the fishing stations down the coast. The Dominion preserve order, and they allot to each respective person a particular area in which he may exclusively fish. If they cannot do that their power of regulation is useless. If they have allotted certain fishing stations along the Fraser River to A. and B., and then the Province can say, "We shall not let A. fish there, and we will not let A. have that locality," the powers of administration would be absolutely futile.

Lord DAVEY—I do not follow that.

Lord HERSCHELL—You may say, in a sense, that everything which gives the exclusive right to individuals, or to particular members of the public in a locality, is merely administration.

Mr. ROBINSON—General regulations over the public, if they are to be effective, must be exclusive.

LORD DAVEY—I do not see why you cannot lay down rules as to the condition of fishing, the condition under which licences to fish and leases can be granted, and yet leave the granting of the licences and leases subject to the conditions imposed by the Dominion Parliament and the Provincial Government.

MR. ROBINSON—Then the Provincial Government would take the legislation?

LORD DAVEY—No.

LORD HERSCHELL—As regards the public rivers, in which the only right is this, that the soil is in the Crown, and unless restrained everybody has a right to fish, you say the Legislature, which will legislate upon all matters relating to fishery, is the Legislature to which that should be entrusted, because it has the administration of the fishing rights of the public.

MR. ROBINSON—That is it.

LORD HERSCHELL—If you grant a licence to a number of individuals in a particular district you do so because you think that is the best mode of administering the public rights.

MR. ROBINSON—Yes, when you come to the little rivers it is a matter of little importance. If all the revenue from them is to go to the Province, the Dominion will not have it for the purpose of regulation. I have pointed out, and it is as well to understand it, we cannot go to the enormous expense we do, keeping some seven or eight cruisers and expending enormous sums in improving the fisheries, unless we get the revenue. My learned friend says let the Province charge what they like for their licences, and then you can impose a tax to pay for the regulation. The result will be there will be no fishing. A man comes to the Province and says, "I want that fishing; what is it worth?" It cost 200 for the Dominion to guard the fishing. The state of affairs on the Pacific Coast, when the canneries are going on, is something that requires a large police control. You have several hundreds of fishermen trying to evade each other's rights, and you have to have a large police force to take charge of them. If we charge him 200 dollars

more we should have no fishing. We cannot tax more than the thing will bear, and the Province will take all it can bear.

Mr. BLAKE—If it is only worth 500 dollars he will not let it at a price that will be greater than 3 *plus* 2.

Mr. ROBINSON—I do not think my learned friend understands me.

The LORD CHANCELLOR—Whether he does or not, you had better address us.

Mr. ROBINSON—I know what happens in Quebec. There are large rivers. A man goes to the Province and says, "What do you want for this fishing?" He is told 500 dollars. That is what he will pay for the pleasure or business of fishing.

Lord HERSCHELL—That only comes to this, that if there are these rights which you suggest, he would say, "You ask me 1,000 dollars; but as I shall have to pay 200 dollars to the Dominion, I can only give you 800."

Lord SHAND—That is the effect of Mr. Blake's interruption.

Mr. ROBINSON—The result is that there can be no exclusive rights of fishing without some arrangement with the Province. We think we have had it entrusted to us as a central system of administration for the public good.

Lord MORRIS—You could charge anything you like for the fishing?

Mr. ROBINSON—Yes.

Lord MORRIS—Then the Province would not be in it?

Mr. ROBINSON—Then what would be the result?

Lord MORRIS—That would be an advantage to you.

Mr. ROBINSON—No.

Lord MORRIS—You can put your own charge upon the licence to fish under section 91; can you not charge anything you choose?

Mr. ROBINSON—Yes.

Lord HERSCHELL—You would then be in this difficulty. If you grant the licences for what you choose,

the Province might say to the Dominion, "We shall not let this except you reduce your price to such a sum as to enable us to get something. You ask 100 dollars, unless you take 10 dollars we will not let it?"

Mr. ROBINSON—Yes.

Lord HERSCHELL—So that the Dominion would be at the mercy of the Province?

Mr. ROBINSON—Yes.

Lord DAVEY—What you say refers to public waters. I do not see, except for the purpose of raising the revenue, that the Province has anything to do with it, because they do not want a licence to fish. A man has a right to fish by common law; and it is only those who have the power of legislating with regard to fisheries that can control or modify his right of fishing.

Mr. ROBINSON—I do not think if it goes to the Province you would say the man has a right by common law to fish in these waters?

Lord DAVEY—He has the right to fish by common law, and the Dominion is the only Legislature which can control that common law right by legislation.

Mr. ROBINSON—That would answer our purpose; but would it be so?

Lord DAVEY—It would not apply to private fisheries.

Lord HERSCHELL—Here the right of fishing was one which existed only by reason of a right of property in the soil. That is a small matter.

Mr. ROBINSON—It is a small matter comparatively. I think it would be a pity to separate it from the other.

Lord HERSCHELL—All these arguments refer to the inconvenience.

Lord DAVEY—The Province cannot legislate in any matter connected with fisheries, and therefore they cannot pass legislation which restricts the common law right of a man to fish.

Mr. ROBINSON—I am not quarrelling about the method if we arrive at what is necessary.

Lord DAVEY—I am only throwing it out. I am not expressing an opinion.

Mr. ROBINSON—No, I should have thought that was subject to difficulty. If we assume to grant to a man the right to fish in a particular locality in public water, then according to the judgment as it at present stands the Province may come in and say, “You cannot fish there without our leave.” That is the whole difficulty so long as we have the right to grant the exclusive right of fishing in particular cases.

Lord DAVEY—I cannot see how the position of the bed of the river can affect the common law right of a man to fish in it as well as the public.

Mr. ROBINSON—If the bed of a public river is vested in the Province and not in us, then the Courts say that the Province may grant it to anybody.

Lord HERSCHELL—I do not see that that follows. It may well be that there will be the question, if we can deal with the question of control and administration, and the public right of fishing which exists independent of the right to the soil.

Mr. ROBINSON—This case has arisen. The Province granted to a man a water lot in the River St. Lawrence; the Dominion granted a fishing licence over the same place, and the man would not let the licensee exercise it.

Lord HERSCHELL—The question is, can anybody derogate from the public right of fishing, so as to give the exclusive right to a member of the public except the Dominion? The question is whether the words cover it.

Mr. ROBINSON—The Courts say that if the Province chooses to grant the navigable lands under water, that man has the exclusive right.

Lord HERSCHELL—I take it that the Crown might grant any part of the lands within its dominion upon the coast, or any navigable river. They might convey the soil, but that would not diminish in the slightest degree the right of the public to fish. The grant of the soil would no more take away the right of the public to fish in tidal waters than it would take away the right to navigate in tidal water.

Mr. BLAKE—Only because of *Magna Charta*, which does not apply to our inland waters.

Lord DAVEY—It does not seem to be a question of property at all ?

Mr. ROBINSON—Now I have only one more point to suggest, which bears a good deal upon the question of our right to the beds. One of the most important branches of our administration with regard to the fisheries, is the propagation and artificial rearing of fish—the stocking of rivers. I have upon the table dozens almost of Orders in Council setting apart particular rivers for the artificial propagation and rearing of fish. That to a certain extent is interfering with the beds.

Lord DAVEY—Public rivers or private rivers ?

Mr. ROBINSON—I think in both. Wherever we have thought it most suitable we have passed an Order in Council saying that it is appropriated to that purpose. Where we did that the Province of Quebec granted a right of fishing, but we have arranged it amicably until this is settled. We have to settle what will be those rights.

Lord SHAND—Although they let that fishery, still your regulation would avail, would it not ? There is no answer to your power.

The LORD CHANCELLOR—The question there is whether that does not involve a proprietary right.

Lord DAVEY—Prohibiting a person from exercising his right of fishing at all in those rivers ?

Mr. ROBINSON—Yes.

Lord SHAND—It is a very common thing to have rights interfered with temporarily, such as by a close time ; and it is only carrying the matter a stage further to say, “we insist upon this being a breeding bed” as a matter of regulation, and I do not see why you cannot exercise that power although the right of property is in the other.

Mr. ROBINSON—Very well. The right of property is of no avail. We have Orders in Council setting apart parts of harbours for the purpose of oyster beds.

That may be a reason for vesting in us the bed of the river. We must be exercising there the rights over harbour beds.

Lord DAVEY—That is a public fishery.

Mr. ROBINSON—That is a public fishery.

Lord SHAND—You can exercise those rights without having the property.

Mr. ROBINSON—All that we desire is that we keep such power as will enable us to exercise our administrative powers over fisheries effectively. I am told that inseparably connected with that is the right to give exclusive licences over particular areas. If we cannot do that it is no use having the administration. If the Province can step in and say, "We will not allow your licensee to fish, it is no use." I do not know whether the Board desire me to say a word about the question of our rights under the words "navigation in shipping"?

The LORD CHANCELLOR—Has anybody doubted you have those rights?

Mr. ROBINSON—Yes, my Lord, most distinctly.

Lord HERSCHELL—I do not think it has been controverted before us.

Mr. BLAKE—I do not know what you mean.

The LORD CHANCELLOR—What is comprehended in those words is a subject of debate, but that you have those rights nobody has denied.

Mr. ROBINSON—We have stated that no person shall put up any structure upon navigable water without our sanction. Our power to do that has been questioned.

Lord DAVEY—Mr. Blake says you have only a power to make regulations for preventing obstruction, leaving it to the Courts to say whether a particular work is an obstruction or not. That was Mr. Blake's point.

The LORD CHANCELLOR—Allow me to say that that does not interfere with those words. It may be that is the application of those words; you are endeavouring to give yourselves jurisdiction by finding a fact contrary to

the truth, and it may be that it is a limitation to your jurisdiction.

The LORD CHANCELLOR—Suppose you say: Be it enacted that in order to keep free navigation no person shall do so and so. You say it is legislation the very purpose and object of which is to keep free the navigation, and you say the power to deal with any acts for the purpose of keeping free the navigation is vested in the Dominion Parliament. You have power to do that. If they use that power for some purpose which has no connection with navigation, when it has no connection with navigation, that would not do—that would be *ultra vires*.

Lord DAVEY—Suppose you say that if a wreck is sunk in the bed of the St. Lawrence a man shall remove it at his own expense.

Mr. ROBINSON—I suppose we can do that?

Lord DAVEY—Mr. Blake would say you have no right to prejudge whether the wreck would obstruct the navigation.

Lord WATSON—I do not think you could pass what is in substance a Rivers Pollution Act because you have power to deal with navigation.

Mr. ROBINSON—That would be bearing on health.

Lord HERSCHELL—That is the point. You could not under the guise of navigation legislate not for the purpose of exercising that power, but some other purpose.

Mr. ROBINSON—Clearly not. This power, as well as all other powers, must be exercised for the purpose for which it is given.

The LORD CHANCELLOR—You could not by reciting it is an impediment to navigation make it one.

Mr. ROBINSON—No.

Lord DAVEY—It is the 16th question, “Has the Dominion Parliament power to declare what shall be deemed an interference with navigation, and require its sanction to any work or erection in or filling up of navigable waters?”

The LORD CHANCELLOR—"Filling up of navigable waters." I should have thought that obviously pointed to something that must in good sense be an impediment to navigation.

Mr. ROBINSON—We have never thought that open to doubt.

Lord WATSON—The argument went upon the words "deemed to be."

Mr. ROBINSON—That may be.

Lord WATSON—You have power to legislate upon what is an obstruction.

Mr. ROBINSON—And we are the judges of what will be an obstruction. For instance, we say you must not put an erection upon any part of the bed without submitting the plans to us and having our sanction.

The LORD CHANCELLOR—That seems to me a totally different thing. The moment you specify what you may or may not do you get into a difficulty.

Mr. ROBINSON—I must take our Statute.

The LORD CHANCELLOR—I should very much doubt whether, to the extent to which you now urge your right, it is questioned. I think Mr. Blake said, and I agree with him, that you have no right to recite in your Statute that a thing is an impediment when it is not.

Lord HERSCHELL—What is your Statute?

Mr. ROBINSON—The revised Statute, No. 2.

Lord WATSON—The very words which are used suggest that the thing made an impediment by Statute is not an impediment. I do not know what "deemed to be" means.

The LORD CHANCELLOR—Mr. Baron Bramwell used to say "A thing is deemed to be when it is not."

Lord HERSCHELL—Do you impeach the whole of the Act?

Mr. ROBINSON—I do not think it is the Act so much as question 16.

Lord HERSCHELL—Is there any statute with respect to that question which they say is *ultra vires*?

Mr. ROBINSON—Yes.

Mr. BLAKE—I thought my learned friend agreed with me that he did not now deem that important, because it does contain a restriction of dubious import, but we both agreed it meant an interference with navigation.

Lord DAVEY—“No bridge, boom, dam, or aboiteau shall be constructed so as to interfere with navigation unless the site thereof has been approved.”

Mr. BLAKE—It was because it was thought that those phrases might obviate the difficulty of the absolute discretion of the Dominion Parliament as to what should be deemed to be an interference that question 16 was put in to raise that question.

Lord HERSCHELL—Suppose you said that no person in certain parts of a river shall throw in any slag and so on; if that is done for the purpose of preventing the river becoming unnavigable, as it might be, that would not be *ultra vires*. You say they prejudge the question because they legislate upon it. If it turns upon the words “to be deemed” that is another thing.

Mr. ROBINSON—As your Lordship puts it, that concedes all we desire. I have always understood, both in the arguments below and here, that they say this, “We may put up any erection we think proper, provided it does not interfere with navigation.”

Mr. BLAKE—I do not say that.

Mr. ROBINSON—Let me finish my sentence. “If you think it interferes with navigation you may go to the Court and have it removed.”

Lord HERSCHELL—Do they deny that you, thinking things will interfere with navigation, may prohibit those things?

Mr. ROBINSON—I understand they do. If they do not I shall be glad if they will say so.

May I refer your Lordships to one section in our factum, at page 17 of Volume I. That embodies practically rights which we claim. In the United States, under their right to regulate trade and commerce, they have said that Congress has the right to regulate all the

navigable rivers to the extent of saying beforehand what may be done in them and what may not, that they may change the channels of them, that they may say where bridges may be put or may not be put, and that it is their province to declare whether what they prohibit will interfere with navigation or not : and we claim the same power. "The Dominion Parliament having exclusive jurisdiction over navigation and shipping, and over the regulation of trade and commerce, has the right to enact what may be reasonably necessary for the due and effectual exercise of its powers. They may, therefore, as they assume by this Statute to do, prevent by a general enactment the erection of any wharves, warehouses, etc., in navigable waters, or so as to interfere with navigation, without their approval, and are not restricted to compelling the removal or preventing the erection of any works which may be proved to the satisfaction of a Court or Jury to be such an interference. Acting in good faith and within reason, it is for them to say what would be injurious, and they may by such legislation as this secure for themselves due control over works or other obstructions in navigable waters." The next sentence sets out shortly what has been held in some of the best judgments of the Supreme Courts of the United States. "The right to make laws in relation to the regulation of trade and commerce, which has been assigned exclusively to the Dominion Parliament, would empower them thus to legislate. It has been held in the United States that the right of Congress to regulate commerce, which is more restricted than with us, includes power to regulate navigation upon the navigable waters of the United States, and to keep such waters open and free for the purposes of intercourse with foreign nations and between different States. Congress possesses under this head all powers necessary to the protection and improvement of the canals ; the right to declare"—this is a quotation—"what shall or shall not be deemed an illegal obstruction of navigation, either before or after its erection or condemnation as a nuisance, and the power to close one or several channels in a navigable river, in order to make it more useful for navigation."

Lord HERSCHELL—I should rather suspect a piece

of legislation which said that a thing should be deemed to be. When you come to a Legislature with limited jurisdiction which begins by saying "It shall be deemed to be," one begins to suspect it.

Lord DAVEY—What they mean is that it shall not require to be proved.

Lord MORRIS—You do not want the word "deemed."

Mr. ROBINSON—Not in the least. I do not care in the least how it is done so long as it is done.

Lord DAVEY—Your Statute that you refer to seems to me, subject to any criticism that may be made upon it, unquestionable, because it only gives you power to remove it if it interferes with navigation.

Mr. ROBINSON—And they said we had to prove before a Court whether it interfered with navigation, and for that reason we submitted question 16.

Lord HERSCHELL—It says a bridge may be removed by Order in Council.

Lord DAVEY—So far as it interferes with navigation.

Mr. ROBINSON—I may say we did not think question 16 absolutely necessary, but we thought it better not to leave anything in doubt.

Mr. BLAKE—My Lords, in replying upon my appeal, I propose not to add anything upon the subject of harbours, and a word or two only upon this question of navigation which has just now been touched upon. I understood the case to be in reference to that, that the original question being with reference to the Act which is before your Lordships, and which is to be found at pages 1, 2, and 3 of the Appendix, the reason why question 16 was added as a supplementary question was because it was believed that the restrictive words "so as to interfere with navigation, and in so far as the same interferes with navigation," in sections 2 and 3, might be construed to get rid of the objection that it would be necessary to prove, in order to bring the Statute into effective operation to the satisfaction of the Court, that in point of fact the thing did interfere with navigation.

Lord HERSCHELL—Suppose those words were struck out, "so as to interfere with navigation"; do you say clause 2 would be *ultra vires*?

Mr. BLAKE—That is what I am coming to. The result of striking out those words and giving this power would be to restrict the right of a person to construct a bridge, a boom, a dam, or aboiteau upon his own property, unless the site were approved by the Governor and Council, irrespective of the question whether that interfered with the navigation or not.

Lord HERSCHELL—It is with the intention of protecting navigation.

Mr. BLAKE—If your Lordship inserts those words it is an Act respecting works constructed in or over navigable waters, it is true; but there is nothing which limits in the slightest degree the power of the Governor and Council to prohibit. In fact, there is a statutory prohibition, “or shall build, etc., unless it is built and maintained in accordance with plans approved by the Governor and Council beforehand.” That I say is beyond what was ever intended.

Lord HERSCHELL—The words are “so as to interfere with navigation.” Suppose it had been introduced with these words, “for the purpose of interfering with navigation”?

Mr. BLAKE—I should suppose what your Lordship would have done would be to refer to the Statute, which it is the obvious object of the Dominion Government in its larger sense to maintain, by the language in question 16, which would be “no bridge, boom, dam, or aboiteau shall be constructed.” No, I cannot see that you can apply it, because it is an absolute prohibition to construct anything at all, unless the site has been approved beforehand.

Lord DAVEY—In navigable waters?

Mr. BLAKE—In navigable waters.

Lord HERSCHELL—If that is done for the purpose of preventing the construction of navigation, why should it not be done?

Mr. BLAKE—You cannot say it is done for the purpose of preventing the obstruction of navigation.

Lord DAVEY—It is *primâ facie* obstruction.

Lord HERSCHELL—You have to show it must be a mere evasion of their legislative limitation. It is a thing which seems naturally to come within the powers to regulate navigation.

Mr. BLAKE—I should have thought that a clause which prevented the person who *ex hypothesi* is the owner of the soil from putting anything upon it, unless the Governor and Council approve, and which left an absolute discretion to the Governor to approve or disapprove, was an interference with the reasonable exercise of powers.

Lord HERSCHELL—The Province could not for the purpose of navigation pass an Act which limited the right in any measure whatsoever.

Mr. BLAKE—I do not say they could limit the right of navigation.

Lord HERSCHELL—The Province could not pass an Act which limits rights of property in individuals merely for the purpose of protecting navigation, because that is committed to the Dominion.

Mr. BLAKE—I do not assent to any limitation of the rights of the Province to interfere with the right of private proprietors. I am not now dealing with preventing interference with navigation.

Lord WATSON—If you, professing to deal with private property, in reality passed an Act which was intended to deal with navigation, you would be trenching upon the powers of the Dominion Parliament.

Mr. BLAKE—Possibly. Take the case of a very shallow river, up which only barges or small masted boats go, and take the proposal to put a bridge fifty feet high, when the highest mast that went up was fifteen feet high; could it be suggested that there is any reason why the plans for that bridge should be submitted to the approval of the Governor and Council?

Lord HERSCHELL—There are numberless things to be determined to see whether it will affect navigation. That is what the Dominion Government has to control, and therefore it must have the power to say what is right and necessary.

Lord WATSON—Whose right to property is interfered with when you prevent a bridge being built over a navigable river? I want to see where the private right is.

Mr. BLAKE—If it is proposed to erect a bridge which the party has no right to erect, there is no use for the Act.

Lord WATSON—The Act says: “We will permit a bridge to be built, and we will take no objection if you do not interfere with navigation.”

Mr. BLAKE—It says “you shall not build at all unless you submit the plans to us.”

Lord HERSCHELL—That means you may get permission to do what otherwise you might not get permission to do by submitting the plans to us, because if we see that you do not interfere with navigation we shall let you do it.

Mr. BLAKE—In *de facto* navigable waters in which the soil may be in the subject or in the Province, not *de jure* navigable waters, the public has a right over the river above tide; but that does not interfere with the right to erect a bridge.

Lord HERSCHELL—To whom is committed the power of determining what legislation is necessary to protect navigation except the Dominion Government? The very legislation itself is a determination that it is necessary for the purpose of navigation. How can you pass any Act without first determining what is necessary?

Mr. BLAKE—That section would be very much less objectionable if it did proceed to determine that such and such a thing is an interference with navigation, but it says you shall not build unless the Governor approves.

Lord HERSCHELL—If you have power to prohibit the building any bridge except upon certain conditions, it is better for the subject that there should be an elastic prohibition that they are prohibited subject to approval.

Mr. BLAKE—The view of the Province was and is that the right of navigation, whether it be the right below tide or the right above tide, which is the nearest analogy to our navigable water, cannot be interfered with.

Lord WATSON—Suppose they were to pass an Act that no bridge should be thrown over a navigable river at a particular point, you would say that is *ultra vires*; and the only proper way of testing it is to get someone to threaten to build a bridge.

Mr. BLAKE—No, I should say that would have been a legislative determination by the Legislature competent so to decide, that no bridge of any height whatever could be built over that place without interfering with navigation. The proposition would involve the ascertainment of that fact.

Lord WATSON—I think the result would be you would give them no jurisdiction at all.

Mr. BLAKE—It seemed to us that that state of the law which prevented the erection of anything that was an interference with navigation was adequate protection.

Lord WATSON—If the matter has been committed to a particular Parliament, I do not think you can find fault with the action of that Parliament, unless you can show that they have dealt with another kind of subject than that which was entrusted to their jurisdiction, and that they are making the power and jurisdiction a mere cover for doing that which they have no power and jurisdiction to do. You must show that, or else legislative jurisdiction becomes, in the view you are presenting now, the merest farce. You say everything must be done, not only by the Legislature, but with the aid of a Court.

Lord HERSCHELL—Suppose a body has power to legislate with regard to all buildings in towns, would not that enable them to legislate that nothing shall be erected without the plans are approved.

Mr. BLAKE—Perhaps so.

Lord HERSCHELL—Is not that analagous?

Mr. BLAKE—This is not a power as to erecting buildings.

Lord HERSCHELL—It is a power to legislate as to navigation, and if they have that power they must have power to direct that for that which may obstruct navigation approval must be obtained. There is no one of these things that is mentioned which may not obstruct

a bridge, a dam, a boom, and an aboiteau. They are, every one of them, things which may obstruct.

Lord MORRIS—The question is very wide.

Lord HERSCHELL—I do not understand the question whether they have power to declare what shall be deemed to be an obstruction. If they have power to say you shall not throw certain refuse into the river, the very fact of their doing it deems it to be, and it is because they deem it to be they so enact. If it means have they power to deem things to be which are not, and cannot in their nature be, that is another question. I do not know which of those was intended to be put.

Mr. BLAKE—I am afraid that the object was to argue and to have determined that there was an absolute right in the Dominion Parliament; and, of course, if they have that right, they have the right to delegate that power to the Governor and Council, or to any other body—an absolute right to determine that anything they deem to be an interference with navigation is an interference with navigation.

Lord DAVEY—Or was calculated to interfere with navigation.

Lord HERSCHELL—If it was something which could not in its nature interfere, that would be ground for saying they were acting *ultra vires*.

Lord SHAND—And that would not be a question to be raised by the Province as much as by the person injured.

Lord DAVEY—It is a question whether the Act is *ultra vires*.

Mr. BLAKE—It is a question whether the Act is *ultra vires* or whether there is power to make an Act in the terms of question 16, which would be *intra vires*.

The LORD CHANCELLOR—That would depend upon the construction to be given to the Act. If, as my noble and learned friend opposite has suggested, it comprehends something that could not be an obstruction to navigation, then it would be *ultra vires*; but if it is capable of being applied to things that are an obstruction to navigation, it is a strange thing to say it is not *ultra vires* because it might be abused.

Mr. BLAKE—I will not trouble your Lordships upon that.

Lord WATSON—I do not think it limits the jurisdiction of Parliament if they decide that something is an obstruction which a Court says is not.

Mr. BLAKE—I am afraid an observation of mine has been overlooked in consequence of what your Lordship said as to the common law right. The Consolidated Statute of Canada of 1859, chap. 72, gives the power of issuing fishing licences or leases for a term not exceeding five years; and as I understand, subject to that right, any of Her Majesty's subjects may fish with bait or otherwise in any harbour, river, or lake of the Province. There seems to be an impression in the minds of some members of the Court that there was a distinction because it was a common law right. I say not merely that the Provincial Legislature might alter the common law right, but that they have done so.

Lord DAVEY—But the question is which Legislature can do it now.

Mr. BLAKE—No doubt.

Lord HERSCHELL—The question is not as to the common law right, but as to the necessary powers which existed independently of the ownership of the soil, and those which existed as incidents to the ownership of the soil.

Mr. BLAKE—Our contention is that before the Confederation they were susceptible of being parted with by the Crown, and that until they were parted with the right of the subject continued; and we say that right was not altered, and that the Crown could continue to exercise its right by alienating any of these fisheries after Confederation as before.

The LORD CHANCELLOR—Their Lordships will consider this matter.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of (1) The Attorney-General for the Dominion of Canada v. The Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia; and (2) The Attorney-General for the Province of Ontario v. The Attorney-General for the Dominion of Canada; and (3) The Attorneys-General for the Provinces of Quebec and Nova Scotia v. The Attorney-General for the Dominion of Canada, from the Supreme Court, Canada; delivered 26th May, 1898.

Present—

THE LORD CHANCELLOR.
 LORD HERSCHELL.
 LORD WATSON.
 LORD MACNAGHTEN.
 LORD MORRIS.
 LORD SHAND.
 LORD DAVEY.
 SIR HENRY DE VILLIERS.

[Delivered by Lord Herschell.]

The Governor-General of Canada by Order in Council referred to the Supreme Court of Canada for hearing and consideration various questions relating to the property, rights, and legislative jurisdiction of the Dominion of Canada and the Provinces respectively in relation to rivers, lakes, harbours, fisheries, and other cognate subjects.

The Supreme Court having answered some of the questions submitted adversely to the Dominion and some adversely to the Provinces both parties have appealed.

Before approaching the particular questions submitted, their Lordships think it well to advert to certain general considerations which must be steadily kept in view, and which appear to have been lost sight of in some of the arguments presented to their Lordships.

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 represented 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.

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*, 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.

Their Lordships pass now to the questions relating to fisheries and fishing rights.

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 "Sea-coast and Inland Fisheries" in section 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 section 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.

In addition, however, to the legislative power conferred by the twelfth item of section 91, the fourth 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 licence as a condition of the right to fish.

It is true that by virtue of section 92 the Provincial Legislature may impose the obligation to obtain a licence, 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.

It follows from what has been said that in so far as section 4 of the Revised Statutes of Canada, chap. 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.

Their Lordships think that the Legislature of Ontario had jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chap. 24, except in so far as it relates to land in the harbours and canals, if any of the latter be included in the words "other navigable waters of Ontario." The reasons for this opinion have been already stated when dealing with the questions in whom the beds of harbours, rivers, and lakes were vested.

The sections of the Ontario Act of 1892, entitled "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 section 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 thereafter enumerated." The twelfth of them is "Sea Coast 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 section 91 is not within the legislative competence of the Provincial Legislatures under section 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in section 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 section 91, and in particular to the word "exclusively." It would authorise, 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.

It is true that this Board held, in the case of *The Attorney-General of Canada v. The Attorney-General of Ontario*, 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 those words were used in section 91.

For these reasons their Lordships feel constrained to hold that the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature and is not within the legislative powers of Provincial Legislatures.

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 section 92, and not as in the class "Fisheries" within the meaning of section 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 section 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 section 92.

The various provisions of the Ontario Act of 1892 were not minutely discussed before their Lordships, nor have they the information before them which would enable them to give a definite and certain answer as to every one of the sections in question. The views, however, which they have expressed and the dividing line they have indicated will, they apprehend, afford the means of determining upon the validity of any particular provision or the limits within which its operation may be upheld; for it is to be observed that section 1 of the Act limits its operation to "fishing in waters and to waters over or in respect of which the Legislature of this Province has authority to legislate for the purposes of this Act."

Sections 1375, 1376, and the 1st sub-section of section 1377 of the Revised Statutes of Quebec afford good illustrations of legislation such as their Lordships regard as within the functions of a Provincial Legislature.

Their Lordships entertain no doubt that the Dominion Parliament had jurisdiction to pass the Act intituled "An Act respecting Certain Works constructed in or over navigable waters." It is, in their opinion, clearly legislation relating to "navigation."

Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or

represented before their Lordships; and accordingly, their Lordships do not think it proper, when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures, to express an opinion upon the extent of the rights possessed by riparian proprietors.

The parties will, of course, bear their own costs of these proceedings.

L.S.

At the Court at Windsor Castle,*The 18th day of July, 1898.**Present—*

THE QUEEN'S MOST EXCELLENT MAJESTY.

LORD PRESIDENT.

MR. GOSCHEN.

MR. RITCHIE.

SIR GEORGE TAUBMAN-GOLDIE.

MR. JAMES A. CAMPBELL.

MR. JAMES W. LOWTHER.

MR. EDMOND WODEHOUSE.

SIR CHARLES SCOTT.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council, dated the 26th May, 1898, in the words following, viz. :—

“YOUR MAJESTY having been pleased by Your General Order in Council of the 27th November, 1896, to refer unto this Committee the matter of an Appeal from the Supreme Court of Canada between the Attorneys-General for the Provinces of Quebec and Nova Scotia, Appellants, and the Attorney-General for the Dominion of Canada, Respondent (in the matter of certain questions referred to the Supreme Court of Canada by two Orders of His Excellency the Governor-General of Canada in Council approved on the 23rd February, 1894, and the 23rd February, 1895, respectively), and likewise a humble Petition of the above-named Appellants, setting forth that by Orders in Council approved on the 23rd February, 1894, and the 23rd February,

1895, respectively, the Governor-General of Canada, pursuant to chap. 135 of the Revised Statutes of Canada, as amended by section 4 of the Act of the Dominion of Canada (54 and 55 Vic., chap. 25), referred to the Supreme Court of Canada for hearing and consideration the following seventeen questions :—

“ 1. Did 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, become under the British North America Act the property of the Dominion, or the property of the Province in which the same respectively are situate ; and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, etc., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, etc., and other rivers, or between waters directly and immediately connected with the sea coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more Provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

“ 2. Is the Act of the Dominion Parliament Revised Statutes of Canada, chap. 92, intituled ‘ An Act respecting certain works constructed in or over navigable waters,’ an Act which the Dominion Parliament had jurisdiction to pass, either in whole or in part?

“ 3. If not, in case the bed and banks of a lake or navigable river belong to a Province and the Province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse, or the like, has the grantee a right to build thereon accordingly,

subject to the work not interfering with the navigation of the lake or river?

“4. In case the bed of a public harbour or any portion of the bed of a public harbour at the time of Confederation had not been granted by the Crown, has the Province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

“5. Had riparian proprietors before Confederation an exclusive right of fishing in non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

“6. Has the Dominion Parliament jurisdiction to authorise the giving by lease, licence, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

“7. Has the Dominion Parliament exclusive jurisdiction to authorise the giving by lease, licence, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

“8. Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the Provinces respectively, under the British North America Act, if any such are so assigned?

“9. If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a Provincial Legislature jurisdiction for the purpose of Provincial revenue, or otherwise, to require the Dominion lessee, licensee, or other grantee to take out a Provincial licence also?

“10. Has the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled ‘An Act respecting

Fisheries and Fishing,' or any other of the provisions of the said Act, or any and which of such several sections, or any and what parts thereof respectively?

" 11. Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled 'An Act respecting Fisheries and Fishing,' or any other of the provisions of the said Act, so far as these respectively relate to fishing in waters the beds of which do not belong to the Dominion, and are not Indian lands?

" 12. If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands, constituting the beds of such waters, as aforesaid, or from the rights incident to the ownership by the Provinces and others; but (subject to such property and rights) providing, in the interests of the owners and the public, for the regulation, protection, improvement, and preservation of fisheries: as, for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish, by taking them in an improper manner or with improper engines, prohibiting obstructions in ascending rivers, and the like?

" 13. Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chap. 24, intituled 'An Act respecting the Sale and Management of Public Lands,' and sections 5 to 13, both inclusive, and sections 19 and 21, both inclusive, of the Ontario Act of 1892, intituled 'An Act for the Protection of the Provincial Fisheries,' or any and which of such several sections, or any and what parts thereof respectively?

" 14. Had the Legislature of Quebec jurisdiction to enact sections 1375 to 1378 inclusive of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

" 15. Has a Province jurisdiction to legislate in regard to providing fishways in dams, slides, and other constructions, and otherwise to regulate

and protect fisheries within the Province, subject to and so far as may consist with any laws passed by the Dominion Parliament, within its constitutional competence?

“ 16. Has the Dominion Parliament power to declare what shall be deemed an interference with navigation, and require its sanction to any work or erection in or filling up of navigable waters?

“ 17. Had riparian proprietors, before Confederation, an exclusive right of fishing in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

“ That the Appellants were heard upon the hearing of the said questions before the said Supreme Court, and the opinion of the Supreme Court was certified to the Governor-General, with the reasons therefor, on the 13th October, 1896: that the Appellants, as representing their said Governments respectively, feeling themselves aggrieved by the Certificate or Judgment given on the 13th October, 1896, presented their humble Petition to Your Majesty in Council, praying for special leave to appeal to Your Majesty in Council from so much of the said Judgment of the Supreme Court as decided that the soil of public harbours is vested in the Dominion of Canada, and that the Dominion has the power to regulate the erection of wharves, piers, bridges, and other works extending into navigable waters, built upon land covered with water, owned or granted by the Provincial Governments: that on the 26th February, 1897, Your Majesty in Council was pleased to order that the Appellants should be allowed to enter and prosecute their said Appeal against the said Judgment of the Supreme Court of Canada of the 13th October, 1896, and humbly praying that Your Majesty in Council will be pleased to take their said Appeal into consideration and to order that so much of the said Judgment of the Supreme Court of the 13th October, 1896, as decides that the soil of public harbours is vested in the Dominion, and that the Dominion has the

power to regulate the erection of wharves, piers, bridges, and other works extending into navigable waters, built upon land covered with water, owned or granted by the Provincial Governments, may be reversed, altered, or varied, or for other relief in the premises.

“THE LORDS OF THE COMMITTEE, in obedience to Your Majesty’s said General Order of Reference, have taken the said humble Petition and Appeal into consideration, and, having heard Counsel for the parties on both sides, their Lordships do this day agree humbly to report to Your Majesty, as their opinion, that the Judgment of the Supreme Court of Canada, of the 13th October, 1896, ought to be discharged, and that the following answers ought to be given to the said seventeen questions hereinbefore set forth ; that is to say :—

- “1. In answer to the first and fourth questions—That under the British North America Act, 1867, the improvements only in lakes and rivers within the Provinces became the property of the Dominion of Canada ; that under the same Act, whatever is properly comprised in the term ‘public harbours’ became the property of the Dominion of Canada ; and that the answer to the question, what is properly so comprised, must depend, to some extent, upon the circumstances of each particular harbour.
- “2. In answer to the second, third, and sixteenth questions—That the Act of the Dominion Parliament, Revised Statutes of Canada, chap. 92, intituled ‘An Act respecting Certain Works constructed in or over Navigable Waters,’ is an Act which the said Dominion Parliament had jurisdiction to pass.
- “3. In answer to the fifth and seventeenth questions—That the riparian proprietors are not parties to this litigation,

- and it is not proper to pronounce any opinion as to the extent of their rights.
- “ 4. In answer to the sixth, seventh, and eighth questions—That under the British North America Act, 1867, the said Dominion Parliament has exclusive authority to enact fishery regulations and restrictions, and is empowered to deal with proprietary rights in fisheries, so far as may be necessary for the purpose of such regulations and restrictions, and that it has power to impose a licence duty on fishing for purposes of taxation.
- “ 5. In answer to the ninth and fifteenth questions — That under the British North America Act, 1867, a Provincial Legislature is not empowered to enact fishery regulations and restrictions, either generally or unless and until the Dominion Parliament sees fit to deal with the subject : that a Provincial Legislature is empowered to deal with fisheries in so far as they fall within the description of ‘property and civil rights,’ or within the description of any other subject assigned to Provincial Legislatures : and that a Provincial Legislature may impose a licence duty on fishing in order to raise a revenue for Provincial purposes.
- “ 6. In answer to the tenth, eleventh, and twelfth questions—That the Dominion Parliament had not jurisdiction to pass section 4 of the Revised Statutes of Canada, chap. 95, intituled ‘An Act respecting Fisheries and Fishing,’ in so far as the said section purports to authorise the grant of fishery leases, conferring an exclusive right to fish in property belonging not to the Dominion, but to the Provinces, and that the sub-

sidiary provisions of the said last-mentioned Act, in so far as they are intended to enforce rights which the Dominion Parliament was not empowered to confer, are of no effect.

“7. In answer to the thirteenth question— That the Legislature of Ontario had jurisdiction to enact section 47 of the Revised Statutes of Ontario, chap. 24, intituled ‘An Act respecting the Sale and Management of Public Lands,’ and that the validity of the provisions of the Ontario Act of 1892, intituled ‘An Act for the Protection of the Provincial Fisheries,’ is to be determined in accordance with the general principles laid down in these answers.

“8. In answer to the fourteenth question— That the Legislature of Quebec had jurisdiction to enact section 1375, section 1376, and sub-section 1 of section 1377 of the Revised Statutes of Quebec, and that the validity of sub-section 2 of section 1377 and section 1378 is to be determined in accordance with the general principles laid down in these answers.

“And in case Your Majesty should be pleased to approve of this Report, then their Lordships do direct that the parties are to bear their own costs of this Appeal.”

HER MAJESTY having taken the said Report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof and to order, as it is hereby ordered, that the recommendations and directions therein contained be punctually observed and carried into effect in each and every particular. Whereof the Governor-General of the Dominion of Canada for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

J. H. HARRISON.