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IN THE PRIVY COUNCIL.

Council Chamber, Whitehall, S.W.1.
Thursday, 20th November, 1924.

Present:

VISCOUNT HALDANE,
LORD DUNEDIN,
LORD ATKINSON,
LORD WRENBURY and
LORD SALVESEN.

On Appeal from the Appellate Division of the
SUPREME COURT OF ONTARIO.

Between:

TORONTO ELECTRIC COMMISSIONERS Appellants

and

SNIDER AND OTHERS Respondents

and

THE ATTORNEY GENERAL OF CANADA

and

THE ATTORNEY GENERAL OF ONTARIO Intervenants.

(Transcript of the Shorthand Notes of Marten, Meredith & Co., 8, New Court, Carey Street, London, W.C.2. and Cherer & Co., 2, New Court, Carey Street, London, W.C.2.).

THIRD DAY.

MR. STUART BEVAN: When your Lordships' Board adjourned, I had drawn attention to the Board of Commerce case, the reasons and principles of that decision being the foundation of my appeal in this case.

There are two other cases which I should like to refer to shortly, and those will conclude the references to authority which I have to make. The first is The Attorney General for Canada v. The Attorney General for Alberta, reported in 1916, 1, Appeal Cases, on page 588; the judgment of the Board, which was delivered by Lord Haldane, begins on page 593. Perhaps I may read the head note to put your Lordships in possession of the facts. It was one of the cases in which the Dominion legislation was held to be ultra vires.

VISCOUNT HALDANE: It was held that insurance was not one of the heads in section 91?

MR. STUART BEVAN: That is so. I think I may go straight to your Lordship's judgment, on page 595. The two earlier pages recite the sections of the Act which were impugned. Lord Haldane says: "It must be taken to be now settled that the general authority to make laws for the peace, order, and good government of Canada, which the initial part of section 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial Legislatures by the enumeration in section 92. There is only one case, outside the heads enumerated in section 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under section 92. Russell v. The Queen is an instance of such a case. There the Court considered that the particular subject-matter in question lay outside the provincial powers. What has been said in subsequent cases before this Board makes it

clear that it was on this ground alone, and not on the ground that the Canada Temperance Act was considered to be authorized as legislation for the regulation of trade and commerce, that the Judicial Committee thought that it should be held that there was constitutional authority for Dominion legislation which imposed conditions of a prohibitory character on the liquor traffic throughout the Dominion. No doubt the Canada Temperance Act contemplated in certain events the use of differences licensing boards and regulations in different districts and to this extent legislated in relation to local institutions. But the Judicial Committee appears to have thought that this purpose was subordinate to a still wider and legitimate purpose of establishing a uniform system of legislation for prohibiting the liquor traffic throughout Canada excepting under restrictive conditions. The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial Legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction." The two instances where that principle has been applied are the Russell case and the Pulp case. Those are the only two instances, except the subsequent Licensing case, which was really determined by the judgment in the Russell case, where this principle, which, in your Lordships words, must be "applied only with great caution", has, in fact, been applied.

VISCOUNT HALDANE: I think it is worth while reading at the top of page 597.

MR. STUART BEVAN: If your Lordship pleases. "Nor do they think that it can be justified for any such reasons as appear to have prevailed in Russell v. The Queen. No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are

today freely transacted under provincial authority. Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well founded. Where a company is incorporated to carry on the business of insurance throughout Canada, and desires to possess rights and powers to that effect operative apart from further authority, the Dominion Government can incorporate it with such rights and powers, to the full extent explained by the decision in the case of John Deere Plow Company v. Wharton. But if a company seeks only provincial rights and powers, and is content to accept such rights and powers in other provinces from the province of its incorporation, as has been explained in the case of the Bonanza Company."

VISCOUNT HALDANE: The last sentence needs a word of qualification. That is true with regard to the legislation that existed at the time in Ontario when the Bonanza case was decided, but it is not necessarily true in the provinces where the Ashbury case applies. The provinces do differ as to the principles with regard to corporations.

MR. STUART BEVAN: My real purpose in reminding your Lordships of that decision is that, when one comes to consider the evidence in this case, I rely upon the language used by your Lordships in that case, that the principle is one that must be applied only with very great care.

LORD DUNEDIN: I take it that the argument against you is extraordinarily clearly brought out by that one sentence of Lord Haldane's speaking of the Russell case?

MR. STUART BEVAN: Yes.

LORD DUNEDIN: If we substitute it for the words "prohibiting the liquor traffic", you could really read that as applying to this case, "the Judicial Committee appear to have thought that this purpose was subordinate to a still wider and legitimate purpose

of establishing" a uniform system of legislation for dealing with the suppression of strikes throughout Canada -------

MR. STUART BEVAN: There must be some limitation, because, if that is to be carried to its full extent, the Dominion Parliament would have the power to legislate generally with regard to any matter.

LORD DUNEDIN: That is what Lord Watson said in this case.

MR. STUART BEVAN: And, therefore, it may very well be that your Lordships will look at the facts of this particular case, first of all, the provisions of the statute itself, which, of course, disclose the purpose to some extent, and to the evidence in the case as to the conditions existing.

LORD ATKINSON: Is not that really the most important point, the conditions, as they existed, to which this legislation was intended to apply.

MR. STUART BEVAN: That is it.

LORD ATKINSON: One of the difficulties that strikes my mind is, if this system of conciliation was merely erected for the purpose of dealing with disputes that were in immediate contemplation, that is one thing, but if it was dealing in advance with something that might or might not arise, that is another.

VISCOUNT HALDANE: If the case is analogous to the case of Russell v. The Queen, it might justify immediate legislation.

MR. STUART BEVAN: In the Board of Commerce case attention was drawn by this Board to the nature of this legislation, which was not directed to a particular state of things, it related to all, and it was indefinite in its application, and the Act would be in existence until it was repealed, and it would affect everybody in the provinces coming within the provisions of the Act for all times

VISCOUNT HALDANE: The relevance of this case is this. We said: No doubt insurance is a very highly important business carried on all over Canada, but still it is a matter with which the provinces can deal under section 92, and, therefore, as they have that right exclusively, it cannot come within the special application of peace, order and good government, and it does not come within

trade and commerce.

MR. STUART BEVAN: Yes, my Lord, that is well established by this case.

LORD DUNEDIN: I have yet to understand the distinction with regard to the generality. It is no use casting up to me the words of Lord Watson that there must be a limit somewhere. The question is whether this case is not of the general sort, and I do not for the moment find it very easy to see the difference. Insurance is quite different, because insurance is not everybodys' matter. ATrade dispute is souniversal that it permeates the whole of society. It would almost drive you to this distinction, which would seen rather slender, that, although there may or may not be a trade dispute, there always is a thirst which some people do not want to be gratified by alcohol.

MR. STUART BEVAN: I am going to ask your Lordships to treat that case as a case which is sui generis.

VISCOUNT HALDANE: Supposing there is an epidemic of cholera all over Canada, could not the Dominion legislate for that?

MR. STUART BEVAN: I should think they ~~probably~~ undoubtedly could.

LORD DUNEDIN: You would probably get that ~~need for success, which~~ under the other clauses; it would be like a war.

VISCOUNT HALDANE: What I had in my mind was this: mere generality or mere importance will not be sufficient; must ~~yes~~ not there be the other element, which you have just spoken of, danger to the State?

MR. STUART BEVAN: Yes, my Lord, that was my submission on the last occasion.

LORD ATKINSON: The evil that is sought to be corrected must have spread so far as to be of national importance, and must call for a speedy remedy. If the thing can be left in abeyance, and may never be required to be put into operation, and can be dealt with by the provinces, then its importance and generality are not enough?

MR. STUART BEVAN: There must be the element of emergency and prompt dealing with it in the Dominion interest.

LORD DUNEDIN: I am only speaking for myself, and others may very well

think differently. To my mind the Russell case is not on emergency at all, and I think Lord Watson did not think so, because there is his remark about a thing, which was local to begin with, spreading so much as to go all over Canada.

VISCOUNT HALDANE: The Russell case is not on emergency.

MR. STUART BEVAN: I agree, if I may say so; there is not a word about emergency or public danger.

LORD ATKINSON: It was an endeavour to put down a vicious habit.

MR. STUART BEVAN: To control the use or abuse of liquor.

VISCOUNT HALDANE: As Lord Watson said, their Lordships in the later case were relieved from the difficult task of deciding whether they would have agreed with the Russell case.

MR. STUART BEVAN: Yes, In the Fort Frances case and the Board of Commerce case, the consideration of the Russell case was really dealt with under the head of emergency. As I submitted to your Lordships on the last occasion, a reference to the argument in both those cases, and to the judgments of the Board, shows quite clearly that the position was regarded from three points of view: first of all, trade and commerce; secondly, criminal law; and, thirdly, emergency; and no separate point was taken that there was a fourth ground on which it could be considered, something short of emergency and Dominion-wide importance, namely, the case made in the Russell case.

VISCOUNT HALDANE: That you get from the judgment.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: The argument does not matter. A case like the Fort Frances case cannot help, because there there was an emergency; it was war legislation.

~~VISCOUNT HALDANE:~~ There is no other case except the Russell case that I remember in which the Dominion has legislated successfully.

MR. STUART BEVAN: The Russell case and the Fort Frances case are the only two in all the history of this legislation, and the Russell case, I submit, is sui generis, and the Fort Frances case is emergency.

VISCOUNT HALDANE: I looked through yesterday the rather thick volume of the Shorthand Notes in the McCarthy case, in which no judgment was delivered. It is obvious that there was a suppressed feeling that their Lordships might not have decided the Russell case in quite the same way if they had had it before them. That runs all through the argument. You see it emerge in some of Mr. Davey's observations, and their Lordships do not dissent at all violently. They say: The Russell case has been decided, and we are relieved from the duty of saying whether it was right or not, because the Privy Council does not, as a rule, reverse its own decisions.

LORD ATKINSON: In the Russell case there does not seem to have been any evidence of the extent of the vice.

MR. STUART BEVAN: No.

VISCOUNT HALDANE: Sir Montague Smith says quite clearly that the Russell case was decided upon the footing that it was outside the enumerated heads of section 91. 92?

MR. STUART BEVAN: Yes, in the words of Lord Davey, when at the Bar, in connection with the Russell case, your Lordships do not overrule, you explain.

LORD DUNEDIN: What was the legislation in the McCarthy case?

MR. STUART BEVAN: It was Temperance legislation.

VISCOUNT HALDANE: The Dominion, having had a victory in the Russell case, proceeded to follow it up by making all sorts of local regulations in the provinces for the purpose of carrying out the principle of the Russell decision. They said: You are not to sell any liquor without seeking licences and so on. There was already in existence legislation which covered the field. Then their Lordships rose against the McCarthy attempt, but very significantly, after a very elaborate argument, they disallowed the Act without giving any reasons. What their motives were one can only guess.

MR. STUART BEVAN: It is quite obvious from the argument that the decision in the Russell case was very strongly pressed, and was not dissented from, but was elaborately explained.

LORD DUNEDIN: Do not think that my remarks are too hostile, because, while I have really the greatest difficulty in seeing how you can distinguish your position from the Russell case, I have equally great difficulty in seeing how the other side can distinguish their position from the Board of Commerce case.

MR. STUART BEVAN: The Board of Commerce case has given, in my submission, a new explanation or justification of the Russell decision. There was no evidence at all, and the precise state of things existing in the Dominion and the particular provinces at that time does not appear from the report, and we know nothing about it.

VISCOUNT HALDANE: You would be in a great difficulty if mere importance and mere generality were sufficient, and they have the Russell case to use against you, as saying that importance and generality are sufficient.

MR. STUART BEVAN: Yes, my Lord, and I reply with every decision since the Russell case, up to the date of your Lordships' decision, in the Board of Commerce case.

May I be allowed to read one passage again on page 197 of 1922, 1, Appeal Cases, the Board of Commerce case, because it puts, in my submission, the Russell case in the right perspective and explains the decision. This is in the course of your Lordships' judgment, on page 197: "The first question to be answered is whether the Dominion Parliament could validly enact such a law. Their Lordships observe that the law is not one enacted to meet special conditions in wartime. It was passed in 1919, after peace had been declared, and it is not confined to any temporary purpose, but is to continue without limit of time, and to apply throughout Canada. No doubt the initial words of section 91 of the British North America Act confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally, provided that they are not withheld from the powers of that Parliament to legislate, by any of the express heads in section 92, untrammelled by the enumeration of special heads in sectior

91." This is the passage: "It may well be that the subjects of undue combination and hoarding are matters in which the Dominion has a great practical interest. In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in section 92, and is not covered by them. The decision in Russell v. The Queen appears to recognize this as constitutionally possible, even in time of peace; but it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the provinces."

LORD ATKINSON: In the case of famine they could deal with it?

MR. STUART BEVAN: Yes. "It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one." No one could dispute in that case, as in the Russell case, that the matter was of Dominion-wide interest. In this case the legislation was directed against profiteering, conservation and distribution of food supplies, which in a Dominion like Canada, must necessarily be of Dominion-wide importance, particularly as some of the provinces are food producing districts, where others are more the consuming districts.

VISCOUNT HALDANE: And they are of enormous territory.

MR. STUART BEVAN: Yes, and one would have thought, if the Russell case was to be given the application that will be contended for by the respondents in this case, that the principle of the Russell case would have applied to this case.

VISCOUNT HALDANE: Might not it be worth while to read just a few words in which, I think, Lord Watson, in one case, said that the provinces got, under the British North America Act of 1867, legislative powers, so far as the heads of section 92 are concerned, co-ordinate with that of the Dominion and quite independent, and that there was no question of overruling?

LORD ATKINSON: He says that in the case in 1896.

VISCOUNT HALDANE: I thought he had said it most distinctly in the case where he said that the Lieutenant Governor, when once appointed by the Governor General, was directly responsible to the Crown, and so were the legislatures.

MR. STUART BEVAN: My learned friend Mr. Lawrence has been good enough to refer me to the case of Hodge v. The Queen, which is reported in 9 Appeal Cases, where ~~Lord Watson~~ it says: "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow."

LORD ATKINSON: That cannot be what Lord Haldane is asking for, because you are reading from a judgment of Sir Barnes Peacock. What Lord Haldane asked for was a judgment of Lord Watson.

VISCOUNT HALDANE: I think it was not in any of the cases that you have cited.

MR. STUART BEVAN: I am sorry I have not got it. Perhaps my friend Mr. Lawrence may have an opportunity of looking it up. I am sorry, for the moment I cannot put my hand on it.

VISCOUNT HALDANE: The matter was touched in the Queens Counsel case, but I think it was more distinctly dealt with in an earlier one.

MR. STUART BEVAN: Perhaps I may have an opportunity of referring to the passage

when my learned friend has discovered it.

MR. DUNCAN: Is not your Lordship thinking of the case of the Liquidator of the Maritime Bank of Canada v. The Receiver General of New Brunswick, which is reported in 1892 Appeal Cases, at page 437.

MR. STUART BEVAN: The passage my friend Mr. Duncan is good enough to refer me to is this. It is at page 442: "The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government."

VISCOUNT HALDANE: If you look at the bottom of the page, there is something which may be relevant there.

MR. STUART BEVAN: If your Lordship pleases. "It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legisla-

tion meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share." I do not think that is the passage your Lordship was asking for, though it is a useful passage to state.

VISCOUNT HALDANE: It is the general doctrine. There is not really any doubt about it.

MR. STUART BEVAN: No, my Lord. I was referring to the Board of Commerce case, and my submission is that since the decision in that case something has to be found to justify such a decision as that which was given in the Russell case in the nature of abnormal circumstances, and your Lordship points out the distinction on page 197, in special circumstances. Then you give an indication of the sort of special circumstances to be looked for, such as those of a great war, and, if I may be allowed to add, famine or public danger.

VISCOUNT HALDANE: Or pestilence.

MR. STUART BEVAN: Yes, but it must be something abnormal.

VISCOUNT HALDANE: Because otherwise you are up against the principle of the British North America Act. It was not a case of taking the number of provinces and bringing them into a federal relation with certain powers, but making a distribution of the legislative powers, according to the subject matter, and giving to the various provinces complete autonomy as regards certain heads of legislative power. The dominion had only a residuary power and certain specified powers. Each province is treated as a most important entity, as a country by itself, except that certain things are reserved. Whether it was a good form of constitution or not it was the form of constitution that was adopted in 1864 at Quebec.

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LORD DUNEDIN: It has been pointed out to me, I do not think it has anything to do with the matter, but it is at least interesting, that in the Commonwealth of Australia Act, in the section which corresponds to Section 91 of the British North America Act, there is a special heading "Conciliation and Arbitration for the prevention and settlement of Industrial disputes extending beyond any one State".

MR STUART BEVAN: Yes.

LORD ATKINSON: They unified first and delegated after, which was the reverse in the case of Canada.

MR STUART BEVAN Yes, the particular statute provides for the particular thing. I think attention is drawn to that in one of the judgments below in this case, but it is really, I submit, irrelevant to the construction of the statute in this case, and the application of the particular circumstances in this case.

There is only one other case which I desire to refer to, and that is on the uuestion of the criminal law, the third ground, May I give your Lordships the reference to that.

VISCOUNT HALDANE: Is that the judgment of Mr. Justice Duff?

MR STUART BEVAN: Yes.

LORD ATKINSON: Lord Watson in that case in 1906 points out that if you make it a crime to dispute an ultra vires statute, you might get it intra vires by a device like that, and Mr. Justice Duff points out the same thing in his judgment.

VISCOUNT HALDANE: What is the case in which Mr. Justice Duff gave the judgment?

MR STUART BEVAN: It is the Reciprocal Insurance case. The judgment was delivered on 25th January last. It is reported in 1924 2 Appeal Cases at page 328. I do not propose to read it.

VISCOUNT HALDANE: Mr. Justice Duff lays down the principle.

MR STUART BEVAN: Yes, in the terms which Lord Atkinson has been good enough to mention.

That, my Lord, concludes the authorities to which

I have to draw attention. In those circumstances I think all that remains for me to do is to draw attention to the evidence that was given in this case; there is a good deal of it, but I will endeavour to select what really seems relevant, and if my learned friends desire to read any more, they will read it. There was very little evidence given on my side. I think the only evidence called on behalf of the Commissioners was of two officials of the undertaking, who said that of 300 or 400 men affected by this dispute, all of whom were not members of the Union, I think 80 or 90 per cent were, had gone out, they could have carried on a limited supply, and it would not have meant plunging the City into darkness. But the evidence called on behalf of the respondents included that of the Minister of Labour, and various Government officials, who spoke to the circumstances under which the Act was passed, and to the circumstances existing when the Order for the appointment of this Board was made.

LORD SALVESEN: The Minister of Labour of the Dominion Government?

MR STUART BEVAN: Yes, it was attempted to be established in both ways: that there was a national emergency first of all, justifying the passing of the Act, and secondly, a national emergency at the date when the operation of the Act took place as against my clients, and my submission ~~xxx xxxx~~ when the evidence is examined is, that there was a complete failure to establish such an emergency or such abnormal circumstances at either date or at any date. The first witness called was Mr. Gunn. He was a Trade Union official who represented some of the Members of his Union in calling for the appointment of this Board. His evidence is to be found at page 30 of the Record. There was a discussion when he was sworn as to whether his evidence was admissible, or how much of the evidence that had been outlined in opening would be admissible, and the Trial Judge at page 30 says this: "I will receive evidence of facts. In the case of Russell v. The Queen, however, it was held that the Scott Act ~~xxxx~~ was within the jurisdiction of the Dominion

Parliament, because it was a widespread measure for pease, orde: and good government, but no evidence was adduced in that regard. Therefore, I do not think opinion evidence cane be received here, and I anticipate that Mr. Duncan will confine the evidence to questions of fact, although it would be very tempting - with the defence which he has, no doubt, developed - to ask Mr. Gunn his opinion, but I would have to rule that out". Then on page 31 line 19 he is asked: "Are you also a member of the Dominion Executive of the Canadian Electrical Trade Union, of which the Toronto branch is a unit?(A) Yes. The Toronto branch is chartered by the Dominion Executive. (Q) What are the names of the various branches of the Canadian Electrical Trades Union?", then he gives the names of the various branches at line 23; then line 33: "What cities does the Toronto branch cover?" then he gives them. "All the cities and towns covered by the Central Ontario System of the Ontario Hydro Electric Commission".

VISCOUNT HALDANE: Will you tell us for what proposition you are reading the evidence. The evidence seems to show that these trade union arrangements disregard the boundaries of the Provinces in many cases and go over the whole of the Dominion. You would not dispute that.

MR STUART BEVAN: No.

VISCOUNT HALDANE: They may be very important, more important in one Province than in another, but you say the Provinces have full power to deal with them.

MR STUART BEVAN: Yes. I suppose industrial conditions there are not much better or worse than the industrial conditions here, but this evidence that was adduced in support of abnormal circumstances originally justifying the legislation, and subsequently the making of this Order, fails to show, I submit, anything of the kind, and the remarkable thing is it is to be on abnormal circumstances, and the necessity of the Dominion dealing with the labour situation as a whole. The making of the Order in this particular case is relied upon in these

circumstances as being justified by among other things this circumstance, that at the time the Order appointing the Board was made, there was a strike among the steel workers a thousand miles away, and therefore it was very desirable to alley any possible industrial unrest in Toronto. The interesting thing in that connection is that the steel workers of a thousand miles away were not subject to this Act, and if the application of this Act was to be a remedy which in the Dominion interest had to be applied to Dominion disputes, one would have thought that when such an important body as steel workers were out in their thousands a great many miles away, the application of this Act to the industrial community at large would have been necessary. The position with regard to the steel workers was a threatening one.

LORD DUNEDIN: Why did this Act not apply to the steel workers ?

MR STUART BEVAN: Because they are not public utility workers, but it was an industry vital to the interests of the Dominion.

VISCOUNT HALDANE: It is not only public utility works, is it?

MR STUART BEVAN: It includes mines.

VISCOUNT HALDANE: Mines are not public utility works.

MR STUART BEVAN: One must look at the circumstances under which this Board was appointed. There was a threatened strike of public utility workers, or indeed it was very doubtful whether there was a threatened strike as your Lordships will see from the evidence. What happened was this. There was this dispute in Toronto concerning 300 or 400 men which left other public utility workers throughout the country quite cold. The strike among the steel workers resulted in a serious strike among the miners in another part of the Dominion.

VISCOUNT HALDANE: Steel workers are not included?

MR STUART BEVAN: No.

LORD DUNEDIN: I did not quite appreciate that. It seems to me apart from the evidence it certainly helps you in your argument in the differentiation, because it really does not go to the

total prohibition of industrial disputes, but only a certain class of industrial disputes.

MR STUART BEVAN. Yes.

LORD DUNEDIN: Whereas ~~in~~ the inculcation of temperance was to be upon everybody?

MR STUART BEVAN: Yes, the curious thing in the working out of the position was, this was an industrial dispute on the part of 300 or 400 men in Ontario, and was quite unconnected with the steel workers in some other provinces. They were quite unconnected with my strike, or threatened strike, or existing strike, and it did not interest any other workers or public utility workers at all, but the moment the steel workers, who are outside the operation of the Act, go on strike,—whereas we are within the Act,—the miners struck in sympathy with the steel workers.

LORD ATKINSON: Utility works are works upon which the existence of society depends, such as water, gas, and railway transit. I suppose that was the reason for it.

VISCOUNT HALDANE: That being so you are not to exercise your civil right to refuse to work for them. It comes back rather to civil rights, does it not. Could the Province have passed this under section 92. You say, yes.

MR STUART BEVAN: Yes, my Lord.

LORD ATKINSON: This gentleman's evidence goes very strongly to show that Canada might have very well applied the Act to catch the steel workers?

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: I was thinking of this, supposing it had not been drink, supposing it had been something else, I will not put it as high as drugs, though a great many people take drugs. There was a famous man in this country who having a passion for alcohol, when he could not get alcohol, drunk ink, and he had to be restrained from drinking his own ink. Could the Dominion have passed an Act saying that people were not to

drink ink. Surely it would have to require an Act of the Province to deprive a man of this civil right to drink from his own ink pot. You say the Province could do it without the sanctions; they could not put in the penal clause.

MR STUART BEVAN: They could under the express sanction of section 92. They could have passed a Provincial Act applicable to the position, but restricted in its operation within the Province precisely the same as the Dominion Act.

LORD SALVESEN: And in fact they did it, except that they imposed no sanction?

MR STUART BEVAN: Yes.

LORD DUNEDIN: And they could put in the penal clause?

MR STUART BEVAN: Yes, undoubtedly. I do not know that it will assist your Lordships to read the evidence. I am not relying on this evidence, and perhaps I may leave it until I see what use of it is made by my learned friends.

VISCOUNT HALDANE: We have the advantage of Mr. Duncan, who argued the point the other way very fully in the Courts below, being here.

MR STUART BEVAN: Yes, in the course of my long submission I think I have indicated all my points, and I do not know that at this stage it would assist your Lordship if I were to sum them up, because they are present to your Lordships' minds.

VISCOUNT HALDANE: I think we know them.

MR STUART BEVAN: If your Lordship pleases.

MR GEOFFREY LAWRENCE: My Lords, I do not know whether I can assist your Lordships by adding anything. Of course, in this case the decision against which we are appealing is decided upon the ground that this Act falls within regulation of trade and commerce, and I have some submissions to make to your Lordships upon that, if your Lordships think it is worth while at this stage for me to make them. The whole of the majority in the Court below have decided it upon that

ground, and I submit to your Lordships that that is clearly erroneous, and that this is not the regulation of trade and commerce at all.

LORD DUNEDIN: The comments on the Russell case seem to bear that out?

MR GEOFFREY LAWRENCE: Yes. I think it may be put very shortly in this way: That this is not regulation of trade and commerce at all; it is the regulation of the civil rights between employers and employed. It is perfectly true that it may be the Legislature which passes the legislation may have had at the back of their minds the protection of trade and commerce; they want to prevent strikes in order that trade and commerce may go on, but that is not the same thing as saying the legislation itself is the regulation of trade and commerce. I might illustrate that I think by putting the case of very proper legislation in certain circumstances providing for an eight hour day, or providing that people might work longer than an eight hour day, such an Act as that would as an ultimate result have some effect upon trade and commerce, but it would not be the regulation of trade and commerce; it would clearly, in my submission, be the regulation of the civil rights of the workmen, and it is clear, in my submission, that you cannot in any ordinary sense of the word say that a workman trades; he is not trading. His relations towards his employers are not those of a trader, and regulation of trade and commerce means the regulation of transactions between traders, between commercial men.

LORD DUNEDIN: It seems to me that with regard to certain things falling under public utilities, take water for instance, in respect of the provision of water for a big town, no doubt you are charged the water rate, but nobody would ever talk of that as trade and commerce.

MR GEOFFREY LAWRENCE: Exactly. There is this further criticism of it, that the legislation is not general, and it has been

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laid down by your LordshipS' Board ~~in~~ over and over again that regulation of trade and commerce placed as it is at the head of section 91, and having regard to the collocation and the other heads of section 91, that it must be read in the most general sense, and that it cannot relate to regulation of ~~a~~ particular trades.

LORD ATKINSON: Must it apply to all trades; cannot it apply to one trade if it is a prevailing one over the whole Dominion?

VISCOUNT HALDANE: Do not answer that in too great a hurry. I think we have said that the specific power ~~was~~ given to the Dominion to incorporate Companies ~~was not restricted~~, which are not restricted to Provincial rights, but may trade all over the country, then trade and commerce may come in, and that it is an Act of regulation laid down by the Dominion that is governing these Companies trading.

MR GEOFFREY LAWRENCE: Yes, that was general legislation applying to all Companies.

VISCOUNT HALDANE: All Dominion Companies?

MR GEOFFREY LAWRENCE: Yes, and of course they are trading Companies which do not trade in any one particular Province. As I understand your Lordship's judgment in the John Deere Plow case it was this: that upon the true interpretation of section 91 and section 92 it appeared that the Dominion had power to incorporate under a general power Companies which had Dominion wide objects, and your Lordship said taking section 91(2) the regulation of trade and commerce in conjunction with that general power, it enabled the Dominion to say that Companies which ~~were~~ have incorporated must be allowed to carry on their business in the Provinces; the Provinces cannot impose licences upon them which will absolutely prohibit them from exercising their statutory rights and powers within the Province.

VISCOUNT HALDANE: You see the point of it is that the trade and commerce section was prayed in aid there in giving effect

to something more than emergency legislation.

MR GEOFFREY LAWRENCE: But those Companies with Dominion objects were Companies which might be carrying on any trade, and therefore it would be perfectly general.

LORD ATKINSON: The Provincial legislation could not destroy the right which the Dominion legislation had conferred upon their creatures.

MR GEOFFREY LAWRENCE: Exactly. In my submission your Lordships left untouched authorities which your Lordships had decided previously and affirmed afterwards, that under the head of regulation of trade and commerce you cannot regulate a particular trade or trades.

LORD ATKINSON: Unless it be a Dominion trade.

MR GEOFFREY LAWRENCE: Your Lordships of course put it in 1916 1 Appeal Cases, the Insurance Case.

LORD ATKINSON: Surely you could regulate the licencing trade and the sale of spirits; that would be only one trade ?

MR GEOFFREY LAWRENCE: I submit not. May I refer your Lordship to one sentence in the Insurance Case in 1916 1 Appeal Cases at page 596, which was a subsequent case to the John Deere Plow case. Your Lordship said: "Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces".

VISCOUNT HALDANE: That was in effect saying that such licensing trade is within the competence of section 92.

MR GEOFFREY LAWRENCE: Yes.

VISCOUNT HALDANE: And therefore it is not affected by trade and commerce in section 91 which does not cut that down.

MR GEOFFREY LAWRENCE: Yes.

VISCOUNT HALDANE: But it is another thing to say that when there is something within the Province itself, the Dominion has the

power to regulate the trade and commerce of that institution. We have left that untouched.

MR GEOFFREY LAWRENCE: If your Lordship pleases.

VISCOUNT HALDANE: The relevance of it is it means that trade and commerce may be used outside mere emergency powers.

MR GEOFFREY LAWRENCE: Yes.

VISCOUNT HALDANE: Where can it be used?

MR GEOFFREY LAWRENCE: The object of my drawing attention to it is, of course, that in the case of this Act, the Act is quite general, and therefore, in my submission, cannot be justified under the regulation of trade and commerce; it is not a general Act which applies to all trades and businesses. Assuming that it was dealing with trade and commerce within the meaning of the sub-head, it only applies to these limited businesses, to coal mines and so on.

LORD ATKINSON: Mr. Justice Hodgins draws the distinction. He says trade means production, distribution, sale and delivery of the goods.

MR GEOFFREY LAWRENCE: Yes.

LORD ATKINSON: And not the conduct of the operators.

MR GEOFFREY LAWRENCE: Exactly. I submit to your Lordships that there are two objections upon this point to this legislation being justified under the head of trade and commerce; first of all that it is not trade and commerce, and secondly that it is not general, and in order to be brought within the regulationof trade and commerce it has to be general legislation throughout the Dominion applicable to all trade and commerce, and secondly, that it has to be trade and commerce. All this is regulation of the civil rights of employers and employed to each other. I will not detain your Lordships longer upon that, but I want to say a word upon the question of whether this legislation can be justified under the general power under section 91.

VISCOUNT HALDANE: Is not the law on that pointclear, that if the thing comes within section 92 it cannot be justified;

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if it does not it may be justified.

MR GEOFFREY LAWRENCE: Quite so, my Lord, that is absolutely clear.

VISCOUNT HALDANE: And it may be outside section 92 by reason of the provisions of section 92 being restricted, as for instance, to Companies with Provincial objects by the initial words of section 92, or it may be justified by it being within one of the heads of section 91, in which case there is a general power.

MR GEOFFREY LAWRENCE: That is so. What I wanted to submit to your Lordships was this: that the course of your Lordships' decisions has been absolutely uniform, ~~and~~ from Russell v. The Queen down to the present day, though of course those principles have been applied to different facts, they have always been uniformly applied in this sense, that your Lordships have held if it comes within section 92, then it is only competent to the Provinces; if it comes within the heads of section 91, it is only competent to the Dominion, but there are certain subjects which are outside the heads of section 92, and although in one aspect and for one purpose they may be within the heads of section 92, yet in another aspect and for another purpose, they may be taken out of section 92, and taken to fall under the general power, and I submit to your Lordships that there is absolutely no difference between cases of emergency, and cases which in the words of Lord Watson affect the body politic; they all depend upon the same principle, and the principle is that from their nature, or from the emergency which has arisen, they come to be altogether outside the heads of section 92.

LORD ATKINSON: What takes them out is their generality and their emergency.

MR GEOFFREY LAWRENCE: The ~~effect~~ fact that they have some Dominion wide significance.

LORD ATKINSON: Must not they be abnormal in addition, not

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according to the ordinary course of events.

MR GEOFFREY LAWRENCE: Possibly that may be so, but I apprehend that it would be competent to the Dominion to legislate with reference to something which was going to happen, such as a disease or famine.

VISCOUNT HALDANE: That is an emergency.

MR GEOFFREY LAWRENCE: Yes, they might legislate in advance for such an event as that, but of course the heads of section 92 are so comprehensive that it requires very exceptional circumstances to get such a state of facts.

VISCOUNT HALDANE: You can go deeper into it. Whenever the State is set up in the full sense there is an implied power given to it to protect itself against sudden danger, and although there may be a distribution of powers in the normal state of things, yet it has ample capacity to save its own life.

MR GEOFFREY LAWRENCE: Yes.

VISCOUNT HALDANE: I illustrated that on Tuesday by the instance of the American Civil War, where the President laid down doctrines that were challenged, but the general opinion was that they must have those powers. The question is, where do you look for them. You look for them in the initial words of section 91. We are dealing with a case of a kind outside the enumerated powers.

MR GEOFFREY LAWRENCE: Yes.

VISCOUNT HALDANE: They do not cover it.

MR GEOFFREY LAWRENCE: But whenever it is a matter which is undoubtedly of public importance, but public importance in each Province, then the mere fact that it is of public importance in all the Provinces does not enable the Dominion to legislate upon such a subject.

LORD ATKINSON: I asked that question on Tuesday; if there was a certain condition of things prevailing in each of the Provinces, and if they had legislated, would the Dominion

Parliament be able to unify the Provincial legislation and legislate for the same thing?

MR GEOFFREY LAWRENCE: I submit clearly not; I submit that is the crux of this case. Is it not absolutely clear that in this case if the Provinces each had an Act in the terms of this Act, that it would be intra vires of each of those Provinces, and it would meet any difficulty which there is. If once you concede that each Province could enact an Act of a similar nature to this for the investigation of industrial disputes within its borders, and it would meet the situation, it clearly demonstrated that it is ultra vires of the Dominion simply for the purpose of uniformity to pass this Act, and I think that gets at the very heart of the matter. It has to be something more than of public importance in each Province to enable the Dominion to legislate under the general powers of section 91. It has to be something that is raised out of the category by abnormal circumstances, or by the nature of events, such a thing as famine, disease, or possibly the supply of natural gas, as to which there was a great crisis in Canada at one time. I do not know that there was ever any legislation passed with reference to it. Natural gas permeates the strata under the earth.

LORD DUNEDIN: There have been several cases as to that.

MR GEOFFREY LAWRENCE: And I believe it may be that there was some legislation with regard to it.

LORD ATKINSON: Some cities are altogether lighted by it.

MR GEOFFREY LAWRENCE: Yes, and if another Province was to interfere with the supply of natural gas to one of the Provinces which did depend solely upon it, it may be that the Dominion Parliament in such circumstances would be able to legislate to prevent the evil.

LORD WRENBURY: If the subject matter is so wide that you cannot control in any one Province, would that be enough?

MR GEOFFREY LAWRENCE: Such circumstances might arise.

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LORD WRENBURY: You ~~need~~ know those words of Lord Haldane with regard to paramount importance.

MR GEOFFREY LAWRENCE: Yes.

LORD WRENBURY: Is it not possible that the test whether the subject matter is one which is of such great importance in each Province, that you cannot properly control it in one unless you control it in all, is only a extension of the emergency doctrine. Supposing there is no emergency, but a very large subject matter, what is the case then?

MR GEOFFREY LAWRENCE: If it is of such paramount importance that it cannot be dealt with in one Province, it may be that it falls within, though it may be on the other hand, that the frame of Confederation is such that it cannot be really adequately dealt with. One must recognise that when you have the frame of a Confederation, it is not as completely satisfactory as a unitary system.

LORD ATKINSON:- As the Provinces have the same title to their legislation, quite as good a title as the Dominion, their powers could not be invaded unless there is some paramount purpose or object to be effected by the invasion of it.

MR GEOFFREY LAWRENCE:- Yes.

LORD WRENBURY:- Lord Haldane's wordsin the Board of Commerce case were: "In special circumstances, such as those of a great war, such an interest might conceivably become of such paramount and overriding importance as to amount to what lies outside the heads in section 92, and is not covered by them". Do not those words mean the paramount and overriding importance is the great test in that particular instance?

MR GEOFFREY LAWRENCE:- Certainly.

LORD WRENBURY:- Is not that really the question we have to keep to, as to whether the subject matter is so large that it ought to be Dominion?

MR GEOFFREY LAWRENCE:- Yes.

LORD WRENBURY:- That is a matter of evidence?

MR GEOFFREY LAWRENCE:- Yes, it is my Lord. I will conclude by drawing attention without referring again to the actual terms of the Act.

LORD DUNEDIN:- I think I can in a sentence bring what Lord Wrenbury said to a point by putting the question: Could Provincial legislation adequately cope with the difficulty or is it impossible for them to do so?

LORD WRENBURY:- You have to get at what is the subject matter; emergency is an instance of it.

MR GEOFFREY LAWRENCE:- It is.

LORD WRENBURY:- There may be other instances of it.

MR GEOFFREY LAWRENCE:- I submit the Provincial legislature can adequately cope with it, and I submit provincial legislation could have been passed in these very words used by the Dominion.

LORD DUNEDIN:- It is not so much passing it in the very words

but having passed it could it adequately cope with the mischief that it was sought to remedy.

LORD ATKINSON:- Could it cope more adequately and efficiently than the separate legislation of the Provinces could; if it could not do it more adequately, is there a case for Dominion legislation at all?

MR GEOFFREY LAWRENCE:- No. One has to consider the mischief which this Dominion legislation hits at. One can see that from the Act, it is merely the investigation of a dispute and the publication of the report of the Board. The question is: Could not the Provinces adequately deal with that, and I submit that they clearly could. Of course, there may be strike legislation of a wider order and of an emergency character which would be competent to the Dominion, but that does not affect the nature of this particular Act.

LORD DUNEDIN:- You only deal with one dispute at a time, the one that is up; your point is that no Dominion tribunal could effect any greater result than a Provincial tribunal could.

MR GEOFFREY LAWRENCE:- Exactly, my Lord. Assuming for the purpose of argument that there may be some aspect of industrial strife which would be more adequately dealt with by the Dominion than the Province, I say that this Act does not deal with that aspect of the matter, it does not deal with the mischief, it deals simply with the investigation of these disputes which may be absolutely local.

LORD ATKINSON:- It does not base the legislation on the greater efficiency of their mode of dealing with it than the Province could do; it does not base it on that?

MR GEOFFREY LAWRENCE: No, it is not limited to Dominion undertakings, it is not limited to trade unions or sympathetic strikes or anything else in the nature of abnormal circumstances, it simply provides for the investigation of disputes between any employer who employs 10 men and any one of his men, and I submit

to your Lordships that that is a matter which is of a purely local nature, and is one which can be dealt with adequately by the Provinces. I desire to draw attention also to this which is no doubt very much in your Lordships' mind, that these matters of industrial conditions are matters which differ very much in different parts of the country, and when you are dealing with an enormous country like Canada it is of the greatest importance to keep that fact in mind. The conditions in Montreal, one of the greatest cities of Canada, and partly a French city, are entirely different from them conditions in Alberta, which is an agricultural country, and it may be of the very greatest importance that legislation upon these subjects should be dealt with by theparticular Legislature which knows best the conditions which are in force there, and it is very likely for that reason the Dominion even in enacting this Act has only passed it with regard to particular undertakings, they have not passed it in a general way; but however that may be, I submit to your Lordships that there is no case here of great national emergency which justifies the passage of Dominion legislation, and that this evil which is dealt with in this Act could equally well have been dealt with by the Provinces.

VISCOUNT HALDANE:- Now Mr Duncan, Sir John Simon will be here, I suppose, later. It may be convenient to you now I think and it would meet what we want if you addressed yourself to the evidence. We want to know the importance of this legislation.

MR DUNCAN:- May I just say one word before I do it?

VISCOUNT HALDANE:- Certainly, we do not want to circumscribe you at all.

MR DUNCAN:- I concede that there are two conceptions of government which are struggling for recognition before your Lordships, that is, ~~wider~~ whether matters which are not mentioned in the enumerations of section 91, but are unquestionably of

national importance can be dealt with (a) By the Dominion Parliament or (b) Whether the legislation can only be passed by the co-operative action of the nine different Provincial Legislatures.

LORD WRENBURY:- When you say: "are not mentioned in section 91", do you mean, and are mentioned in section 92?

MR DUNCAN:- No, my Lord. I say matters which are truly of national importance, but not mentioned in section 91 and matters falling short of an emergency which strikes at the foundation of the State such as war.

VISCOUNT HALDANE:- But they are, are they not, mentioned in section 92?

MR DUNCAN:- Not specially.

LORD WRENBURY:- You say even if they are mentioned in section 92?

MR DUNCAN:- Possibly.

LORD WRENBURY:- Do you mean that?

VISCOUNT HALDANE:- I do not think he does.

MR DUNCAN:- Even though they are mentioned in section 92 in a certain aspect; that is to say it may be they are matters of "Property and Civil Rights in the Province" which if it was only a local or private matter the Province could deal with, but when it has transcended that, and when it has become a matter of national concern ~~your Lordships~~ -- your Lordships will want a definition of what is a matter of national concern, and I will come to that in a moment if I may --- but when it unquestionably has transcended provincial importance must you seek your legislation in the nine different provincial Legislatures, must it be cooperative legislation, or may you find that under the peace, order and good government clause in section 91. I concede that is the problem before your Lordships; there are two different conceptions of government here, or different conceptions of federalism which are struggling here for recognition, and your Lordships' decision on that matter will have a far-reaching effect on subsequent Dominion legislation.

LORD ATKINSON:- I think Lord Watson's judgment has a great deal in support of what you say, but the difficulty is in determining what is of national importance.

VISCOUNT HALDANE:- About the federalism, what is your point upon that?

MR DUNCAN:- If I may put it shortly, and I want to develop it more fully in a moment, I say if you take the genesis of the British North America Act founded on the Quebec Resolutions of 1864 most carefully drawn by the Canadian lawyers at that time after a most careful study of the American decisions on the American Constitution passed at the time the Civil War was raging, or still more perhaps put on the ground of an attempt to maintain the Union, but in reality brought about because the Central Government could not legislate with respect to slavery in the separate States -- there is the Dred-Scott case and other decisions ---

VISCOUNT HALDANE:- War broke out before the Dred-Scott case, did not it?

MR DUNCAN:- No, my Lord, I ~~se~~ do not think so.

VISCOUNT HALDANE:- No, I think you are right, the Dred-Scott case was somewhere about 1860, was it not?

MR DUNCAN:- Yes, my Lord, 1856 or 1857.

VISCOUNT HALDANE:- The Chief Justice gave his decision then. Then war broke out really upon the claim advocated in very carefully defined terms by Mr Lincoln. It was not for putting down slavery, but for saving the Union. He said: I will save it even if slavery has to be maintained, and I will save it the more willingly if slavery is to be abolished. Slavery is not the main question nor is it the main question whether the federal government has power to get rid of slavery, the main question was to maintain the Union.

MR DUNCAN:- Was that not very wisely done from President Lincoln's point of view, it gave him political control of the

position. He was driven to that because of the decision of the Supreme Court of the United States that Congress, no matter what the urgency, could not touch a matter of master and servant, of slave and owner.

VISCOUNT HALDANE:- I think the Dred-Scott case played a very little part in Mr Lincoln's policy; it was not till quite late in the Civil War that he issued his Proclamation about abolishing slavery.

MR DUNCAN: Quite late. He wished to get the fullest possible support in the North even from those who had a sympathetic leaning.

VISCOUNT HALDANE:- He was not fully supported in the North about that, the democrats in the North were much against that, it was the more extreme Republicans under Mr Greely who tried to force upon him the abolition of slavery.

MR DUNCAN:- The only point I was making was this: That the Canadian Constitution was drafted by Canadian lawyers and Canadian statesmen at the time this war was raging which was in the public mind, and I suggest in fact had to do with slavery. It was brought about because Congress was prevented from legislating on this matter by judicial decision. Now this is what the Canadian drafters of the Constitution did. They said: Above all things we must avoid what was probably a mistake in the American Constitution that is giving the residuum of power to the States, and we will use language sufficiently clear to give that residuum to the Dominion so that in any case in which the Dominion considers the matter is for the peace, order and good government of the country, that power lies with the Dominion. That is putting it in an extreme way.

May I put shortly what I propose to develop, if I may: if the second conception of Federalism is the proper one that there are enumerations in section 91 and other enumerations in section 92, that those cover the whole legislative field excepti in cases of national emergency amounting to war on the Dominion, and so on. Who is to find that fact? If that is the conception there is practically no residuum except in cases of national emergency, and those words, which I suggest were most carefully drafted to give to the Dominion power to regulate for peace,order and good government of Canada are by that gloss I suggest deprived of the effect which the founders of the Constitution intended.

LORD DUNEDIN:- Does that quite follow? I may not have caught your words, but it seems to me in saying what you said you assumed that 91 and 92 cover in their enumeration all possible human subjects; if they do not then there are some things which are both outside 91 and 92 and which fall into the residuum. You were rather saying that that conception put out the idea of a residuum which really was meant to be there, but if there are things that fall neither under 91 nor 92 they at least tumble into that residuum.

Mr DUNCAN:- Yes, I grant that.

LORD WRENBURY:- Is there any possibility of a residuum. The Act says: All matters not coming within section 92.

VISCOUNT HALDANE:- There is pne phase of it, namely, education, which is outside the powers of the Dominion Parliament, and the Provincial Parliament, which was left to be dealt with by the Governor General.

Mr DUNCAN:- That surely cannot have been what was intended when they sought to create a residuum.

VISCOUNT HALDANE:- I am never quite sure; I think they were very acute people who drew this, and they may have intended to leave it outside.

LORD ATKINSON:- Regulation of attendance at Schools .

Mr DUNCAN:- That is education, a separate matter, as Agricultural and emigration are separate matters.

VISCOUNT HALDANE:- It is section 93; "In and for each Province ~~and~~ the Legislature may exclusively make laws in relation to Education, subject and according to the following Provisions:- (1) Nothing in any such Law shall prejudicially affect any right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union: (2) All the Powers, Privileges and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec. (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province , an appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education: (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due ~~Extnx~~ Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that behalf, then and in every such Case, and as far only as the circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section". There are other cases in which competency is not directly given to the Parliament of Canada,

and these were also withheld from the Province . I have no doubt it was the result of a compromise between Catholics and Protestants. You would have to come back to the Imperial Parliament if there was a problem that had to be solved, and I am sure you would not be reticent.

Mr DUNCAN:- May I in answer to Lord Dunedin suggest this, that the words "property and civil rights" are given the interpretation of local rights; there may be matters outside the enumeration of section 92, but the suggestion in this case on which my learned friends rely and where I suggest the fallacy in their case lies is that they say that this Act is not in relation to"property and civil rights" . Then if you extend "property and civil rights" to comprehend the entire freedom of control from Government legislation, there is nothing whatever that can fall outside the enumeration of section 92 , because by so doing "property and civil rights" becomes the greatest residuum of all and it says we are Provincial citizens members of some independent State free from any interferance by the Dominion Government under peace order and good government, and we can say you must not interfere with our freedom of action, whatever it may be; they may have a civil right to take poison, as was suggested by Lord Watson, or to burn down a man's house.

LORD ATKINSON:- You are a felon if you kill yourself.

Mr DUNCAN:- Or to take a glass of beer, which was ~~suggested~~ the suggestion made the other day; is it a civil right to take a glass of beer?. It may be a very desirable thing.

LORD ATKINSON:- It is a civil right to have freedom of action in your food.

Mr DUNCAN:- Is it a civil right in a legal sense in which that right was given to the Province?

VISCOUNT HALDANE:- Does not it mean what people are to be allowed to do or not to do, is for the Province?

Mr DUNCAN:- It may have the conception of an independent State.

VISCOUNT HALDANE:- It is an independent State, it is cut into expressly by the enumerations of section 91.

Mr DUNCAN:- Yes, I quite concede that. Although I quite accept of course, with great respect, what Lord Watson said in the case of the Liquidator General v. The Maritime Bank that the desire was not to weld the Provinces into one, but I do suggest that it is a matter for Dominion concern; it was deliberately intended that there should be a Legislative Union in matters concerning the peace, order and good government of ~~Canada~~ Canada, and that you must contrast section 91 with section 92, and the principal words in section 91 are: "To make laws for the peace, order and good government of Canada", and "Not so as to restrict the generality of the foregoing", and they enumerate certain matters; with that must be contrasted: to legislate for civil rights in the Province and No. 16, section 92 I suggest gives colour to all the enumerations of section 92, because 16 says that the Province may legislate generally for all matters of local or private interest in the Province -- generally, that is all these enumerations in section 92, they are provincial enumerations.

VISCOUNT HALDANE:- I am not sure; is not that an additional head?

Mr DUNCAN:- No. 16?

VISCOUNT HALDANE:- Yes.

Mr DUNCAN:- Yes, an additional head, but it is generally all matters, indicating that the previous 15 are also of a local and private nature in the Provinces.

VISCOUNT HALDANE:- I am not so sure about that, I think "civil rights" may be of a very public character. Take, for instance - it is a case that has not been cited here - the

Royal
Standard Bank v. The Government of Alberta , as to whether the Government of Alberta had power to divert the subscriptions which had been made in New York and London for Railway purposes in the Province to a new system under which the ~~Dominion~~ Revenue was to keep up the railway and take the subscriptions. It was said although it may have complete power ~~xxxxxx~~ over the civil rights of these people so far as they are within the Province, yet as their money was outside the Province you are interfering with the civil rights outside the Province by altering the terms on which they paid their money in New York and London to the Bank of Montreal.

Mr DUNCAN:- That was the Royal Bank I think. I may say I rely on that, the Province may deal with the civil rights in the Province.

VISCOUNT HALDANE:- Yes.

Mr DUNCAN:- But it may not deal with civil rights out of the Province.

VISCOUNT HALDANE:- Clearly not.

Mr DUNCAN:- And if you deal with Labour Unions which are spread throughout the Dominion it is necessary to have Legislation; can it be done by Provincial action in each Province, if you are sure you can get it even.

VISCOUNT HALDANE:- Why not. Supposing they all pass the identical Act.

Mr DUNCAN:- If they pass it, but will they pass it?

VISCOUNT HALDANE:- I quite agree with you it may be very difficult to get them to agree.

Mr DUNCAN:- And in matters of national urgency , because three or four do not pass it, or pass it in other terms, or do not amend it as they can, there is a high national danger of disaster, because, as I suggest , this inception of the British North America Act ——

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VISCOUNT HALDANE:- Do not beg the question by calling it a national danger. I should have said that those who framed the Constitution of Canada in 1864 or 1867 were responsible for making insufficient provisions for the invocation of the law; they did make certain provisions; for instance section 104.

Mr DUNCAN:- That is for uniformity.

VISCOUNT HALDANE:- That was by consent.

Mr DUNCAN:- Yes, only by consent; I distinguish that. May I suggest the distinction on that?

LORD DUNEDIN:- Did not they leave out Quebec?

Mr DUNCAN:- Yes. I suggest mere desire for uniformity of law in trade disputes would be ultra vires just as a mere desire for uniformity of law in the Common Law Provinces in relation to ~~Congress~~ contracts or as to rights of succession or status would be ultra vires. The test is, is this susceptible, is it capable of being of national importance, and is this legislation directed not to the uniformity but to a national law.

VISCOUNT HALDANE:- How far do you carry that, Mr Duncan? It is very important to know. There are many things that are very desirable for the nation in Canada; supposing the Dominion said it is very desirable that every Canadian subject should be able to read and write; would there be the power to deal with it ?

Mr DUNCAN:- I think that is no danger to the Province because your Lordships would stand vigilant and say: this law cannot possibly be passed for the peace, order and good Government of Canada, just as in putting questions to a Jury you can withdraw it from the Jury because of the facts.

VISCOUNT HALDANE:- Why do you say education is not within peace, order and good government?

Mr DUNCAN:- For ~~this~~ one reason, because it is enumerated in

another section of the British North America Act.

VISCOUNT HALDANE:- What is the section?

Mr DUNCAN:- It is section 93.

VISCOUNT HALDANE:- What does that section say?

Mr CLAUSON:- "In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions".

VISCOUNT HALDANE:- It isthe section I was looking at; it is "in each Province". Still, supposing it to be a matter of great importance that the citizens of Canada should all be able to read and write, do you say your xgr argument stops short of this, that the Parliament of Canada might declare that to be in operation throughout Canada, and, if so, why do you stop short of that?

Mr DUNCAN:- I should think as a practical question they would stop short of that; one would say this is not capable of being that.

VISCOUNT HALDANE:- It is not "peace, order and good government".

Mr DUNCAN:- No. I would say this, that it is a practical question; a body of evidence was tendered to your Lordship as showing that from a political point of view it is of national importance. Then your Lordship will say: We are not entering the political arena; you are construing a statute of Parliament which consists of persons drawn from every party of Canada which takes on itself the burden of passing this Act believing that the circumstances call for it as a national matter, and we will say well, we will at least put the onus on the other side to show that the facts bear it out. There are two answers, first it is not capable of being of national importance, and secondly, the facts show that it is not of national importance.

VISCOUNT HALDANE:- It is really good government, education, or it may be.

Mr DUNCAN:- Yes.

VISCOUNT HALDANE:- But do you say the Parliament could do it. Supposing Canada as a whole were suffering from want of reading and writing and arithmetic, could the Parliament pass a law enacting ~~uniform~~ uniformity, or could it not??

Mr DUNCAN:- If in fact it was of national importance Parliament could.

VISCOUNT HALDANE:- If it was of national importance you say the Parliament of Canada could pass the Act notwithstanding that section 93 gives it to the Province.

Mr DUNCAN:- I would not like to enter into that, that is a special matter set out in section 92.

VISCOUNT HALDANE:- The point is that it is something desirable in the interest of the whole of Canada which cannot be secured.

Mr DUNCAN:- If your Lordship's illustration falls within the enumeration in section 92 ——

VISCOUNT HALDANE:- I do not see much difference because in section 92 the words are exclusive also.

Mr DUNCAN :- But in the Province.

VISCOUNT HALDANE:- Yes; section 93 is "exclusively in the Province". I think you are driven to say that if it is good enough and important to Canada as a whole that the Dominion can do it.

Mr DUNCAN:- If in fact it is required as a law under the peace order and good government of Canada, I suggest to your Lordship that the Code is wide enough to cover that, that that was certainly what was intended and that was the original conception.

VISCOUNT HALDANE:- If it is important enough and the Provinces are not able to agree themselves, the Dominion Parliament under "peace order and good government" can make a law saying every child in Canada has to learn to read and write.

Mr DUNCAN:- It is putting an extreme case.

VISCOUNT HALDANE:- I am putting it to the test. I do not suppose anybody is going to try to do it.

Mr DUNCAN:- No, because the Legislators are reluctant to assume responsibility.

VISCOUNT HALDANE:- I know they are.

Mr DUNCAN:- They wish to ~~put~~ push it somewhere else. I should say if the Parliament of Canada did interfere in Provincial matters the presumption is it did it for a reason, but the only question left, if your Lordships say there is no evidence to show to the contracy, is, is it capable of being a law for the peace, order and good government of Canada.

VISCOUNT HALDANE:- I am assuming it may be certainly, education generally is part of good government, it falls within the words.

Mr DUNCAN:- Well, does it, my Lord, when one looks at the question of national concern?

VISCOUNT HALDANE:- There are plenty of Crown Colonies who have nothing ~~by~~ but the words "peace, order and good government" and under those they set up education statutes right and left.

Mr DUNCAN:- Yes, but where peace and good government on one side is contrasted with matters of purely personal concern in section 92 then a new colour, I suggest, comes into the phrase "Peace, order and good government".

VISCOUNT HALDANE:- The words are taken from the old Canadian Provincial Government, and from the State Government in Australia, and under the general words they set up systems of education right and left.

Mr DUNCAN:- As to their origin may I just point out, I intend to rely on this at a later stage, that the original words were "Peace, welfare and good government", and those were the words in the previous Canadian Constitution.

VISCOUNT HALDANE:- That is rather something against you, "welfare".

Mr DUNCAN:- Welfare is wider, but "order" is more precise and has closer reference to the matter now in hand, which is civil disturbance and disorder which may be expected to grow from strikes when the Militia must be called in to keep order in

the Province.

LORD WRENBURY:- You take "peace, order and good government" too far; the Act gives the Dominion power to legislate in all matters of peace, order and good government but limited to certain matters. You have to say that you are within that field.

Mr DUNCAN:- May I put it the other way, is it not that the Dominion has power to legislate for peace, order and good government except in certain cases.

VISCOUNT HALDANE:- I rather agree with you because I think that is right. I think peace, order and good government covers everything the Dominion has got under its reserved powers.

LORD WRENBURY:- It is "To make laws for peace, order and good government of Canada in relation to all matters not coming within" section 92. That is limited authority.

VISCOUNT HALDANE:- Does not it imply that those matters are in the Provinces also, peace, order and good government, but are taken out.?

Mr DUNCAN:- Yes, I accept that.

LORD SALVESEN:- These words which are pointed out would cover every sphere of legislation, in construing sections 91 and 92 must not you read in: peace order and good government where there is a serious or threatened disturbance, or something like that; then you would bring in the emergency as the only justification for legislating in the way that the Dominion Government has proposed.

VISCOUNT HALDANE:- All the enumerated heads are interfered with, otherwise you have full power?

LORD SALVESEN:- Yes.

Mr DUNCAN:- Yes. The only difficulty I have with that from the point of view of the construction of the Statute is that the Statute definitely says that you may invoke these powers only in case of emergency. I have cases in the Supreme Court of the United States which I intend to give your Lordships, where the doctrine suggested was quite clear under certain Constitutions, that no emergency can possibly transfer power from

one legislation to another; emergency cannot re-write a Constitution, and who is to define "emergency".

VISCOUNT HALDANE:- Do not be too sure about that. The United States have said that the inherent police power although it primarily belongs to States is also available for the Federal Government, and what limits there are to that police power I do not know. If you can tell us anything about it in the course of your argument today or tomorrow we should like to know.

Mr DUNCAN:- The police power is mentioned in the case your Lordship read of Hamilton v. The Kentucky Distillery . The later cases as to the police power are the Narcotic cases where the Supreme Court held that Congress had power to deal with Narcotic , with white slavery as it was called there.

VISCOUNT HALDANE:- On what ground?

Mr DUNCAN:- On the regulation of inter-state commerce and commerce with Indian tribes.

VISCOUNT HALDANE:- Did they say anything about the police power?

Mr DUNCAN:; Yes, they said that in giving the police power in my conception of what that means in the United States, the police power is the imposition of duties on State citizens. What they did not have was a residuum, and what, until very recently they thought it did not get, the right of Congress to impose responsibilities and duties on State citizens,which is all that is done here; there is no interference with civil right.

VISCOUNT HALDANE:- You say the genesis of the police power is the desire to have the means of asserting authority which they claim to have.

MF DUNCAN:- Yes, to police ~~power~~, to say you shall not in the public interest do so and so. The only place they can find it is under their regulation of trade and commerce clause, which is a much less wide clause than ours; that is another branch of the argument. May I return to the original point, the two conceptions, and put another way of stressing it; if the

second conception is right that is a matter which is for the national concern and you may only legislate by co-operative action, the inconvenience and danger attendant on that does not need to be stressed. It is a great mistake in drafting the British North America Act, but I suggest it was not the original conception in Russell v. The Queen , or in the case in 1896 Appeal Cases, Lord Watson's case. I will come to that in a moment; it perhaps can be put in a word. My submission to your Lordships is that in matters truly of national importance Canada is a State and not a congerie of Provinces.

VISCOUNT HALDANE:- Would you carry that so far as to say that even where there is no emergency or peril to national life that is so.

Mr DUNCAN:- As in Russell v. the Queen?

VISCOUNT HALDANE:- Then you say you do not want emergency.

Mr DUNCAN:- I say emergency is not written into the Constitution at all.

LORD ATKINSON:- Nothing is written into that Constitution except they are not to interfere with section 92 and pass laws relating to peace, order and good government.

LORD DUNEDIN:- The views of emergency that prevailed are not that emergency transfers from one ~~country~~ category to the other ~~to~~ such alters the nature of the subject-matter.

MR DUNCAN:- Yes. That is not the only thing that will alter the facts of the subject-matter, you do not have to resort to emergency to find that matters originally local and private have attained Dominion importance as Lord Watson said, May I refer your Lordship on the question of emergency because we have reached it before I intended to, to the case of Wilson v New in 1917? That was decided by the Supreme Court of the United States, and it is reported in 243 United States Supreme Court Reports at page 322. The place at which I wish to read is at page 338.

LORD ATKINSON:- Lord Watson had said that was one of these things that is included in section 92 which swells out and extends, but it is the thing that was in section 92, or a thing of that character; that is the thing that swells out and extends over the other parts of the Dominion, it is not a new thing in its nature, but it is the same thing that extends.

VISCOUNT HALDANE:- The passage you have given us is in the argument of the Appellees at page 338.

MR DUNCAN:- It is at page 348 I wish to read/~~where~~ where your Lordship will see this. May I tell your Lordships what this case decided? It is a case under "the regulation of trade and commerce" clause, the clause which differed from ours in that it is confined to regulation of commerce between the States and with foreign nations, which is regulation of trades and commerce generally. Under that clause the United States Government passed an 8-hour day Act applicable to Federal railways, that is to say railways which pass between the States. There is no reference in the United States Constitution to railways, it was drawn up long before they were

thought of, but the Supreme Court did hold that a railway fell within the regulation of trade and commerce, and the question then was: Where there was a difficulty with trade unions, acute difficulty, can Congress pass an Act saying, you shall have an 8-hour day, or whatever it was, in force on the railways, and they held by a majority, yes. Chief Justice White delivered the opinion of the Court, and in that case it was said that this is an emergency case, and it was most strongly contended that in emergency you may do anything, and he, giving the opinion of the Court upholding the power of Congress, described the emergency, and said this in answer to their view that they suggest that the situation is one of emergency, and that emergency cannot be made the source of power, and he quoted Ex parte Milligan in 4, Wall at page 2, where it was distinctly held that emergency does not create power, and you cannot re-write the Constitution, and he goes on: "The proposition begs the question since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts, which if done, would interrupt, if not destroy, inter-State commerce/~~should~~ may be by an anticipation ~~operation~~/legislatively prevented, by the same token, the power to regulate may be exercised to guard against the cessation of inter-State commerce threatened by a failure of employers and employees to agree as to the standard wages, such/~~standard~~ being an essential pre-requisite to the uninterrupted flow of inter-State commerce".

VISCOUNT HALDANE:- We cannot follow this unless you tell us what is the provision in the original Constitution of the United States relating to commerce.

MR DUNCAN:- It is section 8 of the Constitution: "'The Congress shall have power sub-head 3 To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes'".

VISCOUNT HALDANE:- Now did not they hold that that gave power to fix hours, but not wages.

MR DUNCAN:- I do not think so.

VISCOUNT HALDANE:- I thought they did.

MR DUNCAN:- I think the reasoning of the judgment which follows will show.

VISCOUNT HALDANE:- This is the head note: "Viewed as an Act establishing an 8-hour day as the standard of service by employees the statute is clearly within the power of Congress under the Commerce clause. The power to establish an 8-hour day does not beget the power to fix wages". Now let us go on. I have the head note before me. "In an emergency arising from a nation wide dispute over wages between Railway Companies and their own train operatives in which a general strike, commercial paralysis and grave loss and suffering overhang the country because the disputants are unable to agree Congress has power to prescribe a standard of minimum wages, not confiscatory in its effects but obligatory on both parties, to be in force for a reasonable time, in order that the calamity may be averted, and that opportunity may be afforded the contending parties to agree upon and substitute a standard of their own". Apparently that is not under the commerce clause, but under the inherent capacity of the Constitution.

MR DUNCAN:- If I may say so, I think it clearly appears from the judgment that it is under the commerce clause because they say that emergency does not give the power. That is at page 348.

VISCOUNT HALDANE:- What I read was from the head note: "Viewed as an Act establishing an 8-hour day as the standard of service by employees the statute is clearly within the power of Congress under the commerce clause. The power to establish an 8-hour day does not beget the power to fix wages".

MR DUNCAN:- They are independent.

VISCOUNT HALDANE:- Then it goes on to say the emergency gives rise to the power to fix wages and it says this: "Where a particular subject lies within the commerce power the extent to which it may be regulated depends on its nature and the

appropriateness of means. The business of common carriers by rail is in one aspect a public business because of the interest of society in its continued operation and rightful conduct, and this public interest gives rise to a public right of regulation to the full extent necessary to secure and protect it. Although emergency may not create power (Ex parte Milligan 4, Wall, page 2) it may afford reason for exerting a power already enjoyed".

MR DUNCAN:- I think that is the ground on which it is put.

VISCOUNT HALDANE:- "The Act above cited in substance and effect amounts to an ~~exercise~~ exertion of the power of Congress, existing under the circumstances, to arbitrate compulsorily the dispute between the parties -- a power susceptible of exercise by direct legislation as well as by enactment of other appropriate means for reaching the same result". Then it goes on: "The Act does not invade the private rights of employees since their right to demand wages according to their desire and to leave the employment individually or in concert if the demand is refused are not such as they might be if the employment were in private business, but are necessarily subject to limitations by Congress, the employment accepted being in a business charged with a public interest which Congress may regulate under the commerce power". There is a great deal in this, and I quite see why you cite it.

MR DUNCAN:- Under the same head which is "regulation of trade and commerce" which, if I may suggest to your Lordships I think is the second case, it is not the true logical head, it is peace, order and good government, I ~~know~~ have another case in the Supreme Court of the United States decided by Chief Justice Taft in 1923, the Pennsylvania Railroad Company v The United States Railroad Labour Board in 1923, 261 United States Reports at page 72. That was a case in which Congress in dealing with strikes on railroads which fall under the inter-State Commerce clause, although railroads are not the only things which fall under the inter-State

Commerce clause, passed an Act similar to the Lemieux Act establishing a Board which should hear the parties and should publish a report, the conception being this, I take it, that in all democratic Governments what you must depend on in the last resort is not force but public opinion, public opinion may give you your force; I should perhaps put it this way, that it is not armed force or machinery, but public opinion brought to bear on parties saying: You are wrong, we have no sympathy with you, we are against you, it is another form of election, it is a fundamental conception in democratic Governments. The Act is not as strong as our Act. The case is not precisely our case, but the parties here brought an action to prevent the Board publishing its Report; the Pennsylvania Railroad Company did not wish the report published. It went to the Supreme Court of the United States, and in giving judgment, Chief Justice Taft said there was the power of the Congress to say that they should publish such a report; it has to do with the regulation of trade and commerce, the conception being that it was not the regulation of a particular case, of a particular trade, or more than one trade, but that where you have power to regulate you have also the power to preserve. If you have power to regulate trade and commerce surely you have power to say: We will preserve trade and commerce from interruption by a strike. One does not need to go further and say that it may be sympathetic; it may be that sympathetic strikes are attached to it, and it may attain the position of a national emergency. Now those two if I may say so, are in anticipation of my argument, and now may I return to the peace, order and good government clause? May I give your Lordship a proposition from the late lamented Mr Lefroy in his last book?

LORD ATKINSON:- If you are right section 91 is useless because peace, order and good government cover everything?

MR DUNCAN:- No. May I just draw attention to the enumeration in section 91. It is for greater certainty only, but not so as to limit the generality of the foregoing and they go on and say

in the last clause of section 91: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature" -- the phrase comes in again,-"comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the ~~Legislatures~~ Legislatures of the Provinces". They give the Central government the power of dealing with bankruptcy matters and insolvency matters, to legislate with respect to a particular insolvent Company, to pick out a local and private matter and attach to that this general scheme of legislation because the Dominion conceives it necessary so to do. I suggest the distinction is in legislating under the peace, order and good government clause, that part of the enumeration, you may not deal with a particular matter, and may not pass an Act as my friend suggests dealing with a particular strike in a particular Province, which is his argument, because that is local or private, and you could only do it if that particular strike was of national concern, or threatened to be of national concern. That, I think is, if I may suggest the difference between the enumerations of section 91 and the residuum in section 91.

VISCOUNT HALDANE:- I see very little in the Pennsylvania case bearing upon the question of the power of Congress. It is assumed apparently that there was the power and the discussion goes to this extent.

MR DUNCAN:- May I read your Lordship a portion of that to which I intended later to come. I am reading on page 79 of the Pennsylvania Railroad case: "It is evident from a review of title 3 of the Transportation Act of 1920 that congress deems it of the highest public interest to prevent the interruption of inter-State commerce by labour disputes and strikes, and that its plan is to encourage settlement without strikes, first by conference between the parties, failing that by reference to adjustment boards of the parties own choosing, and, if this

is ineffective, by a full hearing before a national board appointed by the President, upon which are an equal number of representatives of the Carrier group, the Labour Group, and the Public. The decisions of the Labour Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the public in the undisturbed flow of inter-State commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labour dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at fault".

VISCOUNT HALDANE:- The interesting question is not to discuss the motive, but the right of Congress to take this motive into account. Was it within the power of Congress under the United States Constitution to deal with this and if so, how was it under commerce?

MR DUNCAN:- Yes.

VISCOUNT HALDANE:- Does Chief Justice Taft say that anywhere?

MR DUNCAN:- It is at page 84: "But title 3 was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them".

LORD ATKINSON:- You quoted the exact words of the Act; what were the exact words?

MR DUNCAN:- "The Congress shall have power to regulate commerce with foreign nations and among the several States and Indian Tribes"

LORD ATKINSON:- To regulate commerce between two States must include the government of the machinery to transmit the commerce

for instance.

MR DUNCAN:- Our clause is stronger. We have the regulation of trade and commerce; they do not mention trade. We go further, and I will come to that.

VISCOUNT HALDANE:- I do not think you can draw any inference from the use of "commerce" in the United States Constitution as to its use in section 91 of the British North America Act in a different context; it is among 27 or 28 headings.

LORD ATKINSON: It must involve the transfer fromm one State to another surely.

MR DUNCAN:- I suggest not on their interpretation. Our clause section 91, sub-section (2) which is: "The regulation of trade and commerce" was, as I suggest to your Lordship, distinctly drawn up with the American clause in view, the idea being not to confine it to the troublesome matter of inter-State commerce only, but to give the Dominion, which is a trading State, not a military State, but a trading State and a commercial unit, the power to regulate trade and commerce, and what they said must depend on that which is in the second enumeration.

VISCOUNT HALDANE:- I tell you my difficulty about your argument. When you began I thought you were going to cite decisions of the United States to show that notwithstanding the still more restricted powers of Congress compared with those of the Dominion Parliament still there had been held to be implied powers to deal with matters which concerned the national welfare and life, but when I come to the decisions you cite I find that they turned on the interpretation of the provision as to commerce and inter-State commerce between the American States. These words are there, but they cannot, as I was remarking, afford us much guidance as to the meaning of different words in the enumeration of section 92, the regulation of trade and commerce, because included in those are a multitude of other matters with a context that is different. You can only take the words as the framers of the Canadian Constitution took them, and

you cannot get analogies from the words of a different Constitution.

MR DUNCAN:- That is all in anticipation; the emergency point brought me to the first case.

VISCOUNT HALDANE:- The emergency was all right, but when you parted with the emergency I began to find myself in stormy waters.

MR DUNCAN:- That is my difficulty, whether it is emergency or whether there may be other cases in which the Dominion may legislate because it is for the national welfare.

VISCOUNT HALDANE:- The other words come under the wording of the Constitution as construed by Chief Justice Taft.

LORD ATKINSON:- In clause 10 of section 92 it gives to the Province power to deal with : "Local works and undertakings other than such as are of the following classes: (A) Lines of steam or other ships, railways, canals".

MR DUNCAN:- Within the Provinces, and the Dominion has power to say that these shall be declared to be works to be for the general advantage of Canada and the Dominion wherever it sees necessity may take those out and put them under Dominion jurisdiction, the underlying conception being that it is control of trade.

LORD ATKINSON:- "Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Provine with any other or others of the Provinces, or extending beyond the limits of the Province". Under section 92 the Provinces have exclusive cognizance of those things.

MR DUNCAN:- Until the Dominion takes them away.

LORD ATKINSON:- As long as they remain Provinces there is no right to take them away.

MR DUNCAN:- It is sub-section (c).

LORD ATKINSON:-. That is the well known power I think that they have to declare any particular work a work for the benefit of the Dominion.

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MR DUNCAN:- And if the Dominion finds in its general control of trade and commerce throughout the Dominion because the peace and happiness and prosperity and welfare of the country depend on its fiscal system, and not only its Customs bar, and development of wheat ---

LORD ATKINSON:- It was not to have different governors for different parts of the line, some Federal, and some under Dominion Governments, and some under the Provincial Governments; that would be impossible, and therefore they declared them works for the benefit of Canada, and then it was under the Dominion.

MR DUNCAN:- There could not under the British North America Act, be any portion of a line that was under the Dominion and another portion under the Province. The Province is given ~~power~~ under section 10 jurisdiction over local works and undertakings, it is not given power over : "Lines of steam, or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits" -- that is (A) -- nor is it given jurisdiction over "Lines of steam ships between the Province and any British or foreign country" -- that is (B), nor is it given jurisdiction over "Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces" -- that is (C). Once it is for the general advantage of Canada, or of two or more Provinces, it is, as I suggest, no longer a Provincial concern, and the Dominion is given power under this section to say: This is for the general advantage of two Provinces, and therefore, we must take it under our jurisdiction. I submit, with great respect, there is nothing under section 10, or any other portion of the Act which gives portion of a railway partly to the Dominion and partly to the Provinces.

LORD ATKINSON:-Section 10 would have no power as far as that

is concerned, it is only dealing with Provincial matters, there is no power in the Provincial Government legislation to declare a thing for the benefit of Canada, it must be by the Dominion, it must be constructed in the Province, that is to say, it is local work which falls within the Province under section 10, but the Dominion has no power to declare part of a local work for the general advantage of Canada. If the Province creates a work which extends beyond the boundary of the Province automatically it comes under the Dominion under (A) because it extends beyond the boundary of the Province. So that either it is a local work wholly situate within the Province, and therefore under Provincial jurisdiction, or it is a work extending beyond the Province, and therefore by its very nature of Dominion concern, and under the Dominion jurisdiction under section 10, or, thirdly, it was originally a local work situate wholly within the Province and is now declared to be for the general advantage of Canada, and therefore under the Dominion jurisdiction.

(Adjourned for a short time)

LORD DUNEDIN: Is your proposition this: If it is a matter of national importance it would be ludicrous to suppose that you must wait until you have identical legislation in all the provinces to deal with it, and, therefore, you must have recourse to the Dominion, and, secondly, when you come to what is a question of general importance it is really proof that it is of general importance that the Dominion Parliament, which is composed of people from all the Provinces, has dealt with it?

MR. DUNCAN: That is not precisely my argument. In the first place, I do not put it on the ground that it is outrageous to suppose that one should wait until there has been collective action. I put it on the ground that the jurisdiction is given to legislate for peace, order and good government in all matters of national concern, but that section 92 only covers those matters of provincial concern, and it was a conclusion that I was giving to your Lordships, not so much as an argument, that if the other conception prevails, then you do have the British North America Act so interpreted that you must wait for collective action from each of the provinces.

LORD DUNEDIN: Do you say the fact that the Dominion has so treated it is proof to a certain extent that it is a matter of national importance?

MR. DUNCAN: What is the test to be applied to legislation ostensibly passed under the peace, order and good government clause? May I, before dealing with that, give one short reference to your Lordships. The reference is to Mr. Lefroy's Canadian Federal System, Proposition 34. I do not say this carries me all the way, but it is a conception which I wish to emphasise. "Before the law enacted by the federal authority within the scope of its powers", etc. (Reads to the words) "each and every province." That proposition is supported by his text at pages 123 to 127, and among other cases to which he refers is the case of the Grand Trunk Railway Company of Canada v. The Attorney General of Canada, in 1907 Appeal Cases, which was the case decided by Lord Dunedin. It

was a railway case, and had to do with what was really ancillary to the railway legislation, and the conception that the Court had there was that, if it was reasonably ancillary, you had a legislative union and the central power had sufficient authority to deal with all matters properly relevant to the subject.

VISCOUNT HALDANE: Railways are given exclusively to the Government of Canada.

MR. DUNCAN: Yes, but this legislation as to contracting out might well have been looked at from the point of view of property and civil rights, but the conception that in matters within Dominion concern, whether under peace, order and good government, or under an enumeration, there is legislative union and Canada is one State and not a congeries of provinces which have to come together to pass legislation. There is another case which followed on that, and, without quarrelling with the decision in the case at all, it has been looked on in Canada as the case in which one sees the suggestion of cooperation. That was the through traffic case, The City of Montreal v. The Montreal Street Railway, reported in 1912 Appeal Cases, in which the question was this: Through traffic which originates on a provincial line and goes on to a Dominion line falls within the legislative jurisdiction of the Parliament of Canada dealing with federal railways, and your Lordships held that there was nothing to show that through traffic had attained such proportions as to affect the Dominion, and, therefore, your Lordships suggested that there was nothing to show that there would not be cooperation between the provincial legislatures and the Dominion legislature to deal with this particular matter. I do not know, it has been thought in Canada, that the case in 1907 Appeal Cases, on the one hand, and the case in 1912 Appeal Cases, on the other, illustrate these different tendencies. Personally, if I may respectfully say so, I do not think so. Through traffic is so small a matter that there is no moving away from the principle laid down in the case in 1907 Appeal cases that matters such as railways fall within Dominion property. I submit to your

Lordships that there are four possible tests, which have been put forward in this case, which need to be applied to determine whether legislation passed ostensibly under peace, order and good government is, in fact, within the jurisdiction of the Dominion. The first conception is that to be found in the judgments of Chief Justice Strong, Mr. Justice Taschereau and those Judges who were close to confederation, and also in Russell v. The Queen. May I put, as shortly as I can, what would seem to be the decision in Russell v. The Queen. Shortly it falls into two heads: first, is the legislation in its proper aspect legislation for the peace, order and good government of Canada and so not legislation in relation to property and civil rights; are those words in relation to one aspect? That is the first question: Is it legislation for the peace, order and good government of Canada? I will come to the question of interference in a moment, and I will lay stress on the difference between interference and aspect, the difference between that which interferes with a civil right and that which is legislation about or qua a civil right. Secondly, in Russell v. The Queen it seems to have been suggested, as perhaps follows from the judgment, that, if so, we are not concerned with any question of evidence as to the actual conditions in Canada at all; that is to say, it is not quantitative, but it is qualitative.

LORD ATKINSON: If the Dominion Parliament chooses to legislate for the whole of Canada, that must be right, because they have said so?

MR. DUNCAN: No, my Lord, that is not my argument. I am sorry that I have not made myself clear. My point is that the Board, looking at a statute, says: Can this statute be said to be a law for the peace, order and good government of Canada? That is the test that this Board applied in Russell v. The Queen. Is it peace, order and good government; does it deal with public wrongs, or does it deal with civil rights? I cannot say we have legislated, and, therefore, it is right. The Board has to determine whether the legislation can possibly be classed as legislation for the peace, order and good government, and, if it is, in its aspect and purpose,

or, as the cases say, in its pith and substance, in relation to peace, order and good government, very well, that is what it is. If, on the other hand, it is in relation to property and civil rights, then it fails, and the Board will say so. May I give an example of the legislation in this way? Supposing Parliament says that the succession in the case of infants shall always be to the second son, how could it possibly be for peace, order and good government? It cannot be. It is in relation to property and civil rights. That is the test of Russell v. The Queen, and they are not concerned with questions of evidence if the legislation bears that aspect. Those are questions for Statesmen, for the Parliament of Canada.

LORD ATKINSON: If it bears that aspect in the eyes of whom?

MR. DUNCAN ; In the eyes of this Board. The Board must say: Is it legislation of that kind; can it be classed as legislation for peace, order and good government; if it is in that aspect, and not in relation to property and civil rights, then the Board is not concerned with questions of evidence. If it were concerned with that, what would be the result? Every litigant who had raised against him the allegation that this was ultra vires the Parliament of Canada would have to produce before the Board all the evidence that was before the Cabinet, when it made its decision, and the House of Commons and the Senate, of the actual conditions of Canada before your Lordships would be able to pass on that question.

LORD ATKINSON: Why should they be obliged to produce all the evidence that was before the legislature? If they produce evidence enough to show to the Tribunal that is deciding it, is not that sufficient

MR. DUNCAN: Yes, my Lord, the litigant would have to do that. It would follow from that decision that the Board is not concerned with evidence, although the legislation bears the aspect of peace, order and good government.

LORD DUNEDIN: I have great difficulty in going with you there, because what we have to look at, as being either legislation for

peace, order and good government primarily, or being legislation for civil rights primarily, is the Act of the Canadian Parliament.

MR. DUNCAN: Yes.

LORD DUNEDIN: That is a question of the construction of the Act?

MR. DUNCAN: Yes.

LORD DUNEDIN: It is surely a very tall order to say that we are to come to the conclusion as to what is the proper meaning of an Act by taking evidence upon the state of circumstances at the passing of the Act.

MR. DUNCAN: I was not putting my case in that way; I was trying to answer the objection. I say that in Russell v. The Queen the Board appears to have said: We can construe this Act as one in relation to peace, order and good government.

LORD DUNEDIN: Certainly.

MR. DUNCAN: We are not concerned with evidence.

LORD DUNEDIN: The Board came to the conclusion upon what they thought of the Act as it was before them; they did not hear any evidence in Russell v. The Queen.

MR. DUNCAN: No, my Lord, I am not suggesting that they did. What I mentioned evidence for was in reply to Lord Atkinson. He said: Are we not concerned with the conditions?, and I said: In Russell v. The Queen that was not so.

LORD DUNEDIN: Lord Atkinson's question was a very natural one, if I may say so: Who is to decide; is it the Parliament of Canada or is it us? You submit that it is for us to decide?

MR. DUNCAN: Yes.

LORD DUNEDIN: Then you say in order to show that it was good, <u>prima facie</u> it was because the Canadian Parliament had said so, and, in order to get out of that, it would be for the other side to lead evidence?

MR. DUNCAN: I did not mean to say that.

LORD DUNEDIN: I do not see at present how evidence would have anything to do with our determination of the question as to whether the primary object of the legislation was one thing or the other.

MR. DUNCAN: That is my submission, that under Russell v. The Queen evidence has nothing to do with it. I mentioned evidence in this connection. I said: If you must produce evidence, then what follows?; first the inconvenience to litigants to gather up evidence from all parts of Canada; the impossibility that they can gather it up completely and the fact that the Board will then be sitting in judgment on the Parliament of Canada on a question of fact as to which the Board has not all the materials before them, so that only is an argument on inconvenience from the other rule. I suggest that Russell v. The Queen goes on the first rule: What is the object of the legislation?

LORD ATKINSON: Supposing you have a statement of the Dominion: Whereas such and such a thing prevails, and whereas we deem it a thing that affects the peace, order and good government of Canada, and whereas in the exercise of our powers we legislate so and so; when that came up before this Board are we estopped from listening to evidence to show that the thing particularly put forward as the justification for the Act did not exist?

MR. DUNCAN: I think under Russell v. The Queen, yes.

LORD ATKINSON: You say we would be excluded under Russell v. The Queen, if they affirmed that the matter was a matter affecting the Peace, order and good government of Canada, and in exercise of the powers conferred upon them, under the first head, for dealing with such matters, they executed so and so, could not evidence be adduced here to show that the thing they stated to exist did not exist?

MR. DUNCAN: For the purpose of this case, I would be prepared to say, Yes. Your Lordship is asking for a general principle?

LORD ATKINSON: I want to get hold of the principle that you are contending for. Does the fact that they promote the legislation under the powers of this section, on the ground that what they propose to do is for the peace, order and good government of Canada, shut out every enquiry, and, when the case comes up for consideration, are we to say: We have nothing to do with it; the

legislature is the final judge; it has put in print in the statute that this affects the peace, order and good government or Canada, and we, in pursuance of our powers, because we think it does, do so and so.?

MR. DUNCAN: I think, in looking for the true principle, evidence might possibly be adduced to show that the object of the legislature was not peace, order and good government, but that it was colourable legislation.

LORD ATKINSON: That it was corrupt?

MR. DUNCAN: No, colourable; an attempt to do indirectly what it could not do directly, as in the Insurance case; that is all. In that case evidence would have no bearing on the question at all if that allegation was set up. I do not think any Court would exclude parties who came forward.

LORD ATKINSON: That is, they could not do directly what they purport to do?

MR. DUNCAN: If, in fact, they were legislating for peace, order and good government. I do not think any argument would bind this Board; it would be the nature of the Act itself, and whether in all the circumstances that was capable of being legislation for peace, order and good government.

LORD DUNEDIN: You stated what you considered to be the first test, namely, what is the object of the legislation. You have several times referred to what you call the second, but you have never told us what the second was.

VISCOUNT HALDANE: Mr. Duncan did tell us what was the second by quoting Lefroy.

MR. DUNCAN: No, my Lord, that was before I began on this. I say that, in testing legislation under peace, order and good government, there are four possible tests I put forward to your Lordships. The first is under Russell v. The Queen, to test these two heads: first, Is the legislation, in its proper aspect, for peace, order and good government, or is it in relation to civil rights in the Province?, and, secondly, if it is for peace, order and good

government we are not concerned with the evidence of the actual conditions in Canada.

LORD ATKINSON: If it appears to be for the peace, order and good government, you say the enquiry is estopped?

MR. DUNCAN: No, not if in a recital it appears, but if, on examining the nature of the Act, it appears.

LORD ATKINSON: Not a recital alone?

MR. DUNCAN: But if, in its true nature, judicially construed, then evidence is immaterial, unless it is suggested on the other side that this is colourable legislation, that it was not truly for peace, order and good government, but was an attempt to legislate with respect to succession of second sons, for example. The second point comes from the Attorney General of Ontario v. The Attorney General of Canada, reported in 1896 appeal Cases. I am not sure that this does introduce another rule, the question of the quantitative as distinguished from the other, but it can perhaps be put on the other side. May I read from the middle of page 360: "The general authority given to the Canadian Parliament by the introductory enactments of section 91 is 'to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subject by this Act assigned exclusively to the legislatures of the provinces'; and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate" -- I submit that the residuum is there -- /because they concern the peace, order, and good government of the ~~Canada~~ Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from section 92, which is enacted by the concluding words of section 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is

exclusively assigned to provincial legislatures by section 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in section 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by section 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomyxxx of the provinces." That is a most important sentence. May I direct your Lordships' attention principally to the word "assumption". "If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of private or local interest, upon the assumption" -- "upon the assumption" I submit means upon the assumption without evidence being tendered, or without its appearing aliunde that it is of general national concern -- "that these matters also concern, the peace, order, and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures."

VISCOUNT HALDANE: That is not on the assumption, conceding it to be valid, that in law these matter refer to peace, order and good government of the Dominion. That will not do. Does not he mean that as a matter of evidence these things are concerned with the peace, order and good government of Canada? There are many things in section 92 that do not concern the peace, order and good government of Canada.

MR. DUNCAN: Which one would your Lordship take?

VISCOUNT HALDANE: Property and civil rights, which is a most important Dominion subject.

MR. DUNCAN: Property and divil rights in the Province?

VISCOUNT HALDANE: Yes.

MR. DUNCAN: I say if this is legislation with regard to property and civil rights in any province there is no general Dominion interest, and then it is excluded.

VISCOUNT HALDANE: Property and civil rights in all the provinces may be a matter of Dominion importance.

MR. DUNCAN: Collective action by the legislatures?

VISCOUNT HALDANE: No, on the contrary the theory when the constitution of Canada was agreed on in 1867 was that the provinces should be autonomous places as if they were autonomous Dominions. The Lieutenant Governor is the direct representative of the Crown, and the legislature has direct authority from the Imperial Parliament.

MR. DUNCAN: Within the provincial sphere, not a state sphere.

VISCOUNT HALDANE: You have to look to the heads of section 92. It is within those spheres in which province.

MR. DUNCAN: My difficulty is to discover where there is any residuum at all. In what matters can the Dominion legislate without interfering with property and civil rights.

VISCOUNT HALDANE: Section 91 gives you a number of things.

MR. DUNCAN: Does our constitution come down to the enumerations of section 91, the enumerations of section 92, and nothing else?

VISCOUNT HALDANE: When there is nothing provided for in one or the other, then the words peace, order and good government at the beginning of section 91 come in.

MR. DUNCAN: May I put my difficulty to your Lordships. It is a genuine difficulty. If so, what legislation could possibly be passed by the Dominion which does not interfere with property or the civil rights of the inhabitants of the provinces to do as he pleases? Could you pass any legislation which has the operation of this Act, which says: We will set up a Board to enquire and the Board may make its report? The only thing that is in issue here is the ancillary provision which gives the Board power to

summon witnesses to get at the facts, so that its opinion may carry weight with the public.

VISCOUNT HALDANE: And to stop the business, to stop the strike.

MR. DUNCAN: That is not in issue here; that is another case altogether. The injunction was granted, and the case proceeds on the ground that the Board would probably have summoned witnesses. The only question here is whether you may give ancillary powers to a Board of enquiry established to investigate a matter which the Parliament of Canada thinks is for the peace, order and good government of Canada to get at the facts.

LORD ATKINSON: Must not you take into consideration all the powers which they have?

MR DUNCAN: I am content to take them in this case, but I say in this particular case that comes to your Lordships. Under the other sections people have been convicted and sent to gaol for striking and exciting to strike, while the Board was sittin and endeavouring to inflame public opinion, so that there can be no peace brought about, but the only case before your Lordships is whether a Royal Commission being appointed it can for the peace order and good government inquire into matters which are not enumerated in section 91, and can summon witnesses to get at the facts.

VISCOUNT HALDANE: So far as the mere inquiry is concerned without the power to summon witnesses and put them on oath, the Executive Government of Canada might have instituted such an inquiry. They would only have to set up a Committee;that is not legislation; that is an Executive act. That would not be interfering with the civil rights of the public in the province.

MR DUNCAN: Is that the kind of civil right which is given to the Province. Does not that do this. It says that the Province has power to legislate with respect to civil rights, but it does not say that the Dominion can impose duties on Dominion citizens. The Dominion surely can impose duties on the citizens of the Dominion, and duties are not civil rights.

LORD ATKINSON: And if a man is taken up by a policeman by the authority of someone which is not valid, is not that interfering with the civil right, because the civil right is not to be taken up.

MR DUNCAN: He has a civil right of action.

VISCOUNT HALDANE: He has a civil right to liberty. The essence of the English common law is the right to liberty unless some process of the Court interferes with it. Are you not interfering with ~~it~~ it in the case which Lord Atkinson has

given?

MR DUNCAN: With all respect I submit that in peace order and good government you must draw a distinction as they did in the Russell case between civil rights and public wrongs.

LORD ATKINSON: But that is an entirely different thing. It is acting in the interests of the State as a whole not to alter any person's civil rights.

MR DUNCAN: Yes.

LORD ATKINSON: Lord Watson points out in one case that there are scarcely any of these things in section 92 which upon that principle could not be fairly contended to interfere with peace order and good government. He gives for instance solvency, Municipal Institutions, taxation, and solemnisation of marriage, which are all things that affect peace and order and good government.

MR DUNCAN: Yes, they may have been excluded, and those are all within the Province.

LORD ATKINSON: It means that you could effect the same object for peace order and good government, and practically invade the powers of the Provinces.

MR DUNCANL May I just complete the citation at page 361; the judgment continues: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion." It suggests that that amounts to emergency. "But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the prvincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province would be within the authority of the pro-

vincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, migl be competently dealt with by the Parliament of the Dominion".

LORD ATKINSON: He is dealing with the particular things which are primarily merely concerned with the Province and which expand into something which concerns the Dominion.

MR DUNCAN: Yes. Is not the point here that they find liquor legislation to be in respect to matters local and private?

VISCOUNT HALDANE: What he says at page 361 is: "If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, orderm and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures".

MR DUNCAN: Is not the difference between that and the Russell case that he says you must have evidence. In the Russell case it was suggested that you must examine the nature and extent of the legislation, and if it does bear the aspect of peace order and good government, we are not concerned with evidence. In this case he suggests it must be assumed.

LORD ATKINSON: Almost everything could fairly be brought within the head of peace, order and good government.

MR. ~~LORD~~ DUNCAN: Then his test is a correct one. Must not you look at the facts and ascertain whether it is capable of being and in fact is for the peace, order and good government of the Dominion.

LORD ATKINSON: What the policeman tells you to do to avoid the traffic in crossing the street is all connected with good

government surely?

MR DUNCAN: Yes; then what is the test in the case of 1896 Appeal Cases. Is it not ~~x~~ that all these might be laws passed under the authority of Russell v. The Queen. We say: no, you must use great care in distinguishing that which was originally local and Provincial from what is Dominion.

LORD ATKINSON: The statute excludes you from legislating with regard to those things under section 92 however much your legislation might be under the head of peace order and good government. You cannot attack them under the pretence that you are legislating for peace order and good government; the statute prohibits you from doing that; it says you must not do it.

MR DUNCAN: It does with respect to the first 15 enumerations, but not with regard to the 16th. The 16th is matters local and private, and they said in the Manitoba Licence Holders case that legislating with regard to drink did not fall under property and civil rights, but under head 16, matters local and private. I say it is exactly the same thing here. If the Province ~~x~~ was passing a Trade Disputes Investigation Act, it could pass it under section 92 head 16, because in its true aspect it would be legislation in respect of matters local and private in the Province, not property and civil rights. I think it is clear from the cases that if it was orginally under section 92, head 16, which is generally matters of a merely local or private nature in the Province, if it becomes of Dominion concern it transcends to that enumeration and passes into the peave order and good government section. There is a great distinction between section 92 head 16 and the other enumerations, because their Lordships say in one case the section 92 head 16 appears to them to bear the same relation to the other enumerations of section 92 that the peave order and good government clause does to the enumerations of section 91; that it is the general one. If you examine what is here being dealt with, it is something that would

fall under section 92 head 16. If the Provinces pass the Trades Disputes Act, with which the Dominion has no quarrel whatever, the Provinces might also pass a Trade Disputes Act under section 92, head 16, because it was of only Provincial concern, and such would be the case in 1900 before the Unions became highly organised, or before the labour Unions extended all over the Dominion, and were controlled from the United States, and in some cases from Russia. Now by reason of the organisation of the trade unions, they are no longer Provincial concerns only, because the whole texture of labour is such that a strike in one Province may at any moment cause a sympathetic strike in any Province.

LORD ATKINSON: I think you have what Lord Watson said in that case in your favour, that matters which are <u>prima facie</u> Provincial may so extend in area or position, and so on, as to become Dominion matters.

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MR DUNCAN: Is not it important that he uses the word "matters local and private". He does not say property and civil rights may extend to a matter of national concern, he says "matters local and provincial in their origin may attain such dimensions as to affect the body politic of the Dominion", and in another place he says local and private. "If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion in relation to matters which in each Province are substantially of local or private interest". He is referring to section 92, No. 16, saying that a local Regulation would fall under section 92, No. 16, as was subsequently held in the Manitoba Liquor case, that it was not property and civil rights being dealt with. I suggest it is not property and civil rights which this Regulation is dealing with, it is a dispute and a threatened industrial disturbance.

LORD ATKINSON: He is only giving a definition of a provincial thing which swells into a national thing.

MR DUNCAN: Possibly; that is referring to all the enumerations in section 92.

LORD ATKINSON: He said afterwards none of them could be overborne by the application of the principle of "peace, order and good government".

MR DUNCAN: If he stops there, that property and civil rights in the Province may attain national dimensions justifying legislation by the Dominion. I put a stronger case, where it is not property and civil rights, but originally a local and private matter in the Province, such as regulating a trade dispute, the necessity or the evidence required to take it out of section 92, No. 16 is far less than required to take it out of section 92, No. 13, "property and civil rights". That was the second test that was possible; first Russell v The Queen, then 1896 Appeal Cases, and the third test I suggest to your Lordships is the emergency test, which my friends rely on here, and the difficulty with that is that it is not mentioned in the Act, and I suggest

that the reading of sections 91 and 92 enables one to arrive at the true conclusion without resorting to an emergency, or putting a construction on the Act which requires an emergency.

VISCOUNT HALDANE: There was no emergency when the Act was passed, there was a certain amount of unrest or disturbance, but it was anticipation merely.

MR DUNCAN: The Act was passed under these circumstances. In 1906, the coalminers in the Province of Alberta went on strike. Winter was approaching, and the inhabitants of the Province of Saskatchewan and also British Colombia depend on the coal which comes from Alberta. The Government of Alberta were unable to do anything, or did not do anything, and the result was that the Dominion Government were being asked, and more or less urgently being asked by the Governments of the adjoining Provinces to come to their aid, because Saskatchewan could not possibly deal with the Alberta strike, which was not being dealt with, nor British Colombia. The people were without coal, and winter in the Western Provinces is of extreme rigour, where there are in many cases 60 degrees of frost, below zero, and it was a matter of acute importance. Mr Mackenzie King -----

VISCOUNT HALDANE: The Minister of Labour ?

MR DUNCAN: No, he was a Deputy, he went out and managed himself, as a Dominion representative, to bring about a settlement, and the miners went back to work, and coal was supplied to people who were liable to have been absolutely frozen out, and would have had to migrate to other parts if this had not been done. That was in 1907. At that time there was on the Statute Book the Statute of 1900, which was the Conciliation and Labour Act, and is printed in the Appendix here. It was not effective, and the Dominion Government, seeing the necessity, drew up this particular Act to deal with that situation.

VISCOUNT HALDANE: Will you tell me one thing; I have noticed there is an Act of 1906, and there is an Act of 1907; are they the same ?

MR DUNCAN: No, my Lord, the Statute of 1906 is of the

Revised Statutes of 1906; it was originally passed in 1900, and is called the Conciliation and Labour Act, and the Act now under discussion was first passed in 1907.

VISCOUNT HALDANE: I did not notice much difference between the two.

MR DUNCAN: There is a material difference; in the first place the parties are not allowed to strike under the later Act.

VISCOUNT HALDANE: That was introduced for the first time under the later Act ?

MR DUNCAN: Yes, because of what happened in Alberta. The principle is that in matters of vital interest to the community, these people may not strike until there has been an attempt made to bring them together by conciliation. It was in fact on that, as I suggest to your Lordship, that this Act was necessary- acute situation, not emergency such as war, but such as might arise at any time in Canada, where the Provincial boundary lines are not even geographical, they are merely an imaginary straight line, they do not follow a river, and there is no economic division between the Provinces, each Province is absolutely dependent on the other Provinces in many cases for their means of livelihood and everything like that; that is inherent in the economic situation. You must, I suggest, have a central control. If I may give an illustration, just before coming over here I happened to be in the coal district where this dispute arose. The men had gone out on strike again after having had a Board. Some of the mines in which the strike was going on were just across the imaginary border line of British Colombia, the remainder of the mines are in Alberta. If you had two separate Boards dealing with the danger from the United Mine Workers of America, No. 18, which is made a district because of the descriptions of mines and because the mines are there, you would have two separate Boards,because of this Provincial artificial boundary line, which might not bring in the same recommendations and might prolong the strike. I suggest it is impossible in economic

things like this, where conditions are in that economic state, to say: We must leave these things to the Province. It was because of that emergency in 1907 that this Act was passed by the present Prime Minister, or drafted by the present Prime Minister, and ~~kxs~~ he handed it over to Mr Lemieux, then Postmaster General, a Professor of Economics, and most vigilant of all to uphold Provincial rights, it has his name, because the Parliament of Canada, seeing the situation said: We must pass it. Now we come to the test. Is the Russell v The Queen test the one that it is directed to, "peace, order and good government", or is it directed to "property and civil rights" ? It is not; if anything it is local and private at first, and, as I suggest, transcended local and private and passed into section 91. Then the second test is the 1896 Appeal Cases. I suggest on that we succeed. The next test is emergency. Now what else could you have in the way of emergency ? I propose in a moment to deal with the evidence on that point, both the emergency then and the emergency in 1923. This is what happened in 1923. The Department of Labour had not in the past been applying this Act to Municipalities if they objected. It is said: We will leave it alone, there may be rejection, there may not; we will not be bothered with it. In this particular case, the steelworkers of Nova Scotia went out on strike, the British Empire Steelworkers Corporation. They are outside the Act. I suggest to your Lordship, if there is jurisdiction it is jurisdiction to cover all the employers because of the texture of labour, it runs all through, but they happened, for the moment to be outside. They struck, and the situation was acute. The coalminers of the British Empire Steel Corporation also struck in sympathy. Application was made at once by the Local Authorities for the Militia, because they were afraid of the ~~xx~~ situation. Troops were drafted from all over Nova Scotia and the surrounding military district, they were not sufficient. The Local Officer there, who has nothing to do with politics, he is an officer of the Permanent Force, requisitioned

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for more troops, and more and more troops were sent to that area, until every available man of the Permanent Militia of Canada was in Nova Scotia, from as far West as Winnipeg, over 1,000 miles to the West of Toronto; so that Toronto was standing there without troops at all, they were all in Nova Scotia. The Government at that time was receiving telegrams and other communications from Labour Unions all over Canada protesting against the movement of troops, and threatening strikes in other parts of Canada. A threat was made from the United Mineworkers of America, District 18, that is in Alberta; they actually went on strike because of that, and the telegram threatening it is in evidence here. There were other people and other Unions, many of them also protesting at that time, and in those circumstances this application was made for the appointment of a Board. The Minister was reluctant. The dispute, however, had been of long standing, over a year, the men had made application to the Provincial Government for the appointment of a Board under the Trades Dispute Act, and the then Minister of Labour, Mr Rollo, wrote back and said: We are not sure whether they are under our jurisdiction, we have not used our Act for many years, I do not know of any example, and I will consider it, and nothing was done. The dispute was critical. The leader of the dispute, a man called Gunn, who was called here as the first witness, was a known agitator, the only man who has ever successfully engineered a Police strike in Toronto which was successful, a man who, a little time before that, dealing with similar employees, electrical employees, had engineered a strike of the tramway employees at the time the Exhibition was on, when over 100,000 people, including women and children, were in the Exhibition, and they had all to walk home at great inconvenience. He was a ruthless agitator. This application came on before the Minister at that time, and in view of the critical situation existing in other parts of Canada, all the troops being down there, labour being very much agitated, and particularly in view of what the Minister knew of the then

mind of labour --he is a labour man himself, and he knew about the Winnipeg general strike, which was a strike at the very existence of Canada, engineered by the communist and soviet people and very nearly successful at one time --he appointed this Board. I suggest on the question of the emergency, if it is necessary it is there. I say emergency is inherent in the situation because of class feeling, and you never can tell with a strike, however innocent-looking it may be, that it will not spread to other parts of Canada. The Winnipeg strike started in the most innocent way, among a few people in a little concern in Winnipeg, and within a week of it it had spread to other parts of Canada and was a general strike. If emergency is necessary, I suggest to your Lordship it is there, but I submit that emergency always is inherent in this matter because of the Labour Unions being all over Canada, controlled in many cases outside Canada, and what Government other than the Canadian Government can deal with the situation ? It is not as if it were the alteration of a civil right here and there that is being discussed, it is the question of a large group of citizens liable at any moment, irrespective of the Provincial boundaries, to take action.

Now the fourth test that is before your Lordship I submit is the test which my learned friends have suggested, that x of interference. They say, Does this law interfere with any of the enumerations in section 92. If this is the true test, the curious result follows that the greater the interference the less the possibility of it being for peace, order and good governMent. The suggestion was made by my friend that interference on such a scale as this brings it outside the Act, it is a grievous interference with the right of persons to refuse to give evidence and so on, the interference is very great. Is interference the test ? I suggest to your Lordships that the only possible test is the one, in many cases founded on the words of the Statute, the aspect of the legislation. It is not, Does it interfere with it, but is it in relation to property and civil rights ?

LORD ATKINSON: The aspect of the legislation ?

MR DUNCAN: The aspect of the legislation.

VISCOUNT HALDANE: You say that is the test ?

MR DUNCAN: I say that is the test in many cases; it is in all four liquor cases, it is in the railway cases, and it is founded on the words of the Statute which give the Provinces jurisdiction ---

LORD ATKINSON: You must mean by "aspect" what it purports to have been designed to do or intended to do.

MR DUNCAN: Yes; what is its object and substance, what is it dealing with, is it dealing with property and xi civil rights. Now that is founded on the words of the Act, both section 91 and section 92. In section 92 it says: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects hereinafter mentioned".

LORD DUNEDIN: I do not quite follow you here; I do not follow how this can be a test.

MR DUNCAN: Interference.

LORD DUNEDIN: I understand your first proposition, as to what should be a test, but I cannot conceive any Dominion legislation which, if it is coercive at all, is not an interference with civil rights, and, therefore, if that is so, I do not see how interference can be a test.

MR DUNCAN: That is exactly my point. I say my friends have put that forward as a test, and I say it cannot possibly be a test.

LORD DUNEDIN: Then that is all right.

MR DUNCAN: I say that cannot be a test. I say one cannot conceive of any legislation which does not interfere either with property and civil rights, or rights in some other enumeration. On the construction of section 92, it has been clearly laid down by this Board that no Provincial Legislation can fall within more than one of the enumerations. that is to say yhat the enumerations in section 92 are mutually exclusive.

LORD DUNEDIN: Pardon me, I understand you put it that is a bad test as put by the other people, but the first test you gave

is a test put by yourself, not by them; the first test is, you look at the legislation; remember it is you that have to put forward the test. Indubitably this legislation does interfere with some rights, and, so to speak, begins with the question of being provincial legislation. Then you have got to rise it to the Dominion legislation under "peace, order and good government". I quite understand you put that test and saying the real test is the question as to the power over civil rights and peace order and good Government. That is the test in your mind and not theirs. In one sense you are rather shifting ground when you come to the test which is proposed by them, which you then say is bad.

MR DUNCAN: I wanted to cover all possible tests.

LORD DUNEDIN: Emergency I can understand; that is the Great War; I am very sorry, but your second point has always been elusive to me; I do not undestand what the second point is.

MR DUNCAN: The one under 1896 Appeal Cases, which introdueed the question of evidence. The way I put it is this, Russell v The Queen says you may look at the view of the legislation, and we are not concerned with evidence. 1896 Appeal Cases said it must not be assumed that any law ~~anar~~ which the Dominion Legislature establishes for peace, order and good government is of that class.

LORD ATKINSON: That is not what it says; it says, if you assume this for the purpose of the argument, every one of the things enumerated in section 92 must be dealt with as the regulation of peace, order and good government.

MR DUNCAN: The second test, I suggest, is 1896 Appeal Cases, which says you may look at evidence to see whether the matter originally local pr private has reached Dominion dimensions.

LORD ATKINSON: Has extended into section 91.

MR DUNCAN: Yes. That is the second, and that is the beginning of the emergency doctrine, because as put in 1896 Appeal Cases, it was not an emergency, I suggest, it was. Does it

affect the body politic, is it traffic in arms under such circumstances as to raise a suspicion that they may be used against a foreign State. Then the third test is emergency, and the fourth test I reject, with all deference to my learned friends. If I were asked to put the test, I should say this, the first test is the view, what is it, the second test is, is there any evidence of actual conditions showing that that was not the true view ?

LORD ATKINSON: The true view of the legislation ?

MR DUNCAN: The true object and so on.

LORD ATKINSON: Is that repealed by the terms of the Act they passed ?

MR DUNCAN: By the terms of the Act if there is no evidence to the contrary. Just as showing that it cannot possibly be that interference is the test, that is not the word of the Act, it does not say: We give to the Provincial Legislature sovereign powers over all kinds of property and civil rights and you must not interfere with them. The test is, is it in relation to property and civil rights. May I refer your Lordships to 1896 Appeal Cases, at page 365. There your Lordships see: "It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or by the other of these heads", it is not necessary to determine whether it is 13 or 16. "It cannot in their Lordships' opinion be logically held to fall within both of them". Then in the Attorney-General for Manitoba v The Manitoba Licence Holders' Association, in 1902 Appeal Cases, your Lordships will see at page 78, "Although this particular question was then left apparently undecided" , that is whether local legislation falls within section 92, No. 13, or section 92, No. 16 -- "a careful perusal of the judgment leads to the conclusion that, in the opinion of the Board, the case fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion. In legislating for the suppression of the liquor traffic the object in view is the

abatement or prevention of a local evil, rather than the regulation of property and civil rights--though, of course, no such legislation can be carried into effect without interfering more or less with 'property and civil rights in the province'. Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter.". On the point Lord Atkinson made, if it is 92 No. 13, it could never become a Dominion concern.

VISCOUNT HALDANE: What is troubling me throughout is that looking at this, it seems to me clear that the Province could have passed it, it was within the competency of the Province.

MR DUNCAN: Yes.

VISCOUNT HALDANE: The only thing left in it is, only one Province has passed it.

MR DUNCAN: Four Provinces have passed it.

VISCOUNT HALDANE: One province has passed it for Ontario, four provinces may have passed it.

MR DUNCAN: Yes. Five Provinces passed it. British Colombia repealed it by the Obsolete Statutes Act. Manitoba has no appropriation for it this year. In Quebec it has been held not <u>ultra vires</u> but the Dominion Act held <u>intra vires</u>, and the only remaining Province, Nova Scotia, passed it in 1923, and I am informed, there is no application under the Act in Ontario, and the evidence shows that the Act is not applied, is not used, and no application has been made for many years.

VISCOUNT HALDANE: Nor under the Dominion Act until the present time.

MR DUNCAN: With respect, applications were made.

VISCOUNT HALDANE:- For the Board?

MR DUNCAN:- Yes.

VISCOUNT HALDANE:- But only as regards this particular principle, this is the only case.

MR DUNCAN:- No, the Act has been constantly applied to these particular people at other times, and there have been one or two other cases in which municipalities it has been applied to without consent, but generally the practice of the Department was not to apply it to municipalities without consent. It has been applied to hundreds of cases other than the cases of municipalities within Ontario and within all the other Provinces.

VISCOUNT HALDANE:- Miners and railwaymen?

MR DUNCAN:- Yes, those within the purview of the Statute, but in Ontario in many cases since 1907; some hundreds of cases have been dealt with under the Act all over Canada as the evidence shows. I might be indeed driven to this -- I am not using "driven" in any terrified sense -- we must show that it falls not under 92, No. 13, but under 92, No. 16, a Provincial Act under 92, No. 16.

VISCOUNT HALDANE:- Why not under section 92, No. 13?

MR DUNCAN:- Because it is so much easier under section 92, No. 16.

VISCOUNT HALDANE:- But section 92, No. 16 is a mere generality, and section 92, No. 13 is a very specific thing?

MR DUNCAN:- Yes, but in substance the Act is not if one takes the Provincial Act, an Act which you might classify under section 92, No.13.

VISCOUNT HALDANE:- I do not know.

MR DUNCAN:- I suggest not.

VISCOUNT HALDANE:- Why not?

MR DUNCAN:- I suggest the object of the Act was not to alter "civil rights", but it was to deal with a local and private disturbance.

VISCOUNT HALDANE:- What difference does it make if in the carrying out of it the machinery interferes with "property and civil rights"?

MR DUNCAN:- That is the very point that Lord Macnaghten makes in the liquor legislation in the last case.

LORD ATKINSON:- Long ago all the legislation that was placed against heretics was not done for the purpose of killing them, but to prevent them spreading false doctrines and professing a false faith. The machinery may interfere with civil rights although the object may be different.

VISCOUNT HALDANE:- I think the object was to interfere with civil rights.

LORD ATKINSON:- I think it was; they both existed.

MR DUNCAN:- But, my Lord, is that the test, is interference with civil rights the test; it does not say so in the Act.

LORD ATKINSON:- Why on earth should it say so?

VISCOUNT HALDANE:- Do you mean the test of validity?

MR DUNCAN:- Yes, or the test of classification.

VISCOUNT HALDANE:- The Dominion of Canada have no power to interfere with No. 13 of section 92 unless that power is expressly enumerated in section 91, or is something implied.

MR DUNCAN:- I am speaking for the moment on the test of classification. If one is to classify the Provincial Trades Disputes Act, under what enumeration in section 92 would one place it?

VISCOUNT HALDANE:- Why should you classify it; it may come under different heads.

MR DUNCAN:- In 1896 Appeal Cases they held that legislation cannot come under more than one head logically.

VISCOUNT HALDANE:- Not under more than one?

MR DUNCAN:- Not if the legislation has only one object.

VISCOUNTK HALDANE:- Where did they say that; I want to see that?

MR DUNCAN:- At page 365 of 1896 Appealx Cases Lord Watson says: "It is not necessary for the purposes of the present appeal to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the

one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them".

VISCOUNT HALDANE:- Well, go on.

MR DUNCAN:- "In sectionn 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peacem order and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in section 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have bee omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated".

VISCOUNT HALDANE:- That is explaining the interpretation; he does not for a moment say a thing is not local because it affects civil rights; it may come under both. All he says is in No. 13 civil rights is something different from No. 16, which is a sweeping up section carrying in all things that are not enumerated, just like the peace, order and good government sweeps up things in section 91.

LORD DUNEDIN:- I confess I find it a little difficult. Nobody knew what Lord Watson meant better than Lord Macnaghten but it is difficult to reconcile those two sentences. The one on page 365 of 1896 Appeal Cases is where Lord Watson says "It" -- that is No. 16 -- "assigns to the provincial legislature all matters in a provincial sense local or private whi h have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated". Lord Macnaghten in 1902 Appeal Cases says: "A careful perusal of the judgment leads to the conclusion that in the opinion of the Board the case falls

under No. 16 rather than under No. 13". I have read the other sentence as precisely the opposite.

VISCOUNT HALDANE: I should have thought so; I think Lord Watson was saying that No. 16 is not tautologous, it is sweeping in something not enumerated. I find Lord Macnaghten's sentences a little obscure.

LORD ATKINSON:- If there was an Act passed which enabled some things like money to be recovered from a man by execution, if the execution was put in force, and it was properly situated in the Province, and it was seized, and it was held afterwards all that procedure was unlawful, would not it affect his property, his civil rights, and fall within a local matter, the property being situate in the Province?

LORD DUNEDIN:- I wish Lord Macnaghten was here; I think Lord Macnaghten was getting at our old friend Russell v The Queen. He says: "Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter". That is to say it might be questionable whether Russell v The Queen was rightly decided.

SIR JOHN SIMON:- Do not you think, my Lord, that Lord Macnaghten had his eye on the passage at the very top of page 365 in 1896 Appeal Cases: "It is not impossible that the vice of intemperance may prevail in particular localities within a province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling prima facie within No. 16". I do not know, but it seems to me to be so.

VISCOUNT HALDANE:- If there is a particular village with a great deal of drunkenness it may be thought that it would be proper to deal with it under No. 16, but it would none the less be an interference with the civil rights of the people of the village to enjoy their liberty to get drunk.

LORD DUNEDIN:- You do not make it easier for me, Sir John; look at the next sentence: "In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province where prohibition was urgently needed". That is to say in other words Russell v The Queen could not be supported if it was under No. 16, whereas Lord Macnaghten says it could not be supported if under No. 13, it could only be supported under No. 16. It is not altogether easy to reconcile.

VISCOUNT HALDANE:- It might come under both, but No. 16 is only a sweeping up clause.

LORD DUNEDIN:- I do not think really in the long run it much matters because you always come to this, if you begin with the hypothesis that it either comes under No. 13 or No. 16 you have always got to go back to this: Well, there is such a state of affairs, so to speak, left out of it, and you put it in the general power of the Dominion under peace, order and good government.

MR DUNCAN:- I am not labouring that point any further my Lord.

VISCOUNT HALDANE:- Then we will adjourn.

(Adjourned until to-morrow morning).

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IN THE PRIVY COUNCIL.

On Appeal from the Appellate Division of the SUPREME COURT OF ONTARIO.

Between:

TORONTO ELECTRIC COMMISSIONERS

and

SNIDER & OTHERS.

and

THE ATTORNEY GENERAL OF CANADA,
and
THE ATTORNEY GENERAL OF ONTARIO

THIRD DAY.

Thursday, 20th November, 1924.