2, 1925

5

IN THE PRIVY COUNCIL.

Council Chamber, Whitehall, S.W.1,
Monday, 24th 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.).

SIR JOHN SIMON: My Lords, I tender my apologies to the Board because I have not been physically present, owing to circumstances, which, I think your Lordships will realise, were rather exceptional, but I have taken the most abundant care to make myself acquainted with all that has passed, and I think I can promise that, if I take advantage of your Lordships' indulgence and ask if I may add a few words to my friend Mr. Duncan's argument, I shall be able to do it with knowledge of what has already passed. My friend Mr. Duncan has taken the labouring oar here, and I need hardly say that I am very greatly indebted to him, as I have no doubt the Board is. What I wish to do is to submit to the Board in very compendious terms what further appears to us important to argue for the respondents, and I will do it quite briefly, remembering, of course, that your Lordships, in view of the importance of this case, would be willing, besides hearing me, to hear my friend Mr. Clauson for the Attorney General for Canada, and remembering that the Attorney General for Canada will be able to speak through his own counsel.

My Lords, the point which my friend Mr. Duncan has been urging, and which, I have no doubt, is fully before your Lordships' minds as the real centre of our argument, is, if we may eschew the language of metaphor and of the phraseology, which is not precisely the phraseology of the British North America Act, the real test of the matter is whether or not a particular piece of legislation is a piece of legislation which, in the actual words of these two sections, comes within a class of subjects, or, rather, whether it is in relation to a matter which comes within a class of subjects here listed. Other expressions, such as interfere with or trench upon, are very valuable, of course, as being a judicial exposition of what must be considered, but, after all, the actual question, if we put it in the terms of the statute, is: Taking this legislation, is it legislation with regard to a matter coming within a class of subjects listed, and, if so, what class? I observe that in the course of the

argument on Friday that there was some debate as to whether or not that is exactly the same thing as seeing whether it interferes with. I merely give a single instance as I go along, because I want to get to the heart of the argument here without more analogy. Take this illustration, this is a very simple one: Supposing that you have before you a piece of legislation which provided for the laying down of mains underground in a street, it might be for the purpose of sanitation or electric supply, or what not, there can be no question at all that such legislation interferes with street traffic: there cannot be the least doubt about that; it might prevent it altogether for a long period of time, but, none-the-less, it would obviously be a wrong classification to say that that as legislation trenched upon or came within a head, if there was such a head, of street traffic, because after all, the class of subject which is being dealt with, and the matter in relation to which the legislation operates and is passed, is nothing to do with street traffic, though it very grievously interferes with it. That is a mere illustration, of which all your Lordships are perfectly apprised of more important instances.

My Lords, this is my point. If you take the Record and look at Mr. Justice Orde's judgment, you will see that the learned Judge fell into a very grave error in his view of the scope of this legislation. It is on page 9. There is no authority for saying that in judging whether one of these Canadian enactments is or is not <u>intra vires</u> one has to look at the enactment as a whole, or, at any rate, has to consider it by reading it as a whole, and the learned Judge, Mr. Justice Orde, with great respect to him, whether his ultimate decision is right or wrong, has grievously misapprehended and exaggerated what this statute does. May I read to your Lordships -- it has not been read since the beginning of the argument I think -- a few lines from page 9, beginning at line 7? He describes this portion of the statute in these words: "Sections 56 to 59 contain

extremely drastic provisions designed to preserve the status quo from the moment the Minister grants the application for a Board until it has made its report." -- I ask your Lordships to observe this sentence -- "Notwithstanding that the several contracts of employment may have come to an end, or be subject to cancellation for cause, neither of the employers on the one hand nor the employees on the other, can exercise their ordinary civil rights of bringing the engagement to an end, or of refusing to renew upon the same terms, if either party sees fit to apply for a Board of Conciliation, without subjecting themselves to serious penalties." While I agree that if that was indeed an accurate description of this statute my task for the respondents would be a far more difficult one, if you turn to the Joint Appendix, at page 53, you will see that the learned Judge in that passage has quite misunderstood what is the scope of this legislation. It is not true that the result of this legislation is to prevent a contract of employment expiring, or to prevent the dismissal of a man for cause, or to prevent the determination, in the course of the ordinary civil right of an ordinary individual, whether of the employer or workman, of any contract that is going on. All those things remain exactly as they were before. The only thing which the statute deals with is this: It holds, I agree, in suspense the power, if, indeed, the power otherwise existed in 1867, as to which I shall have a word to say in a moment, of the work people striking, which does not mean an individual ceasing to work at all, but means a combination, or, as our common law would have said, a conspiracy of persons to act together by way of a strike for the purpose of putting pressure on the employers, or <u>vice versa</u> action by the employers, not in relation to a workman, but in relation to the doby of his work people, in order that he may improve conditions from his point of view. Will your Lordships look at section 56: "It shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute prior

to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act, or prior to or during a reference under the provisions concerning railway disputes in the Conciliation and Labour Act: Provided that nothing in this Act shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein for any cause not constituting a lockout or strike." Take the instance, first, therefore, of a man who is employed by a contract, under which he has to work down to a particular date, or until he has finished a particular job, and then there are no further contractual relations between the parties, there is nothing in this legislation to say to the employer: You must go on employing him. Take the case of a man who is entitled to say to his employer: You have employed me to do one thing and you were willing that I should do another, but I do not want to do the other; I have a better job; I will go elsewhere, or retire on my means; there is nothing to stop that.

VISCOUNT HALDANE: What about section 57?

SIR JOHN SIMON: "Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours". It does not even cover other conditions; it is wages or hours. It is perfectly true that if the employer says to his men: Up to now you have been working so many hours a week; unless you are prepared to work more hours a week, I declare a lockout; it is perfectly true if the workmen say: At present you are only paying us wages at so much an hour, we require more wages an hour ----------

VISCOUNT HALDANE: It goes beyond a strike or a lockout.

SIR JOHN SIMON: Is that quite so? I confess I had thought that one had to read the two sections together, and the result of it was that the proviso in section 56 is really a finger post for the clause; "Nothing in this Act shall prohibit the suspension or discontinuance of any industry". Take, for instance, in the Summer the demand for electric light in Toronto is not as high as in the

6

Winter, and they may reduce the number of people whom they employ.

VISCOUNT HALDANE: Are not the terms of the contract altered? Will you read the beginning of section 57?

SIR JOHN SIMON: "Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours".

VISCOUNT HALDANE: That is general.

SIR JOHN SIMON: Yes, and I would agree, I am anxious not to put the matter a shade too high, that, supposing the employers were desirous of reducing hours or extending hours, or supposing that the work people were desirous of a change in the other direction, that section 57 applies. We shall see in a moment the Common Law which Canada got by the transfer of 1867. It is very important to see whether it is a branch of criminal law, but my point is that this legislation is legislation which does not, as Mr. Justice Orde thought, interfere with the prevention of contracts of employment which have come to an end, or interfere with the termination of contracts.

LORD ATKINSON: It provides that a dispute is to be determined, and neither of the parties shall alter the conditions of employment with respect to wages or hours?

SIR JOHN SIMON: Yes, that is exactly what a strike or a lockout is for. The workman strikes because he wants to get more wages, and the employer locks out because he wants/to pay lower wages.

LORD ATKINSON: That would extend to an alteration by consent?

SIR JOHN SIMON: It might, I agree; but your Lordships will appreciate my point. If you consider the life of the factory, there is nothing in this legislation which prevents the employer saying to

AB: You are not satisfying me, and if he, for genuine reasons, says: I terminate your employment, not because he is going to lower wages or increase hours, but because he does not want the man, and the man is equally free to do the opposite.

LORD DUNEDIN: There is this difficulty. I will assume for the moment that you have made good your point that Mr. Justice Orde has gone

too far. There is still left undoubtedly, under the Act, certain provisions which prevent people doing what they otherwise might do, if it was not for the Act. In so far as they may deal with that it seems to me to be dealing with civil rights. For the moment I do not see what you gain by, to a certain extent, knocking the learned Judge on the head for what he has said.

SIR JOHN SIMON: I take no pleasure in that, especially when he is not here, but I think the point is important in this way, if I may put it to Lord Dunedin. My submission is going to be, among other things, and this is a view of the case which I rather think has not yet been developed by my friend Mr. Duncan, because we rather agreed that we should divide this into compartments, that the topic or head of Criminal Law comes in in this way. Let me assure your Lordships at once that I am not going to argue the proposition that if on other grounds this is ultra vires it becomes intra vires because penalties are enacted; that is a hopeless proposition, and I shall not argue it, but for a wholly different reason. It is a very remarkable fact that in the Canadian constitution, as framed in 1867, you find nothing at all about industrial conciliation or disputes. The reason, as I will show your Lordships in a moment, is this, and it is very interesting when we come to contrast it with the Australian constitution of 1906, that Canada took over the criminal law of this country as at a certain date, which I will call attention to, and that, if you once draw the distinction between the undoubted civil right of every Englishman to say to his employer: I give you notice that I wish to leave, and the right of every employer to say to the workman: I give you notice that you are to go, and contrast that with what is a wholly different thing, namely, the attempt of work people to combine for the purpose of putting pressure upon their employers to improve the conditions as regards wages and hours, you find that you pass, your Lordships will forgive me for using the metaphor, into the realm of what was criminal law in this country, and it was not

until the subsequent legislation, which my Lord Haldane knows so very well, because he served on the Commission on the subject, it was not until later statutes in this country that the workman's right to combine for the deliberate purpose of bringing pressure upon his employer by conspiracy, as it was called by the Common Law, to improve conditions and hours was recognised as lawful.

VISCOUNT HALDANE: That is true of the workman, but is it true of the employer?

SIR JOHN SIMON: That was one of the points brought before the Royal Commission. I know because I have read the proceedings with great interest. Let us leave the employers' side out, and take the workman's side. Your Lordships will find, if you look at the Australian Constitution, which was drawn up in the year 1906, that this precise topic of legislation in regard to industrial disputes and conciliation is given in terms as a special head. If you had asked the fathers of confederation, or, perhaps I had better say, skilled and competent lawyers, in 1867, the moment this statute had been passed: Can the Dominion Parliament codify and it may be to some extent alter and extend the law which prevents combinations for the purpose of altering conditions of wages and hours, I venture to think that the answer would have been: Certainly. It was in fact, in the view of most ENglish lawyers of the time, already a branch of the common law, the criminal law of England. It has been made the subject of statutory enactment under the Combination Laws of 1900. It was, again, in a slightly different form, made the subject of statutory provision in 1825. Chief Justice Erle, who himself, your Lordships will remember, was the Chairman of the earlier Commission, in Hilton v. Eckersley, in 7 Ellis and Blackburn, made use of an expression, in which he said that such a combination is a conspiracy under the Criminal Law, and, therefore, if the Parliament of Canada, after it had been constituted in 1867 had said: We do not care about the Common Law of England, let us codify it; and if they had written down: It shall be an offence punishable by fine

9

and imprisonment for people to combine, not for the purpose of exercising their own individual civil right, but for the purpose, by combination and pressure, of bringing about an alteration of wages or hours; that would be a legitimate exercise of the powers of the Parliament of Canada to legislate in relation to a matter included in the class of Common Law. When you come to 1900, then, of course, as a result of English legislation, as my Lord knows so well, you have the change, so that today no doubt it is no part of the Criminal Law of England. Whether it could be made so in one of His Majesty's Dominions by a legitimate exercise of the power to make Criminal Law is a question which I need not trouble about. I am not in the least arguing that the thing comes within section 91, Criminal Law. The point is that the topic of combinations such as strikes, I will leave out lockouts for the moment, is a topic which, of its nature, at the time when the British North America Act was passed, might well be regarded as a topic of that character.

VISCOUNT HALDANE: Is it not primarily a civil topic?

SIR JOHN SIMON: I venture to submit there is a difference between a civil right and an individual which is unquestioned and unquestionable, and the public right, or the public wrong if you like, which it is the object of the Criminal Law to define and to restrain. May I give your Lordships one reference, and then I am going to submit that there are four or five pages in Sir FitzJames Stephens' history of the Criminal Law which really bring our minds to the kind of atmosphere at once. What was the law of Canada in 1867? The answer is this. The date, I think, of the passage of the British North America Act is 29th March, 1867. If you had occasion to enquire what was the body of Criminal Law which existed in Canada at that date, we have to apply a well known principle, but we also have to have regard to another thing. English Criminal Law was transported, perhaps I may say, by 40 George III, Chapter 1, Section 1, to Upper Canada, as it was then; it does not apply to Quebec. It was the English

10

Criminal Law fixed as at the 17th September, 1792.

VISCOUNT HALDANE: That was the Province of Canada?

SIR JOHN SIMON: Your Lordship will remember the story well. The Constitution Act of 1791 divided greater Canada into Upper and Lower Canada.

VISCOUNT HALDANE: It divided the Province of Canada?

SIR JOHN SIMON: Yes, the Quebec element, the French element, has its own traditions and system of law; it is more favourable than the British Law on this subject; but we are not concerned with that, because this is Toronto. If we take what was called Upper Canada, the result of the Constitution Act, which is an Imperial Act of course, 31 George III, Chapter 31, had created Upper Canada, which is now in substance Ontario; it had created a legislature for Upper Canada. The date on which that legislature began to function was, in fact, 17th September, 1792.

VISCOUNT HALDANE: It became a separate Province?

SIR JOHN SIMON: Yes, and it had its separate legislature, and the theory was that the Province had to be started off with a system of Criminal Law, and, therefore, the Criminal Law of Ontario is, in fact, the Criminal Law, so far as it is capable of being transplanted from the Mother Country as at 17th September, 1792, and if your Lordships care for the reference that is to be found in the Act of Upper Canada, 40 George III, Chapter 1, Section 1, which fixes as at the 17th September, 1792, the Criminal Law in that area as being the English Criminal Law, subject to certain statutory alterations which the Ontario Legislature subsequently chooses to make. That being so, the question would come to be this. If we were to imagine ourselves a body of lawyers advising the Parliament of Canada in 1867 as to whether it could or could not put down in black and white divisions, such as my Lord Atkinson has referred to, codifying the law, ~~a~~ of conspiracy, so far as regards strikes and lockouts, the position

undoubtedly would be that they could. They did not, in fact, do it, because they already had the English Common Law transferred, but the question was not whether they did, but whether they could do it.

VISCOUNT HALDANE: They could have altered the English Common Law?

SIR JOHN SIMON: Yes, or codified it.

VISCOUNT HALDANE: They could have acted under the Criminal Law head of section 91.

jl

SIR JOHN SIMON: Undoubtedly, therefore if in 1868, taking the year in which the Dominion Parliament was called altogether they had said, as indeed the lawyers on the other side of the boundary said after the Declaration of Independence: We do not like this common law; let us write it down; let us make out our own law; if the Canadians had said: We will have our own law in black and white, undoubedtly the Dominion Parliament could have said:We will legislate that itis a criminal offence for workmen to combine for the purpose of improving their conditions as regards hours and wages. That is criminal conspiracy. What did this legislation do? It does not go nearly as far as that. All it does is this: It says: call it what you will, conspiracy or no conspiracy, we at any rate will prevent you from carrying that conspiracy out until a certain event has happened; we insist that there shall be a pause, during which an inquiry may take place and a report may be made.

VISCOUNT HALDANE: Did not they therefore alter civil rights?

SIR JOHN SIMON: My argument is, if it is once agreed that they could have legislated for the whole thing, they plainly can do what is much more than the whole thing, say it is a statutory crime.

VISCOUNT HALDANE: They could alter the criminal law no doubt, or the statute of the United Kingdom, but had they power to make new laws regulating rights between emplyers and employees?

SIR JOHN SIMON: Is not there a great danger, if I may put it in that form, that we may possibly be rather begging the question. After all it must be agreed that the classes, or the matter which is in relation to the classes of the subject of civil right is not the same thing as the matter which is in relation to the subject of criminalllaw.

LORD DUNEDIN: When you enact a new criminal provision, do not you always interfere with the civil right?

SIR JOHN SIMON: Yes, you do. Let us suppose you pass a larceny Act. We passed one a few years ago which defined the law, and also

had provisions which were new. If we provided that if anyone obtained money by menacing or blackmailing an individual, that is larceny that might be depriving such individuals of their civil rights.

VISCOUNT HALDANE: Supposing you said you are not to alter your contract without 30 days notice; that is a civil change.

SIR JOHN SIMON: With great respect does it quite say that. If you have a contract which extends over 30 days between A and B, there is no provision which would enable either party to break it.

VISCOUNT HALDANE: Supposing you have 3 days to go of this contract under section 57 you have to give at least 30 days notice of any change in the conditions as regards hours or wages, is not that an alteration?

LORD ATKINSON: If a man is hired on the terms being of being able to terminate his employment at 6 days notice, and you say he is to continue for 30 days, do you not interfere with his civil rights?

SIR JOHN SIMON: That is not what it says. The whole subject of sections 56 and 57 is this. It has never been the common law of England that I as employer, and A.B. as workman were not at law to give proper notice to one another and terminate our engagement, but it has been the common law of England that my workpeople cannot combine together in order to give me contemporaneous notice for the purpose of putting pressure on me to improve the conditions.

VISCOUNT HALDANE: That is another thing.

SIR JOHN SIMON: That is the contrast.

VISCOUNT HALDANE: It seems to me to be a very substantial alteration of the civil rights of employers and conversely of the employed to insist on his contract.

LORD DUNEDIN: Suppose we read the condition as a general condition let me put this case. A workman is engaged to do 8 hours a day, and the condition of his employment is a weekly

engagement, and there has to be on each side a week's notice. If I understand you aright, you said you must not give up the employment as a general proposition without 30 days notice, and I say I am going to have a 9 hours day for all of them.

SIR JOHN SIMON: Yes, my Lord, may I add: if you do not agree I will lock you all out.

LORD DUNEDIN: Supposing you say to a particular single workman, not to them all generally: I shall not take you, John Jones, back again unless you work 9 hours, could you do that without 30 days notice to John Jones?

SIR JOHN SIMON: It would be a nice question whether this covers it or not; I confess I should rather have doubted it. It depends on one of those inferences which makes the perplexity of the law of comspiracy; it depends on a very metaphysical thing; it depends on whether when these things are done as Lord Justice Romer used to say, they are done with justification or excuse, or whether they are done for the purpose of exerting pressure, or in the exercise of a bona fide civil right, and those are very fine distinctions which I should be sorry to expound exhaustively today, but my proposition would be that supposing you had a body of workmen, let us take a trade union, which says we are going to get our work people better wages; we are not going to break his contract; we will give notice, and we will inform the employer that unless he agrees to improve the wages there will be a strike, my proposition would be that that was regarded by the common law of this country as illegal; certainly a great authority thought it so, and at any rate, it would be a bona fide exercise of the powers to legislate in respect of the matter of criminal law to declare in plain terms that it was illegal. Then the argument would be that since the greater must include the less, it is not really legislation in relation to anybody's civil right, but is legislation in relation to a public right, or if you like, a public wrong, which

is involved if you restrict the exercise of the right to strike.

VISCOUNT HALDANE: In the particular circumstances. If a man has been employed for a weekly job, and they give him 10 days notice, is there any provision which says you must not give him notice?

SIR JOHN SIMON: Undoubtedly there is no such provision, but would your Lordship for a moment hesitate before saying it is otherwise here.

VISCOUNT HALDANE: Looking at the construction of section 57?

SIR JOHN SIMON: I should suggest that section 56 and section 57 have to be read together.

VISCOUNT HALDANE: Is not section 57 an independent provision?

SIR JOHN SIMON: I doubt very much that that is the right construction.

LORD SALVESEN: It is all under the general heading.

SIR JOHN SIMON: Yes, it is all under the general heading "Strikes and lockouts prior to and pending a reference to a Board illegal". Your Lordships will forgive me if I go back to section 56, but after all it is the first and presumably the main provision: "It shall be unlawful" -- that is where criminal matters comes in -- "for any employer" -- not any employee -- "to declare or cause a lockour, or for any employee to go on strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act, or prior to or during a reference under the provisions concerning railway disputes in the Conciliation and Labour Act; Provided that nothing in this Act shall prohibit the suspension or discontinuance of any indutry or of the working of any persons therein for any cause not constituting a lockout or strike".

VISCOUNT HALDANE: That is in respect to disputes between employers and employed prior to the Reference?

SIR JOHN SIMON: Yes. I was going to say one more word about it.

LORD DUNEDIN: Before you go to that may I tell you what I thought, namely, that section 57 is a mere appendage to section 56,

section 56 being the penalty clause, and section 57 providing that they should have 30 days notice.

SIR JOHN SIMON: In order to confirm your Lordship's view may I say that section 57 has been amended, and it is important to notice that. If you turn to page 30 you will see it confirms what Lord Dunedin says. It is plain that section 57 is a mere appendage to section 56, and this is merely saying that if there is a change affecting conditions, there shall be an opportunity of inquiring into the matter before the flames burst out. At page 30, line 12, is section 5 of the later Act;"Section 57of the said Act, as amended by section five of chapter 29 of the Statutes of 1910, is hereby further amended by substituting for the words in the first six lines hereof down to 'alter' inclusive the following". This is what we must do reading section 56 as the main condition which says that "Employers and employees shall give at least thirty days' notice of an intended change affecting conditions of employment with respect to wages or hours".

VISCOUNT HALDANE: This only applies to industries to which the Act applies?

SIR JOHN SIMON: "Employers and employees shall give at least thirty days notice of an intended change affecting conditions of employment with respect to wages and hours; and in the event of such intended change resulting in a dispute" -- which it may very easily do -- "until the dispute has been finally dealt with by a Board, and a copy of its report has been delivered through the Registrar to both the parties affected, neither of those parties shall alter", the conditions of employment with respect to wages and hours.

VISCOUNT HALDANE: Supposing the workman says to his employer: I have been working for 8½ hours, I am only going to work for 8 hours, has he not to give 30 days' notice, or ifthere is a dispute going on, until the end of the dispute?

SIR JOHN SIMON: What is contemplated is a state of things in which

6

you can ask: How many hours do people work in a certain industry, and then supposing the workmen were to say, that is too long ----

VISCOUNT HALDANE: Or a workman?

SIR JOHN SIMON: I am not sure that one workman could do it.

VISCOUNT HALDANE: I am looking for the element of conspiracy.

SIR JOHN SIMON: There have to be 10 workers affected.

VISCOUNT HALDANE: I am not quite sure about that. For some purposes 10 have to be affected, but it does not say for all purposes.

LORD DUNEDIN: What makes me rather think that a single workman could not do it is the other words I do not think one man can strike, and if you send away one man because you do not like him it is not a lockout.

SIR JOHN SIMON: No.

LORD ATKINSON: If 10 men strike each man is concerned with that strike.

SIR JOHN SIMON: Yes, and that is really at the heart of a good deal of this question about it being a conspiracy as to whether particular cases are within the criminal law of conspiracy or not. No doubt your Lordships will recall that whereas Chief Justice Erle and some other very distinguished Judges in the last Century thought it was, a most distinguished Judge of the High Court, Mr. Justice Wright, in his book tried to show that it was not. It does not matter to me. The question as to ~~what~~ a particular right in relation to criminal law cannot depend upon whether Chief Justice Erle or Mr. Justice Wright understood the criminal law best. The question is whether it is a topic of that character, and if it is quite enough criminal law for me. I do not know whether your Lordships would think it convenient if I reminded you of a passage in the ~~short~~ 3rd volume of Sir James FitzJames Stephens criminal law. He begins at page 203. I think the four or five pages which follow give one in the most admirable compendious form what

is necessary to be reminded of on this subject. It is Sir James FitzJames Stephens history of the Criminal Law of England, Vol. 3. It was written in 1883. The page is 203. This is a work of great interest and authority, and if I can summarise it it will save your Lordships time. What the learned author points out is this. He points out that really this view about there being something in the nature of a criminal conspiracy if you have a combination for the purpose of raising wages, really goes back to the time of the statute of labourers. The truth is after the Black Death when the statute of labourers was passed, there developed in this country a view that really it was the business of Parliament and the State to fix people's wages and so forth, and that therefore while individuals no doubt had the right to give notice, or might in some cases have a right, it was also disputed that they had any business to combine for the purpose of forcing up things. In the 18th Century that was very greatly supported by another view, the view of the economists who took the view that wages will always find their own level by the action of economic forces, and really to try and combine for the purpose of altering rates and wages was almost as vile a crime as if you tried to improve the pressure of the atmosphere by tampering with the barometer. Their theory was that wages were what they were as the result of the economic forces, and Sir James FitzJames Stephen points out that under those two influences, one the historic influence, and the other economic influence, there was a body of doctrine in this country at that time, and that all this kind of matter was criminal, and he gives the essential references. After referring to that early period, he then points out that later on the Chairman of the Trades Unions Commission reported in 1869 wrote a very elaborate memorandum. 1869 is two years after the British North America Act. He refers to the history of the combination laws. The essential facts are that there

was a statute passed in 1800, a time of very great domestic disturbance. and there was an attempt by Mr. Joseph Hume to repeal the combination laws. At first they were repealed in rather a wholesale fashion, but subsequently they were watered down to much what they were before. Then right down to 1871 a workman if he combined with his fellows was in a considerable state of danger, because he was always liable to be indicted, not because he was not entitled individually to give notice, but because if it should be shown that he really was combining for the purpose of bringing pressure upon his employers to settle an industrial dispute with him to his own advantage, that was or might come within the criminal legislation.

Sir Fitz James Stephen says: "The most important of these is the dictum of Mr. Justice Grose in Rex v. Mabey: "In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual, without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages; each may insist on raising his wages if he can, but if several meet for the same purpose it is illegal and the parties may be indicted for conspiracy.'" Then he points out that in the well known case of Hilton v. Eckersley, in 5 Ellis and Bladkburn, the case about the employers in Lancashire who agreed together that none of them would never pay more wages to any one of their work people and would fix the wages by consultation together and would give their bond so to do. Eckersley gave the bond, and he was sued on it, because he gave more wages to his work people, and got all the work people, and it was held that they could not recover on it. There you get something that the Courts would not assist, because it is criminal in its nature.

VISCOUNT HALDANE: The idea of that is restraint of trade; it is all the outcome of the old fashioned doctrine as to restraint of trade.

SIR JOHN SIMON: Yes.

LORD DUNEDIN: What Commission did you refer to on which Lord Haldane sat. I think you must be thinking of myself. I was Chairman of the Trade Disputes Commission.

SIR JOHN SIMON: I think that must be it, my Lord. I do not know to whom I should apologise, but I sympathise with both of your Lordships. I submit that shows how plainly this would have been the 70's of the last century as being in relation to Criminal Law. Would your Lordships be good enough to look at 5 George IV, Chapter 95, which was the law which replaced the Combination Act of 1800. It only stood on the Statute Book for twelve months. This ~~in~~ Act was the work of Mr. ~~Justice~~ Joseph Hume and the Radicals. It was repealed in the next year, and the exact result has, of

course, always been a matter of very serious dispute. Mr. Justice Wright exerted his very ingenious and powerful mind in the direction which one would rather expect; he took a very sympathetic view of this before ever the Trade Unions Acts of 1871 and 1875 were passed, that, as a matter of fact, it was a historical mistak to suppose that workmen could not combine in the way suggested. Other people took a different view. The recital of this Act of 1824 is contemporaneous of the fact that in the first quarter of the last century this topic was a topic of Criminal Law. May I read the recital: "Whereas it is expedient that the Laws relative to the Combination of Workmen, and to fixing the Wages of Labour should be repealed; that certain Combinations of Masters and Workmen should be exempted from Punishment; and that the Attempt to deter Workmen from Work should be punished in a summary Manner". That is what is called peaceful persuasion. "Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same" -- I ask your Lordships to look at this list of statutes which they were engaged in repealing, Scottish as well as English -- "That from and after the passing of this Act, so much of a certain Act passed in the Thirty third Year of King Edward the First, intituled Who be Conspirators and who be Champertors, as relates to Combinations or Conspiracies of Workmen or other Persons to obtain an Advance or to fix the Rate of Wages, or to lessen or alter the Hours or Duration of the Time of working, or to decrease the Quantity of Work, or to regulate or control the Mode of carrying on any Manufacture, Trade or Business, or the Management thereof, and as relates to Combinations or Conspiracies of Masters, Manufacturers or other Persons, to lower or fix the Rate of Wages, or to increase or alter the Hours or Duration of the Time of working, or to increase the Quantity of Work, or to regulate or control the Mode of carrying on any Manufacture, Trade or Business". Then they proceed to recite a

whole sheaf of statutes, both Scottish and English. Then there is also an Irish one; then they come to the Caroline Statutes and the Georgian Statutes. The truth is that the historial and Criminal Law of this country includes as part of its proper subject matter that topic in relation to which the Parliament of this country in the past has often legislated, namely, the action, whether by lockout or strike, with a view of determining a trade dispute in favour of one side or the other.

VISCOUNT HALDANE: Where are these words you are referring to now?

SIR JOHN SIMON: Having recited all those it goes on, just before the end of the first section to repeal all those, together with all other laws, statutes and enactments now in force "enforcing or eetending the Application of any of the Acts or Enactments repealed by this Act, shall be and the same are hereby repealed".

VISCOUNT HALDANE: There were two objections to an agreement among a body of workmen to stand together for increased wages, and shorter hours. The first was that it was in restraint of trade, and that made it indictable. The second was that it was a conspiracy. Does this first section deal with both those objections, the civil objection and the criminal objection?

SIR JOHN SIMON: No, I think it was addressed to the criminal objection. That is my impression.

VISCOUNT HALDANE: That still remains?

SIR JOHN SIMON: Yes, but what is interesting is that, this having been passed in 1824, Parliament within twelve months repealed this Act, and restored a very large part of the old laws. The Criminal Law of Canada, in fact, is as at a date at the end of the eighteenth century, and in this case I am not concerned to go into very closely exactly what was the criminal law of this place or that. All I need do is to say that that topic, the thing which the statute is dealing with, is a topic that is in relation to criminal law.

VISCOUNT HALDANE: You cannot touch this case without its being in relation to criminal law?

SIR JOHN SIMON: Then we come to a thing that is very familiar to all your Lordships when you have to ask yourselves: Is not that the real matter in relation to which this legislation is passed?

VISCOUNT HALDANE: There is one thing which troubles me, and that is that head 15 of section 92 enables the Province to pass criminal laws for the purpose of enforcing civil obligations.

SIR JOHN SIMON: That is true.

VISCOUNT HALDANE: And all this might be read as legislation under that if you start by altering the civil rights in a Province?

SIR JOHN SIMON: Perhaps I might ask your Lordships' attention to two more passages in this statute while it is before you. Having in the first section recited this immense bundle of statutes, they go right back and repeal them. Then in section 2 it is said: "And be it further enacted, That Journeymen, Workmen or other Persons who shall enter into any Combination to obtain an Advance, or to fix the Rate of Wages, or to lessen or alter the Hours or Duration of the time or working, or to decrease the Quantity of Work, or to induce another to depart from his Service before the End of the Time or Term for which he is hired, or to quit or return his Work before the same shall be finished, or not being hired, to refuse to enter into Work or Employment, or to regulate the Mode of carrying on any Manufacture, Trade or Business, or the Management thereof, shall not therefore be subject or liable to any Indictment or Prosecution for Conspiracy, or to any other Criminal Information or Punishment whatever, under the Common or the Statute Law."

VISCOUNT HALDANE: That is pure Criminal Law?

SIR JOHN SIMON: Yes, and your Lordships see section 2 is as to workmen Then section 3 is an exactly corresponding provision about employers: "And be it further enacted, That Masters, Employers or other Persons, who shall enter into any Combination to lower or to fix the Rate of Wages, or to increase or alter the Hours or Duration of the Time or working, or to increase the Quantity of Work, or to regulate the Mode of carrying on any Manufacture, Trade

or Business, or the Management thereof, shall not therefore be subject or liable to any Indictment or Prosecution or, for Conspiracy, or to any other Criminal Information or Punishment whatever, under the Common or the Statute Law."

VISCOUNT HALDANE: That is criminal, too?

SIR JOHN SIMON: Yes, it is Criminal Law, there is no doubt.

VISCOUNT HALDANE: Section 4 is a little more. Will you look at the end of section 4?

SIR JOHN SIMON: Is it not about penal provisions?

VISCOUNT HALDANE: It goes further.

SIR JOHN SIMON: "That all penal Proceedings for any Act or Omission against any Enactment hereby repealed, and not made punishable by the Provisions of this Act or for any Act or Omission hereby exempted from Punishment, shall become null and void; and that no penal Proceedings for any Act or Omission against any Enactment hereby repealed, and not made punishable by the Provisions of this Act, or for any Act or Omission hereby exempted from Punishment, shall be instituted against any one in relation to any such Offence already incurred."

VISCOUNT HALDANE: Look at the proviso.

SIR JOHN SIMON: "Provided that no Person shall be subjected to loss or Liability for any Thing already done, touching any Act or Omission, the Penal Proceedings against which are hereby made null and void, or shall lose any Privilege or Protection to which the Enactments hereby repealed entitle him."

VISCOUNT HALDANE: That touches civil rights.

SIR JOHN SIMON: I think all it meant was that if you had already as a common informer recovered a particular penalty you shall not be made to pay it back.

VISCOUNT HALDANE: It says: "No person shall be subjected to Loss or Liability for any Thing already done, touching any Act or Omission, the penal Proceedings against which are hereby made null and void". Does that mean that anybody who has got the benefit can also say: I am to be made civilly liable?

SIR JOHN SIMON: I had thought it was securing that vested rights were not interfered with.

VISCOUNT HALDANE: He is not to be made civilly liable for anything apparently.

SIR JOHN SIMON: It is in respect of what has already happened. I want to put now it is fresh before your Lordships' minds what is the application of this. This is 1824. Every one of these statutes hereby recited I submit was the criminal law of Canada, and this Act of 1824 did not stop them being the Criminal Law of Canada, because this only applied to the United Kingdom, and they are the Criminal Law of Canada today, save in so far as the Criminal Code of Canada may have altered them. If that is the case, how can it be other than legislation by the Dominion Parliament in relation to Criminal Law, if it says: If you are contemplating a strike, or if you are contemplating a lockout, or a forcible way of settling an industrial dispute, we legislate that until there has been this investigation you shall not strike or you shall not lockout. Why is not that in relation to Criminal Law?

VISCOUNT HALDANE: If that were all there would be a great deal in what you say, and probably there would be none of us here, but it is far more than that. I am referring to sections 56 and 57.

SIR JOHN SIMON: Your Lordships have them.

VISCOUNT HALDANE: Must not you say, in order to succeed, that these relate to Criminal Law?

SIR JOHN SIMON: I do not think the test is exclusively.

VISCOUNT HALDANE: The pith and substance?

SIR JOHN SIMON: If you please, whatever the phrase may be. You must look at the substance of the thing, and consider, when you look at the thing, in substance, though no doubt it may indirectly and incidentally affect something else, after all when you look at the thing in substance is not the pith and substance so and so?

LORD DUNEDIN: Must not the test be this? As I have already said you cannot in any way make a criminal provision that does not

interfere with a civil right. If you are not allowed to do a thing which before you had the right to do, that certainly is interfering with a civil right.

SIR JOHN SIMON: Yes.

LORD DUNEDIN: Therefore, in so far as the effect of what I assume to begin with is criminal legislation touches civil rights, that will not matterif the other provisions are truly ancillary to what I may call the criminal part of it; but, if the other provisions are something substantially by themselves and not in any way ancillary to what has been done before, then the difficulty suggested by Lord Haldane would arise. Does it not do more, and, therefore, I think, your next point is to show us if anything which looks civil upon the face of it in these provisions if nothing more norm less than a sweeping ancillary provision to the part of the statute which is dealing with criminal law.

SIR JOHN SIMON: Yes.

VISCOUNT HALDANE: You would have to say that, because if it is true that this is a substantive provision, then the criminal provisions do not require section 91 to bring them into existence; they can be brought into existence under head 15 of section 92.

SIR JOHN SIMON: I should like to look at that as your Lordship is good enough to mention itp

VISCOUNT HALDANE: Just look at head 15: "The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section", that is section 92. Is not that Criminal Law?

SIR JOHN SIMON: I am afraid I do not quite follow your Lordship.

VISCOUNT HALDANE: The question is whether the substance of this statute could have been enacted by the province. If it could, it falls within section 92, and then it falls exclusively within section 92, and not within the enumerated heads of section 91. Do not those two sections cover the whole thing?

SIR JOHN SIMON: I speak with the greatest submission to your Lordship,

because we all know your Lordship is a master of the subject. With great respect, is that against us? Your Lordships see section 91, under which: "Any matter coming within any of the classes of subjec enumerated in this section"-- Criminal Law is one of the specific subjects in section 91 -- "shall not be deemed to come within the class of Matters of a local or private nature comprised in the Enumeration of the classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

VISCOUNT HALDANE: That is true; that refers to all the heads in section 92.

SIR JOHN SIMON: Yes. I am not asking for the moment if your Lordships think my argument is right; I only want you to see that it is logical. My argument is that this topic on this view will be found to be a topic in relation to a specific head of section 91. I may be wrong about that.

VISCOUNT HALDANE: If that is really the test, is it a matter of section 91 at all?

SIR JOHN SIMON: May I pursue what I am submitting as a little scheme of argument. I agree it is a question of whether I am right.

VISCOUNT HALDANE: I think you can accept my test.

SIR JOHN SIMON: Yes, I do entirely.

VISCOUNT HALDANE: It is something rather different.

SIR JOHN SIMON: Yes, and it is a formidable point. I want to make it plain. It is a question of the pith and substance, or to take a famous phrase if it has relation to head 27 of section 91 then it is no good saying: Ah, but then might not it be that this is a topic which, under the head of property and civil rights, could be dealt with under section 92, and then could not the provincial legislature supplement and validate what it was doing by saying: If you do not do what we say we will punish you?

VISCOUNT HALDANE: If it was civil rights merely as incidental to criminal law under head 27 of section 91 that would be all very well, but supposing it is the other way on. Supposing it is civil rights primarily and criminal law only assisting civil rights, do

9

you require head 27 at all? Have you not under head 15 of section 92 all you need in order to cover the field of this statute for the province?

SIR JOHN SIMON: May I deal with that? I have another argument. I am anxious to make the Board see that when we talk about criminal law it is not nriminal simply because we have imposed a penalty. It is more substantial than that. I am on the point that the subject matter of this legislation, so far as it is objectionable at all, is really what the Dominion Parliament of Canada would regard as criminal law.

There is one other reference I will give your Lordships before I deal with Lord Dunedin's point. I mentioned the famous declaration of Chief Justice, then Mr. Justice, Erle in the case of The King v. Rowlands. That was a case which was tried at Stafford, and it became really the locus classicus with regard to the judicial view about this. Chief Justice Erle's summing-up in this case is extremely well known and often referred to. He told the Jury this, and this was taken to be good law: "A combination for the purpose of injuring another is a combination of a different nature", etc. (Reads from the summing-up.). It does not appear to me that it is material for me to argue, and I should have doubted whether it was necessary for your Lordships to decide exactly at what point, according to the Common Law of England, you are face to face with a criminal Act. It is enough for me to say that the fact that there is this vast mass of statute law and Common Law and authority shows quite clearly that if the Parliament of Canada in 1868, as in subsequent years, instead of contenting themselves with saying that you shall not settle an industrial dispute, except by strikes or lockouts, for thirty days, had said: You shall not settle it by strikes or lockouts at all, they would have unquestionably been dealing with a matter which was in relation to criminal law. ~~The~~ What they have said is something which is tepid compared with that. They have said: We are not going to make so severe a law as that, but we

10

are going to make it criminal for either employers or work people, if an industrial dispute arises between them, to lockout or strike until a particular condition is fulfilled; and my respectful submission is that on the right view of this legislation it is still a Dominion topic within section 91.

LORD DUNEDIN: The greater includes the less, and the less does not thereby become something different?

SIR JOHN SIMON: Yes, my Lord, that is my whole point.

VISCOUNT HALDANE: Supposing that the provinces were to pass a law saying nobody is to be in a public house after eight o'clock, and he is to be liable to a fine of a Dollar if he is found there; that would be criminal law. Do you say that is within the competence of the Dominion?

SIR JOHN SIMON: I am not sure whether we are not approaching the famour reflection about the unoccupied field.

VISCOUNT HALDANE: I want to get a little away from the unoccupied field. Here is section 92, which says that municipal institutions are exclusively in the hands of the province. There is head 15, which says that the imposition of punishment by fine, or penalty, for enforcing any law of the province, in relation to those things, is given to the province.

Why is not that given exclusively to the province? Can you read the words "any matter", at the end of section 91, as including that? Otherwise it might repeal everything which section 91 touched. It has never been said that the words at the end of section 91 are anything but words of construction. I am not sure under which specified head of section 92 the penalty would come.

J1

VISCOUNT HALDANE: Primarily civil rights, but it might be under 8, Municipal Institutions. This is a Municipal Institution.

SIR JOHN SIMON: Your Lordship was referring to the case of a public house.

VISCOUNT HALDANE: Yes, I thought you had gone back. Let us assume that a regulation has been made by the Municipality of Toronto that nobody is to stay in a publichouse after 8 o'clock at night, and there is a fine of a dollar if he does.

SIR JOHN SIMON: I suppose the power of a Municipality to make by-laws for securing peace, order and decency in a town is unquestionably a Provincial matter.

VISCOUNT HALDANE: And it imposes a penalty.

SIR JOHN SIMON: I do not see myself the difference between saying that a man shall not be in a public house after 8 o'clock, and saying that a man shall not eat chocolates in a theatre.

LORD ATKINSON: Doesit not make a difference if it says he shall be sent to prison?

SIR JOHN SIMON: Whether we are dealing with a piece of Provincial legislation or a piece of Dominion legislation, merely saying that you shall not do a certain thing, and if you do you shall pay so much, that is purely ancillary to the purpose, presumably the lawful <u>intra vires</u> purpose.

LORD DUNEDIN: Section 15 is really corelative to the other thing. You shall not make legislation which is truly civil criminal by adding a penalty. On the other hand true civil legislation shall not lose its character.

SIR JOHN SIMON: I should not suggest for a moment, supposing you had an unquestioned case of legislation which fell within civil rights, I should not seek to argue that merely because there was appended to that a penalty that it was a criminal matter. Supposing it was a provision that no man shall practice in this Province as an auctioneer unless he has a licence from the Town Hall, and if he does practice as an auctioneer without getting a licence, he shall be fined 20 dollars, I comprehend beyond all question that the provision

K.

3

that he is to get a licence from the Town Hall is no doubt legislation which affects his civil rights, but the appendage that if he does not do what he is told to do in exercising his civil rights, he shall pay a fine, is a mere appendage.

VISCOUNT HALDANE: Do you say that under section 91 the Parliament of Canada could make it a serious offence if he violates the terms of his licence, although it is a Dominion law?

SIR JOHN SIMON: I do not know how that might be; there is a good deal of authority about it.

VISCOUNT HALDANE: I do not know of the Dominion ever legislating criminally to enforce the statutory provisions of section 91. I am suggesting to you that under head 15 the Province has power to pass criminal laws which it could pass if it was enacting this statute, and then if so the whole matter is within the competence of the Province.

SIR JOHN SIMON: I do not think that my Lord for the moment appreciates the bold position that I take up. He is being too good to me. My Lord is being so good as to suggest that I am saying this is a matter of civil rights under section 92, but I save myself by saying that the provision about punishment and convictions would come under section 91. That is not my point; I go much further. I say the topic that is being dealt with here is criminal law, and the circumstance that you say not that a man shall never settle an industrial dispute except by a lockout or a strike, but that before he claims to do so something else must happen, ~~xxxx xxx~~ does not in the least prevent it being criminal. That was the point Lord Dunedin put to me. I go the whole way.

VISCOUNT HALDANE: The statute goes further. The statute is saying you are not to do something which it appears to assume you might do; you might give these notices and declare a strike or a lockout. It says you are not to do that. It is not a statute enacting the law of conspiracy; it is a statute to put in a further restriction.

SIR JOHN SIMON: Let me put it in a slightly different way. I am only putting the argument as best I can; it is for your Lordships to judge. Supposing that after 1867 you had in succession two separate enactments of the Dominion Parliament, and supposing that the first of those enactments said:it shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike in the case of an industrial dispute, and it stopped there, thensupposing that there was a second and subsequent enactment of the same Dominion Parliament which said:"With reference to the law we have already passed it is unlawful" - which means criminal - "for any employer to declare or cause a strike, and we amend that by saying that they may do so as soon as a particular inquiry has been held". If that is the position why is not the whole of that criminal law?

VISCOUNT HALDANE: That is one way of putting it.

SIR JOHN SIMON: That is the way I am putting it.

VISCOUNT HALDANE: The other is to say it is unlawful to do this unless there has been a reference to a Board?

SIR JOHN SIMON: I have read the words of the statute, but I have put them in two Acts of Parliament instead of one.

VISCOUNT HALDANE: I am looking at the statute itself. Will you look at page 56: "It shall be unlawful" and so on. Is not that making something unlawful which is treated <u>prima facie</u> by the statute as being lawful?

SIR JOHN SIMON: The whole point of what I have been saying this morning is to show that the subjectmatter of criminal law in Canada was this in 1867. We have to transport ourselves back to that date.

VISCOUNT HALDANE: All I mean is that the draughtsman of the Dominion Parliament Act does not seem to have appreciated that.

SIR JOHN SIMON: Possibly there might be some people in England who do not appreciate that if we had been legislating in 1867 it would have been necessary to have enacted for the first time

that strikes and lockouts were unlawful, because Chief Justice Erle and Sir James FitzJames Stephen thought it was already criminal.

VISCOUNT HALDANE: I think it would mean that public opinion had got so strong that the law was treated as obsolete that you might not combine to raise wages, and the Conservative Government of that day passed legislation.

SIR JOHN SIMON: That is perfectly true.

VISCOUNT HALDANE: Supposing they passed a statute saying that strikes and lockouts were illegal, would that be within their powers?

SIR JOHN SIMON: Yes, I submit so. All criminal law which prohibits human action and punishes it is to that extent a thing which is called interference with civil rights, but the test is not whether it interferes with civil rights, the test is a different test, what is the subject matter in relation to which the law is really passed. To give an illustration that is familiar as long ago as Russell v. The Queen, your Lordships will remember it was pointed out that universal prohibition for Canada may interfere with the sale of liquor under licence, and the granting of liquor licences for the raising of tariff revenue, is a Provincial matter, but I say that the Province probably may interfere with the sale of liquor included in the licence, but not in relation to the licences.

I am not quoting a passage that has been criticised, it is an illustration given. It is on page 838. My Lords say: "Suppose it were deemed to be necessary or expedient for the national safety, or for political reasons, to prohibit the sale of arms, or the carrying of arms, it could not be contended that a Provincial Legislature would have authority, by virtue of sub-section 9 (which alone is now under discussion), to pass any such law, nor, if the appellant's argument were to prevail, would the Dominion Parliament be competent to pass it, since such a law would interfere prejudicially with the revenue derived from licenses granted under the authority of the Provincial Legislature for the sale or the carrying of arms. Their Lordships think that the right construction of the enactments does not lead to any such inconvenient consequence". Then comes this critical sentence: "It appears to them that legislation of the kind referred to, though it might interfere with the sale or use of an article included in a license granted under sub-section 9, is not in itself legislation upon or within the subject of that sub-section, and consequently is not by reason of it taken out of the general power of the Parliament of the Dominion".

VISCOUNT HALDANE:- That is a critical sentence which raises the principle.

SIR JOHN SIMON:- Yes. I am thoroughly bearing in mind what we know now, that there are passages in Russell v The Queen, perhaps even the actual application of it, which have been sometimes thought to be very doubtful. As my Lord Haldane says, the test on the construction of the statute is very properly put there, the real test is: What is the subject in relation to which this law is passed, and the circumstance that having passed it you interfere with this, that or the other is in certain aspects very relevant; it is one of the misfortunes of legislation that you have reaction other than what is expected. It is interesting to observe this -- my learned

friend has been good enough to give me some of his thunder --- one of the points which my Lord Haldane has been suggesting for the purpose of test is exactly the point argued by Mr Benjamin in Russell v The Queen unsuccessfully. I might call the attention of the other members of the Board to this. The point Lord Haldane raised by way of discussion just now, not at all adopting it, about Provincial criminal law, is exactly the argument which was unsuccessfully advanced by Mr Benjamin in Russell v The Queen. Let me read on page 840 of 7 Appeal Cases: "It was argued by Mr Benjamin that if the Act related to criminal law, it was provincial criminal law, and he referred to sub-section 15 of section 92, viz., 'The imposition of any punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section'. No doubt this argument would be well founded if the principal matter of the Act could be brought within any of these classes of subjects; but as far as they have yet gone, their Lordships fail to see that this has been done".

VISCOUNT HALDANE:- I am with you on that.

SIR JOHN SIMON:- I know your Lordship is.

VISCOUNT HALDANE:- The question is really: Is this provincial or dominion?

SIR JOHN SIMON:- That is the whole point. Your Lordships on this point are not likely to disagree as to what the test is. Of course I am only an advocate here.

VISCOUNT HALDANE:- I only refer to sub-section 15 of section 92 as showing that legislation by the Province on that subject would not necessarily be incomplete for want of criminality.

SIR JOHN SIMON:- I take up the position before we come to the general subject-matter or residuum business in section 91. My submission is, you take section 91 and go through its specific heads; then you take section 92 and go through its specific heads.

You observe what in fact was the criminal law and the field of criminal law which Canada adopted by transfer when the Dominion was created; it is unquestionably a body which includes as Lord Wrenbury said just now, the power to prohibit that form of action, dangerous it may be to the community, which is endeavouring to settle industrial disputes by force whether it is by strike or lockout. It is one of the most interesting things in the history of industrial settlements, and most interesting when one recalls that Mr Mackenzie King was then an official in the Ministry of Labour and had, in an official character as a Departmental investigator, something to do with it, and one understands his interest in it to-day. It was a very remarkable idea seeing that modern conditions will not stand the perpetuation of the severe Criminal Code which some people held in the eighteenth century; with out modern community we cannot do it, but what we do is this: The attempt to settle industrial disputes by this form of combination in England is in the last degree injurious to the public weal, let us begin by saying it shall be unlawful for any employer to declare a lock-out or for any employee to go on strike, but do not let us say that that is for ever, let us say that it is to be so until this inquiry has been held, and this Board has reported. When we come to the inquiry, a thing which Lord Dunedin put at the outset of the case which has to be considered, where do we stand? I do not understand it to be suggested that it is ultra vires the Dominion Parliament to say they will have an inquiry, it is not ultra vires, that itself is not ultra vires in any view. The inquiry is merely the condition which has to be fulfilled before it becomes lawful to strike. As a matter of fact our own body of Criminal ~~law~~ law at this moment contains things not altogether unlike it. As your Lordship knows there are certain public services, gas-works are one, where as a matter of fact provisions are made to secure that there should not be a sudden ~~going~~ cutting off of the gas, without a crime being committed.

LORD ATKINSON:- Lightning strikes?

SIR JOHN SIMON:- Yes. To summarize this case, I could put it in three propositions by saying that a law in Canada which prohibited lock-outs or strikes as a means of settling industrial disputes, must be in relation to criminal law, a lightning strike or a lightning lock-out is a kind of strike or a kind of lock-out of that sort, and the conclusion of the syllogism is this law which says, though you may legitimately strike or lock-out, saving a lightning strike or a lightning lock-out, the truth must be known first, and, therefore, within the topic.

LORD ATKINSON:- I cannot help thinking if a man has a certain legal right to do a certain thing and you pass an Act to say under certain circumstances it shall be a crime to do that thing, you interfere with his civil rights, and make it a crime for him to exercise them in a particular way.

SIR JOHN SIMON:- That is true, and I would agree to it; I think it is true that you interfere, but none the less the circumstance that you make even a new criminal law will not prevent your regulation being in relation to a criminal matter.

LORD ATKINSON:- I think it is both; it is in relation to exercising his right in a way that is criminal.

SIR JOHN SIMON:- Lord Atkinson follows this: The position is taken up that it is in relation to both, I mention the language at the end of section 91 is that if it is once established that the legislation is in relation to enumerated topics in section 91 it is none the less within section 91 even though it is also within an enumerated topic in section 92.

VISCOUNT HALDANE:- That surely cannot be quite right; there are many things within section 92 which touch heads of section 91 and, on which yet ~~in~~ section 92 prevails.

SIR JOHN SIMON:- I am using very careful language, I am saying "in relation to" on both occasions. Would Lord Atkinson at any rate follow my reference?

VISCOUNT HALDANE:- To clear it up, surely these words at the conclusion of section 91 which were commented on very carefully in the case in 1896, simply mean that the whole of the subjects in section 92 are included, ~~and~~ as local matters ~~at~~ and heads in section 91 are not to be construed as affecting them.

SIR JOHN SIMON:- I am not discussing some vague and impossible hinterland.

VISCOUNT HALDANE:- I am alarmed at that.

SIR JOHN SIMON:- I am keeping very close to the coast.

VISCOUNT HALDANE:- But a claim to the hinterland often gives rise to warfare though you are not going there.

SIR JOHN SIMON:- Will Lord Atkinson look kindly at the Joint Appendix Statutes on page 2; my Lords know it well, I am afraid it is probably inscribed on your heart.

LORD ATKINSON:- We shall never forget it.

SIR JOHN SIMON:- "Any matter coming within any of the classes of subjects enumerated in this section". I am going to substitute: "Any matter which is really in relation to the criminal law".

VISCOUNT HALDANE:- It is a very material substitution. What does it come within?

SIR JOHN SIMON:- I am not making any assertion about this law, I am merely putting an argument.

VISCOUNT HALDANE:- I quite follow it, but it is not the equivalent of the words.

SIR JOHN SIMON:- If my Lord will forgive me, I am dealing with the observation of Lord Atkinson who said his present impression was these particular things came within both.

LORD ATKINSON:- Every man has a right to fish in his own fresh water, but he must not use a particular instrument; the enactment is passed to make that a crime if he does that.

SIR JOHN SIMON:- Your Lordship has my point. I want to say a word about the Board of Commerce case which is quite fresh in my memory. I had the honour to argue that case, and I found myself

on the side which prevailed. I recognise that the Board of Commerce case is a case which goes as far against me as any case at present reported. The distinction, if I may say so, is a very plain one. The Board of Commerce case is in 1922, 1, Appeal Cases.

LORD ATKINSON:- It is difficult to reconcile that with Russell v The Queen.

VISCOUNT HALDANE:- If you had not Russell v The Queen you would be in a great difficulty notwithstahding your ingenious argument of to-day. Russell v The Queen is really your sheet anchor.

SIR JOHN SIMON:- I am not throwing it over. I rather thought it must be considered in relation to this, and I want to submit a short argument about the Board of Commerce case. There, the first object was to prevent people who were in possession of goods, who owned goods, from exercising one of the ordinary civil rights of everybody who owns a piece of movable property, namely, of selling it.

LORD ATKINSON:- At any price he could get.

SIR JOHN SIMON:- That is what it was, it was an unjustifiable interference, if I may use that rather dangerous substantive, with contracts, it was the first purpose of the Statute to legislate in relation to private rights, and therefore there is a very broad distinction between that class of ~~goods~~ case and what we appear to be dealing with here. I perfectly understand your Lordship's anxiety lest the present Statute we are now discussing should be found materially to touch or trench as it is said, upon "property and civil rights". The right answer, as I venture to submit, is that after all that is or may be a consequence, but the whole point is, not what is the consequence. but what is it at which the Statute is aiming, and if you have in the present instance a statute which is aiming at the establishment and preservation of public order, or at the prevention of a particularly dangerous kind of disturbance, at restricting at any rate the exercise of

combination in order to settle industrial disputes by force, it is nothing to the point to say, yes, but if you do those things, incidentally you will touch the civil rights of A or of B whereas in the Board of Commerce case that was the very thing which the Act was aiming at. I can imagine my friends talking about forestalling and regrating and all those old things. Your Lordships observe the Board of Commerce case went far beyond that, the law of forestalling and regrating was obsolete. The object was even if you had got the goods in your shop although you made no special arrangements to corner the market, you could not sell them except on particular terms.

LORD ATKINSON:- That is a very old proposition; although a man might have money in his chest he might not lend it at interest beyond a certain sum; he was allowed to get interest but not at a higher rate of interest than was indicated.

SIR JOHN SIMON:- It would be an amazing thing to fit the book of Mosaic Codes into section 91 and section 92.

VISCOUNT HALDANE:- I have already pointed out the form of the Act in question in this case; it appears to recognise the right to enter into combination and to do certain things, and then to prohibit it if there is an inquiry ordered. It may be due to a vague state of mind on the part of the draftsman, or it may be he thought these Acts were all out of date in 1867.

SIR JOHN SIMON:- There was a good deal that happened even as late as that in this country, and you get Mr Justice Stephen writing much later than that. Then your Lordships observe about the Board of Commerce case, in that case your Lordships' judgment conceded some portions of what I have here. I will call attention to a passage on the last page of the Judgment where, after emphasising the fact that this really was entrenching upon the Provincial power, your Lordship goes on to say: "It may well be that it is within the power of the Dominion Parliament to call, for example, for statistical and other information which may be valuable for guidance in questions affecting Canada as a whole". Let me build up a little. Let us suppose that is a permissible

action for the Dominion to take. Let us suppose that by publishing such information they really got public opinion to work. Supose they said: We are going to have provided a precise inquiry in this country. Nobody questions that is within the competency of the Dominion. Now I get back to my original argument: If therefore I am at liberty to treat what is the matter in dispute --- this is putting an argument of m criminal law in the full sense of the Dominion --- the circumstance that it also provides, as Lord Dunedin pointed out, for inquiry, I do not know that it is quite statistical, but it involves a detailed examination of the circumstances, prices and wages, and all that sort of thing, and that is supplemented by saying: You must produce your books, and you must show us this and that which is incidental, and makes the whole thing stand as one consistent Code, if you are asked you would say that is a matter which is in relation to a specified class of criminal law, and therefore our argument is this -- I have not gone over the ground Mr Duncan has gone over/I hope, though I am most deeply indebted to it, and I include it --- but I can put my submission if any under four heads, and if your Lordships would allow me to leave the rest of the argument to my learned friend Mr Clauson I shall be obliged especially as I feel that I am having a very special indulgence at your Lordships' Board for which I am most grateful.

VISCOUNT HALDANE:- It is a most important case.

C.C.

SIR JOHN SIMON: It is. I should say when you contrast section 91 and section 92, this law is not in relation to any one of the 16 classes of subjects assigned to the Province. I do not want to repeat the argument, but in order to determine that we have to read section 91 as well as section 92. When I say that, I do not mean that one shuts one's self up in a room with section 92 and nothing-else, but one reads section 91, and section 92, and considers what light section 92 throws on section 91, and my argument is that as the result of that it does not really come within any one of the 16 enumerations in section 92. I submit, secondly, that if it did, which I altogether dispute, it would the more nearly come under the 16th. head, the last one, than any other, the head, "local or private Nature in the Province". But it is not under that, because it is a thing which is in relation to and affects the body politic of the whole Dominion. Your Lordship remembers the passage in 1896 Appeal Cases, at pages 360 and 361, which puts it very clearly. I will not break into an argument again, but what I meant was this. In the Attorney General for Ontario v Attorney General for the Dominion of Canada, Lord Watson says this: "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 interests of the Dominion". In the same way, on the previous page, 360, referring to sections 91 and 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". If your Lordships finally turn over to the Answers to the Questions, this was a case where there were some questions put, the Answer to the third Question, on page 371, is: "In the absence of conflicting legislation by the Parliament of Canada, their Lordships

are of opinion that the provincial legislatures would have jurisdiction to that effect if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province". Therefore, I should submit, as a second proposition, ~~that the merits of the argument~~ --the merits of the argument can be judged-- that if indeed this did come within any clause and that it was in relation to ~~that~~ one subsection in section 92, the one really would have been No. 16, and that is prevented by the evidence here, and the very powerful argument of my friend Mr Duncan. Then, thirdly,- I have given up my hypothesis against myself now --I say if I am ~~x~~ right in saying that its pith and substance is not in relation to ------

LORD ATKINSON: What is it affects the body politic of the whole Dominion. Is it the evil legislated against, or the act of the legislation. Must it be the evil legislated against ?

SIR JOHN SIMON: I think so. Take temperance. The ground on which it is said you are not really trenching upon property and civil rights, if you say you must set a standard for the people of this Dominion which they will adopt if they think fit by local option, which will amount ~~xxx~~ to prohibition, is exactly that.

LORD SALVESEN: That is the illness that affects the body politic ?

SIR JOHN SIMON: That is the illness that affects the body politic, that is the plague.

VISCOUNT HALDANE: Suppose everybody in Ontario took to carrying ~~revolvers~~ rifles, they might turn it into an army.

SIR JOHN SIMON: They are not people of that sort, I should hope and believe. Thirdly, I was going to put this: If my first proposition is right, if it is in relation, it is one of the 16 heads in section 92, and if it is not within the enumeration of section 92, then the Respondents must win whatever be the true head under section 91. There I bring in the reflection that it is an interesting circumstance that when you come, as late as the year 1900, to ~~permit~~ frame the Constitution for Australia, this

particular thing has developed to such a point that the topic of national disputes is a topic which is enumerated in terms.

VISCOUNT HALDANE: If it is not within section 92, you are within the general words, peace order and good government.

SIR JOHN SIMON: Yes. I am going to say, lastly, in a sense you may say, I am assuming I have jumped the stile, and am now simply walking about in the meadow, if I say it is not in relation to No. 16 in section 92, even then the Respondents must win, and, as your Lordship said, they must win without condescending upon the putting of what particular head, and, finally, if I am asked about the head, which is a perfectly fair question to be put, I submit you have to consider criminal law; I am not in any way abandoning the argument of trade and commerce, but I see difficulties about that argument, of course; both those heads ~~and~~ are special heads, before ever I come to peace, order and good government, and consequently, if that course of reasoning is right, by whatever road I reach the destination, I do reach the destination that the decision which was arrived at by the majority of the Appellate Court in Ontario is right and ought not to be reversed. My Lords, I am extremely obliged to your Lordships for allowing me to intervene in this way.

VISCOUNT HALDANE: It is a most reasonable request.

MR CLAUSON: May it please your Lordships. I appear with my learned friend Mr Wylie for the Attorney-General of Canada, and it is my duty to put the matter to your Lordships, and offer your Lordships any assistance I can in the matter from the point of view of the Government. I have listened with great care, and, your Lordships will forgive me if I say, admiration, to the arguments put before your Lordships by my friends Mr Duncan and Sir John Simon. I do not feel that anything I could add now would really assist your Lordships, and I propose to confine myself to a very narrow compass. My Lords, it is my duty to tell your Lordships this, that the Government of Canada attach great importance to this case from this point of view, it is a

point of view that may be of assistance to your Lordships, that this legislation was dealing with the mutual rights between employers and employees, the rights of one to strike against the other, and the rights of the other to lock-out the one; if that were all the legislation was dealing with, the position would be different, but at least I may say this, the view of the Government and the view I am instructed to present to your Lordships is this, that this legislation is legislation passed in the interests of a third party, namely, in the interests of the State as a whole. It is not a question of saying to A. the employer, or to B. the employee: We are going to interfere with you, we are going to decide whether you,A. are right, or wrong, or you,B. are right or wrong; that is not the position. The whole of the legislation is to protect the interests of good government and order of the State and interests of the ordinary citizens against the results which will flow from A. and B. not settling their mutual affairs in such a way as shall prevent disorder and discomfort, indeed, having regard to the recent history of labour disputes in Canada, I should not be wrong, I think, if I used far stronger words than "disorder" and discomfort" Your Lordships have heard from Mr Duncan what occurred in Canada and what may occur again. It is from that point of view that I am instructed to present the matter to your Lordships. I do not think, therefore, I should be assisting your Lordships if I tried to differentiate between the various heads under which, from the point of view of the Government, this legislation can be justified. I venture to submit to your Lordships that the whole matter is summed up in this, as Sir John Simon put to your Lordships: The Appellants have got to show that this legislation is in a true sense legislation in relation to something which is within the exclusive provincial domain of legislation, and if they fail to do that, they fail on this appeal. I am not going to spend time in refining to your Lordships upon trade or commerce or criminal law, or peace, order and good government,

it suffices if the Appellants fail to bring themselves within the exclusive provincial power for the Respondents to succeed. I am much obliged to your Lordships for giving me this opportunity of adding a few words, and with that I propose to leave the matter in your Lordships' hands.

MR STUART BEVAN: My Lords, at the close of the Respondents' arguments, it appears to me, in my submission in reply, I have to deal with two main points, the one point raised by my learned friend Mr Duncan, which is this, the main point raised by him which, as I understand it is this, that one has to regard the aspect of this legislation, and to see whether it deals with a Dominion-wide subject, or to see whether it falls within a Dominion-wide subject, or is merely a matter of local provincial concern and interest. The other matter that I shall have to deal with is my learned friend Sir John Simon's argument, which takes the bold line that this is primarily or essentially and altogether criminal law and nothing-else. Now perhaps it would be convenient that I should deal with that first. I venture to think that the bold submission made by my learned friend is actuated by the feeling that it is necessary in this appeal to distinguish the present case from the case of the Board of Commerce.

VISCOUNT HALDANE: You have come now to what, to me, is the great difficulty in the case. Sir John puts it that, looking at this Act, it is really an Act to repeal the Statute of Conspiracy. I suppose you answer: Looking at the Act, it is an Act restricting civil rights on the face of it. Well, Sir John might answer: Really, whatever its form, it is an Act to alter the law of conspiracy. I want light upon this. Can you say the law of conspiracy is all based upon civil rights, that part of the law that we have to deal with anyhow, that the law of conspiracy is, you are not to combine to do what would be an assertion in the case of the individual, of a civil right, a combination or conspiracy within the law that comes in and makes

that legal. If,therefore, you take away the civil right, it is combination or conspiracy within the law. You say they come in and make that law, and, therefore, take away the civil right, not by adding to the law of conspiracy, but, you say, you only do it by taking away the civil right.

MR STUART BEVAN: If you please.

LORD DUNEDIN: I have sent for the Report of the Commission on which I sat, and there is a special heading dealing with the law of conspiracy in the first three lines of the Report, which was written by myself, and concurred in by the others. "The subject of the law of conspiracy is peculiarly involved, and it is perfectly impossible to reconcile the opinion and dicta which have been pronounced by Judges and writers and authors on the matter".

MR STUART BEVAN: Fortunately we are relieved from entering into any elaborate submission as to the law of conspiracy, because my case is that this statute goes far outside and beyond conspiracy, whatever view may be taken as to what conspiracy is in law.

VISCOUNT HALDANE: Yes. I think it is very important that you should clear our minds upon that subject. I have had some difficulty over the question. Perhaps if it is convenient to you, you could take this stage first in your reply.

MR STUART BEVAN: If your Lordship pleases, I should be very glad to do that. It is perhaps not unimportant to remark that in this amendment of the criminal law, as it is presented by my learned friend, Sir John Simon, it is not until the 56th. section of the Statute is reached, that there is any reference to any offence or penalty, or anything-else.

VISCOUNT HALDANE: There is nothing about conspiracy in the early words. It simply takes away the civil right of an employer to declare a lock-out, or of an employee to go on strike.

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: Take the simple case of a striker, all he does is to say: I will not work; it does not matter whether other

workers say the same or not. What this Act says is, You are not to exercise that civil right, which is not touched by the law of conspiracy.

LORD ATKINSON: One employer might lock-out.

MR STUART BEVAN: Yes.

LORD ATKINSON: One man cannot conspire.

VISCOUNT HALDANE: No, he can go on strike, he can lock-out or go on ~~xmi~~ strike, and it may be very serious. If I am a watch-maker, and my best employee, the man who adjusts the main springs goes on strike, I cannot make any watches and there may be nobody-else who can.

MR STUART BEVAN: The sections in question, section 56 onwards, are not limited to providing for penalties in the case of a lock-out and strike alone, the penalties go to matters outside strikes and lock-outs altogether, as I shall endeavour to show your Lordships in a moment. When we look at the Act itself, this amendment of the Criminal law or additions to the Criminal Law of Canada, one finds on page 11 it is: "An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities".

That is specified to be the subject of the Act, and the first 55 sections deal entirely with the creation of a Board, the functions and powers of the Board,and the manner in which the appointment of the Board may be called for, and there is nothing in all that deals with the law of conspiracy, or deals with strikes or lockouts in any way except the definition section on page 12 (f) and (g).

LORD SALVESEN:- I was looking at strike as defined there, it says: "The cessation of work by a body of employees acting in combination".

Mr STUART BEVAN:- Yes.

LORD SALVESEN:- So that that would exclude the idea of a single person going on strike.

Mr STUART BEVAN: - Certainly; but I am going to endeavour to satisfy your Lordship in a moment that when one looks at section 57 and section 7 of this Act, the provisions in that section go outside strikes and lockouts and deal with disputes.

LORD ATKINSON:- A lockout may be done by one man, and the definition of it means: " A closing of a place of employment , or a suspension of work , or a refusal by an employer to continue to employ any number of his employees in consequence of a dispute, done with a view to compelling his employees , or to aid another employer in compelling his employees, to accept terms of employment". One man can lock out.

Mr STUART BEVAN:- One man can lock out.

LORD SALVESEN:- But he must do it in order to aid another.

Mr STUART BEVAN:- Yes, he must do it with an ulterior purpose.

VISCOUNT HALDANE:- He is entitled to close his shop if he finds he cannot make it pay. It is disjunctive "Compelling his employees or to aid another employer".

LORD SALVESEN:- That I quite agree.

LORD ATKINSON:- It is quite legitimate to say I must decrease your wages, if you do not agree to that I will lockout.

Mr STUART BEVAN:- Yes. This Act does not declare, I think this is a point that ought to be emphasised, a strike or lock-out is illegal; a strike or lockout is perfectly legal.

LORD ATKINSON:- The great object is conciliation and agreement.

Mr STUART BEVAN:- Yes.

LORD ATKINSON:- And you are not to endanger that by, while negotiation proceedings are pending, either locking out or striking.

Mr STUART BEVAN:- Yes, my Lord, and the moment the Board has met and has failed to get the parties to a dispute to agree, and the moment it has issued its report stating the facts and circumstances of the dispute, the strike or lockout can go on merrily and the law cannot prevent them.

LORD DUNEDIN:- If you take Sir John's argument as I understand it, they did not need to say that a strike was illegal because it was illegal at Common Law.

Mr STUART BEVAN:- I ought to tell your Lordship my learned friend has been good enough to look into this matter and there is another Statute.

LORD ATKINSON:- It is not to prohibit absolutely either strikes or lockouts, but to prohibit striking or locking out while proceedings are pending.

LORD DUNEDIN:- That is this Act. Sir John's point was you did not need to say that a strike or lock-out was illegal, it was illegal at Common Law.

VISCOUNT HALDANE:- The whole idea was criminal law therefore.

LORD DUNEDIN:- To test that by the third section of the Act of 1875 it says: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime".

That altered the law. Before that Act it was punishable as a crime. Sir John's view, as I understand, is that inasmuch as the Act of 1875 did not apply to Canada it was the old Common Law.

Mr STUART BEVAN:- I ought to tell your Lordship my friend has looked into it and has found that there was in 1872 a Trade Unions Act passed by the Dominion of Canada. I think your Lordships ought to know ~~xxxx~~ this, whether it assists my argument or not.

VISCOUNT HALDANE:- Certainly we ought to know it.

Mr STUART BEVAN:- It is the Trade Unions Act of 1872. This followed the 1871 Act, it is 35 Victoria, Chapter 30, Then for the purpose of your Lordships note it is in the Revised Statutes for Canada of 1906.

VISCOUNT HALDANE:- You mean it is reprinted?

Mr STUART BEVAN:- Yes, it is the Revised Statutes, Chapter 131, Section 1.

VISCOUNT HALDANE:- We had better have it in 35 Victoria .

Mr STUART BEVAN:- It is altered I am told in some respects.

VISCOUNT HALDANE:- We will take the 1872 form as it was.

LORD SALVESEN:- I understand you have to consider the law as in 1867, and it was the Common Law that combination was an illegal thing.

Mr STUART BEVAN:- ~~Xxx~~ In my submission that construction cannot be given to sections 91 and 92.

VISCOUNT HALDANE:- Suppose it was so. Suppose that in 1867 strikes were included in illegal conspiracies, then came 1872 which may or may not have altered that, but when you legislate in 1907 under the Lemieux Act, strikes ycu say, were no longer part of that law.

Mr STUART BEVAN:- Yes, it is quite irrelevant to consider what powers there are under section ~~69~~ 91 that go back to 1867.

LORD SALVESEN:- The Act you refer to was a Dominion act

which made strikes legal in the Common Law as in England.

Mr STUART BEVAN:- It follows substantially, if not strictly, the Act of 1871.

LORD DUNEDIN:- Is not this double-edged to you; if the Dominion did legislate as against strikes in 1872 that showed that really the topic of strikes fell under the Criminal Law otherwise they could not do it.

MR STUART BEVAN:- I appreciated the risk that I ran of that criticism being levelled against me, and I propose to deal with it, if I may.

LORD LUNEDIN:- It did not require any great ingenuity on mym part to see it.

MR STUART BEVAN:- It is a point I quite appreciate.

LORD ATKINSON:- It took away from Trade Unions some of the elements that the Act of 1871 did in England.

MR STUART BEVAN:- It substantially followed it.

VISCOUNT HALDANE:- It says: "This Act may be cited as the Trade Unions Act, 1872".

MR STUART BEVAN:- May I read the heading: "Criminal Law Amended", we rely upon that. Then there follow five sections dealing with the amendment of the Criminal law.

VISCOUNT HALDANE:- We must go through them; it is a very critical point for you.

MR STUART BEVAN:- Yes. Section 2 says: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise".

LORD ATKINSON:- That is the purpose of the enactment?

MR STUART BEVAN:- Yes. Then section 3: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust", identical with this is section 74 of the Act of 1871.

VISCOUNT HALDANE:- Is there anything else there?

MR STUART BEVAN:- No, that is all we get there. Then we get to section 6 which is headed "Registration of Trade Unions" and those sections go down to and include section 12. Then section 13 onwards "Registry of Trade Unions". I have not had an opportunity of reading the whole Act through and comparing it with the Act of 1871, but I think I am correct in saying substantially you will

find it is the same enactment as our own Act of 1871. It will be said against me at once as was indicated by Lord Dunedin, some at any rate of these provisions are headed "Criminal law amended", but some of these provisions might well be said in one aspect to interfere with civil rights within the Province, the provision for instance as to registration of Trade Unions, or even the earlier provision under section 4: "Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements", which are specified". All those matters it may be said, if my argument in the present case is right, create a difficulty, but my Lord my answer to it is that it may very well be, I do not know whether the matter has ever been considered, at all events it has never come before this Court, that some of these provisions in the Trade Unions Act of 1872 upon inquiry and investigation and argument might well be declared to be outside the power of the Dominion Government.

VISCOUNT HALDANE: Let us see what the Act really does; its primary purpose is to declare that the purposes of a Trade Union are not simply because they are in restraint of trade, to be any more unlawful.

LORD DUNEDIN:- May I remind you, and Lord Atkinson particularly, you have already called attention to the fact that this Canadian Act of 1872 is just a repetition of the Act of 1871.

VISCOUNT HALDANE:- That is so.

LORD DUNEDIN:- That was found to be an unfortunate Act in this country, and had not effected the purpose wanted.

VISCOUNT HALDANE:- It did not go far enough.

LORD DUNEDIN:- In the Gas Stokers' case it was held that the provisions of the Act of 1871 had not in fact effected the common law of conspiracy for which an indictment would still lie; therefore it was that we have the Act of 1875; Therefore I am only doing justice to Sir John Simon; if he were he would say this Act

of 1872 had not affected his statement that at common law the thing would still be illegal.

VISCOUNT HALDANE:- Yes, but Trade Unions were no longer found to be illegal.

MR STUART BEVAN:- There was the Act of 1871 and the amending Act of 1875, and again speaking withdut having an opportunity of comparing the two, I think some of the provisions at any rate of the Act of 1875 are to be found set out in the Canadian Act of 1906, the Revised Statutes, Chapter 131, section 1.

VISCOUNT HALDANE:- Was the Lemieux Act directed to the law of conspiracy, or for another purpose?

LORD ATKINSON:- I suppose it was brought into conformation with the Act of 1875.

MR STUART BEVAN:- I think your Lordship will find the Act of 1906 brought the matter in line with the English legislation.

VISCOUNT HALDANE:- The Lemieux Act is purporting to deal with something which was treated, rightly or wrongly, as being lawful, and it was declared not to be lawful if a Board was set up.

MR STUART BEVAN:- Strikes and lock-outs were lawful after the passing of the Act of 1872. At the time of the Lemieux Act they were lawful; there was nothing illegal about them.

VISCOUNT HALDANE:- I want to be quite sure. Strikes had been legalised by the Act of 1872. The words of the Lemieux Act go rather further, they deal with various matters, but they deal with them on this peculiar footing, they are all treated as lawful, and it is a restricting Act, it is not altering the criminal law, but rather enacting the criminal law?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- It does it by reference to civil rights, and then adding penalties for violation of the new restrictions?

MR STUART BEVAN:- Yes. The Act is not confined to the position of regulating or suspending the right to strike or to lock-out, it goes far beyond that in my submission when one looks at the terms of section 57.

LORD ATKINSON:- It says strikes and look-outs shall not be indulged in pending the decision of the Conciliation Board.

VISCOUNT HALDANE:- It seems to me to assume you are legally entitled to strike or look-out, but for a period you are not to do it, it is a new offence created.

LORD ATKINSON:- It qualifies the general words.

MR STUART BEVAN:- The argument put forward against us is this: That all the Act does is to deal with the subject of criminal law at the time of the passing of the British North America Act. When one looks at section 57 one sees it goes far outside criminal matters at the date of the British North America Act. I want to make that good.

LORD DUNEDIN:- I do not find in the Statute you refer me to anything corresponding to section 3 of the Act of 1875?

MR STUART BEVAN:- My friend, Mr Duncan, is very familiar with the Statute and he is good enough to find it for me. It is section 32 at the end of Chapter 125.

LORD DUNEDIN:- Pardon me, that is a perfectly different thing, it is in restraint of trade. The third section of the Act of 1875 was not that at all, it was this: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime". That is a perfectly different thing from the difficulty that arises from a Trade Union being an illegal body in restraint of trade.

MR STUART BEVAN:- I will see if I can find anything else.

VISCOUNT HALDANE:- What is section 32?

MR STUART BEVAN:- "The purposes of any trade Union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful".

VISCOUNT HALDANE:- That is Trade Unions.

MR STUART BEVAN:- Looking through it with the assistance of my learned friend, Mr Duncan, I do not see that section 3 enacts it.

LORD DUNEDIN:- I am sorry to reiterate it, and I am only doing it in the absence of Sir John Simon; I do not want to plead the case against you; I am doing his argument a little justice, I think he would still say at common law still these acts are illegal.

VISCOUNT HALDANE:- I would like to be sure there is no other Canadian statute that effects this point that has emerged. Has it been considered?

MR STUART BEVAN:- Mr Geoffrey Lawrence has just handed me the Criminal Code which deals with offences connected with trade and a breach of contract. It is section 496: "A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade". Then section 497: "The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section". That is the Act of 1871.

VISCOUNT HALDANE:- There is nothing else in the Criminal Code.

MR STUART BEVAN:- No, my Lord.

VISCOUNT HALDANE:- They were watching so closely in Canada these changes that took place here that I am surprised they did not pass legislation.

MR CLAUSON:- My learned friend, Mr Duncan, has prepared for the assistance of all of us a very careful note tracing the whole of the Trade Union legislation; I think he did refer to some of it in his address to your Lordship, and if your Lordship would like to be furnished with particulars of all the Acts we can easily do it.

VISCOUNT HALDANE:- We would like very much to know one thing, Mr Duncan will be able to tell us whether there is anything either in the Criminal Code or in any other Statute which enacted what corresponded to section 3 of the Act of 1875 here, that what is

illegal if done by a number of people is not to be illegal if it could be done by one of them.

MR DUNCAN:- May I look that up?

VISCOUNT HALDANE:- Yes, if you please, look it up from your note and tell us later.

MR STUART BEVAN:- I am sorry I have not had an opportunity of putting myself in a position to assist your Lordships; till my learned friend, Sir John Simon, took this point about criminal law it did not occur to one.

VISCOUNT HALDANE:- The other point is: What does the Lemieux Act really do, does it do anything else but restrict what were assumed to be things people were entitled to do?

MR STUART BEVAN:- In my submission the Lemieux Act goes far outside strikes and lock-outs, very far outside matters which at the time of the passing of the British North America Act were the subject matter of criminal law. It all turns on sections 56 and 57, which are to be found on page 23 of the Joint Appendix section 56 in terms deals with strikes and lock-outs: "It shall be unlawful for any employer to declare or cause a lock-out, or for any employes to go on strike, on account of any dispute prior to or during a reference of such dispute to a Board of Conciliation and Investigation under the provisions of this Act". I need not read the rest of it, it deals with nothing but strikes, lockouts and the suspension of the right to declare either the one or the other.

LORD ATKINSON:- Striking or locking out is a crime, and that says you must not commit it.

VISCOUNT HALDANE:- If there is a Board. If the draftsman had thought it was illegal without anything of the sort happening one wonders why he did not say so.

MR STUART BEVAN:- At that date in my submission, the date of this Act, neither a strike nor a lockout was illegal; it was legal at the date of the Lemieux Act in virtue of the Canadian Trade Union legislation.

LORD ATKINSON:- The earlier legislation took away the

criminal element of combination?

MR STUART BEVAN:- Yes, and therefore when the Lemieux Act was passed strikes and lockouts were perfectly legal.

VISCOUNT HALDANE:- All that remained was that the Gas Stokers strike was contrary to the common law of England.

LORD SALVESEN:- If it was competent for the Dominion Parliament to ~~xxxx~~ declare a thing that had previously been illegal to be legal, would one not have thought it equally competent for the Parliament to reverse the process, as you say they have done in parts.

MR STUART BEVAN:- I have not considered it, but it might very well be that if they passed an Act to amend the Trade Unions Act, to amend the criminal law, which was the declared purpose of part of the Trade Unions Act, it might very well be, but that could be done in two sections, you would not have provisions in sections 56 and 57 of an Act which in 55 sections dealt with interference of civil rights.

VISCOUNT HALDANE:- Lord Salvesen is putting this: That if they could do one thing, why cannot they do the converse thing, why should not they declare something that was legal to be illegal, and annex penalties to it?

LORD SALVESEN:- Yes.

VISCOUNT HALDANE:- Supose, which is very remote from this case, that they had passed an Act that it was to be unlawful for anybody to own land in the Province of Ontario, you might say in pith and substance you are interfering with the right to own land in Ontario, which is a civil right.

LORD SALVESEN:- I suggest that civil rights must be construed as having reference to the civil rights existing in 1867, not to any civil rights that may come into existence as a result of the Dominion Parliament legislation thereafter.

VISCOUNT HALDANE:- That would carry you very very far; must not it be whenever you legislate under section 91 you must look at the state of the law as it is then and see what are the civil rights?

LORD SALVESEN:- It may be so.

MR STUART BEVAN: Your Lordship will appreciate that since 1867, the provincial legislatures may have created all sorts of new civil rights, and may have cut away civil rights altogether that existed in 1867.

LORD ATKINSON: When you take the Act of 1906, are not you to look at all the legislation that has gone on and consider and see how it has left the question of lockouts and strikes.

LORD DUNEDIN: I cannot take from you what you said a moment ago, it may be right or wrong, you calmly assented to Lord Atkinson's conclusion and you have no business to do so it; you said strikes and lockouts were legal at the time of the Limoaux Act. Lord Atkinson then brought to your notice what had been done in 1871 and 1875 in this country, but that legislation did not apply to Canada. I have yet to see in black and white how it is that strikes and lockouts were legal in Canada even in 1906.

MR STUART BEVAN: May I endeavour to show your Lordship ?

LORD ATKINSON: The Canadian Act blotted out the criminal element of restraint of trade.

LORD DUNEDIN: Of Trade Unionism. A strike or a lockout was illegal as a strike or a lockout in England, quite apart from a Trade Union.

MR STUART BEVAN: I am not reading the Act of 1872, the Canadian Act. "The purposes of any Trade Union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such Trade Union liable to criminal prosecution for conspiracy or otherwise".

LORD DUNEDIN: What has that to do with the question put to you ?

MR STUART BEVAN: I would submit that a strike is in restraint of trade and a lockout is in restraint of trade.

VISCOUNT HALDANE: These are not Trade Union matters; they may be, but they are not necessarily.

MR STUART BEVAN: Not here.

VISCOUNT HALDANE: The gas-stokers were not prosecuted as

6/2

members of a Trade Union.

MR STUART BEVAN: My learned friend refers me again to the Criminal Code in the Revised Statutes of 1906, Chapter 146, at section 498, which may provide the answer. I am sorry I have not had an opportunity of looking into this. Section 498 says: "Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company,--(a)to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or, (b) to restrain or injure trade or commerce in relation to any such article or commodity; or,(c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or(d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property. 2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees".

LORD DUNEDIN: That is no answer. Section 498, which you have just read, makes a new offence in certain heads, and then says: As regards this new offence, so and so.

MR STUART BEVAN: It seems to recognise that combinations of workmen for their own reasonable protection is a thing perfectly legal,that is as far as I can go at the moment.

LORD DUNEDIN: You are taken at a great disadvantage on that. I am not complaining, because this argument of Sir John Simon's was quite new, and there is not a trace of it in the judgments

5/3

in the Court below, and, as I said, you are at a great disadvantage: do not think I do not sympathise with you, because I do, but that does not enable me to swallow, because you are at a disadvantage, something that does not satisfy me.

MR STUART BEVAN: I may have an opportunity later of seeing if the section of the 1875 Act finds its way into any Canadian legislation. May I say that in my submission the considerations with regard to the ~~lesy~~ law of conspiracy, the position of strikes and lockouts, is wholly irrelevant to the discussion in this case. If I am right upon that, that absolved me from the necessity of investigating the matter with regard to this later point that has been taken against me. Now my ground for submitting that is to be found in section 57 of the Industrial Disputes Act. Will your Lordships be good enough to look at it, that is section 57 of the Limeaux Act. It goes further, in my submission, than dealing with strikes and lockouts, which, according to the other side, were matters of criminal law at the time of the passing of the British North America Act. It says: "Employers and employees shall give at least 30 days' notice of any intended change", this has been altered on page 30 by the amending Act, section 57, and I had better read the amendment. "Employers and employees shall give at least 30 days' notice of an intended change affecting conditions of employment with respect to wages or hours". Now, stopping there for a moment, that deals with all cases, it places every employer and employee under this obligation to give 30 days' notice, irrespective of the fact as to whether a strike or lockout is in contemplation or not; it is a very wide invasion of the civil rights of an employer or employee.

VISCOUNT HALDANE: I wish you would not go so fast; I want to see this, there may be nothing in it, but I want to see what the provisions of section 56 say. It is drawn in such a way as to require careful consideration: "Provided also that, except where the parties have entered into an agreement under Section 62

5/4

of this Act, nothing in this Act shall be held to restrain any employer from declaring a lockout, or any employee from going on strike in respect of any dispute which has been duly referred to a Board and which has been dealt with under section 24 or 25 of this Act, or in respect of any dispute which has been the subject of a reference under the provisions concerning railway disputes in the Conciliation and Labour Act". Does not that make it lawful, by implication, for employers to declare lockouts and for employees to go on strike ?

MR STUART BEVAN: I should have submitted so.

VISCOUNT HALDANE: It is very important. It is in the form of a proviso. It looks rather as if it did.

MR STUART BEVAN: It seems to recognise that there is legislation somewhere. I may be able to find it, or there may be none.

VISCOUNT HALDANE: It may be the draughtsman thought it was all that was necessary to put in that proviso; you see what I mean, Lord Dunedin ?

LORD DUNEDIN: I see the point.

VISCOUNT HALDANE: I daresay it is so unless this is drawn on the footing that they were getting rid of what was section 3 of the Act of 1875 in England in respect of strikes and lockouts anyhow.

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: It looks to me like a proviso saying that the common law of England is not to affect this ?

MR STUART BEVAN: If I am right about section 57, it becomes really irrelevant to consider the law as to strikes and lockouts, conspiracy and soforth. Might I go to page 30.

VISCOUNT HALDANE: Section 57 again looks to me as if the draughtsman was assuming there he had said, or thought it was the law without even having said it, that it was perfectly lawful to strike or lock-out.

MR STUART BEVAN: Yes, it does.

VISCOUNT HALDANE: The lockout is only one thing contrary to

to the provisions of this Act, a strike must be contrary to the provisions of this Act.

MR STUART BEVAN: That is another observation to be made upon it.

LORD DUNEDIN: It is declaring a lockout or going on strike after there has been a Board.

MR STUART BEVAN: If strikes and lockouts were illegal, one wonders what the necessity was for this particular piece of legislation or any legislation.

LORD DUNEDIN: Lord Haldane's point is against you there.

MR STUART BEVAN: Nowhere in the evidence is it suggested that there was any power of dealing with strikes or lockouts as being illegal combinations.

VISCOUNT HALDANE: We ought to be perfectly clear about this. The first provision is important: "Provided that nothing in this Act shall prohibit the suspension or discontinuance of any industry or of the working of any persons therein for any cause not constituting a lockout or strike".

LORD DUNEDIN: It does not stop a man who says: I am going to shut up business because I do not want to go on.

VISCOUNT HALDANE: Or: I will not work for you any more, the workman may say. The proviso says, except where they have entered into an agreement; they may lockout or strike except where they have entered into an agreement under section 62; is that an agreement to agree to a Board ?

MR STUART BEVAN: Section 62 is an agreement to be bound by the recommendations of the Board.

VISCOUNT HALDANE: What is the other provision ?

MR STUART BEVAN: Sections 24 and 25 are the Report of the Board.

VISCOUNT HALDANE: Very well. Then it says that provided that, except where they have entered into an agreement which is to bind them in this way, nothing in the Act is to be held to restrain a lockout or strike ?

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: It is quite true it is only negative there.

LORD ATKINSON: They may settle a strike or lockout under 56, but not if the strikers say: We will go on with it contrary to the agreement. That is the only kind of strike or lockout as far as I can see.

LORD DUNEDIN: If you had had this agreement and had gone before the Board and the Board made their report, then after that has all been done and it is hoped it will be settled up, if it has not, you may go on to strike or lockout ?

MR STUART BEVAN: Yes, and the Statute only recognises or gives the right after the expiration of that period and the happening of those events, to cause a strike or lockout.

VISCOUNT HALDANE: It makes a criminal provision: if you violate the exceptions, that is to say, the exceptions under 62, or under the Board Act.

LORD DUNEDIN: It makes a criminal provision if you, so to speak, strike too soon or lockout too soon.

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: If you violate what is enacted in respect of civil rights.

MR STUART BEVAN: A question then arises whether the section constitutes a crime by then participating in a strike or lockout. There is no power of imprisonment, it is simply a fine. It may be this does not come within criminal law in the true sense of the word "criminal" at all. For the moment I am not dealing with that. I am assuming that all my learned friend has urged against me as to strikes and lockouts being illegal at the date of the passing of the Act in 1867 is irrelevant to this matter, and I will deal with that later. My first point is this, that the Act, by section 57, deals with things other than strikes and lockouts, and cannot be justified as being criminal law, because it deals with things that never have been and never could be within the meaning of criminal law.

7

VISCOUNT HALDANE: Let me get your first point.

MR STUART BEVAN: My first point is that this law does not come within section 91, enumeration 27, because it deals with matters outside the criminal law altogether.

VISCOUNT HALDANE: That is the point you have just been making.

MR STUART BEVAN: Yes. I want to make it good by referring in terms to the language of section 57.

(Adjourned for a short time).

j1

MR STUART BEVAN: Your Lordship will remember that under section 2 of the Lemieux Act on page 17 : "Any dispute may be referred to a Board by application in that behalf made in due form by any party thereto;provided that no dispute shall be the subject of reference to a Board under this Act in any case in which the employees affected by the dispute are fewer than ten". Then under the definition clause, which is on page 12, dispute includes various matters. You see various kinds of disputes; No. 7 is:"the interpretation of an agreement or a clause thereof' so that if an employer has an agreement with 10 of his workmen that they are liable to dismissal at a week's notice, or that they are to work an 8 hour day, any workman, there being not less than ten, affected by the construction of that agreement can apply to the Board. It extends to matters outside matters which are properly described as matters appertaining to the criminal law. Now will your Lordships look at section 57of the Act?

LORD SALVESEN: It is only such disputes as are likely to result ina strike or lockout. Reading section 21, which is the definition, it says that a dispute with regard to the interpretation of an agreement and affects ten or more may be referred to a Board.

MR STUART BEVAN: Yes.

LORD SALVESEN: And the provision with regard to it will be applicable.

MR STUART BEVAN: Yes. I got that from the definition of "dispute" on page 12, which makes no reference to a dispute of such a character as threatens a strike or lockout. Section 5 on page 13:"Wherever any dispute exists between an employer and any of his employees, and the parties thereto are unable to adjust it, either of the parties to the dispute may make application to the Minister for the appointment of a Board of Conciliation and Investigation". I think your Lordships will find that is the scheme of the Act throughout. Now may I come to section 57.

MR CLAUSON: Will my friend refer to section 17 before he goes on.

There is to be a statutory declaration to the effect that a lockout or strike has taken place.

MR STUART BEVAN: That is on page 15, and it says: "The application shall be accompanied by a declaratinn".

LORD SALVESEN: That rather qualifies what you said, because it does seem that all the disputes are such as may lead to industrial trouble.

MR STUART BEVAN: That is if the applicant for a Board feels he is justified in making the statement which I agree is to be a statutory declaration.

LORD SALVESEN: Yes.

MR STUART BEVAN: Now I will go to section 57, which is on page 23, and as amended on page 30. This is the substantial view I am submitting that the provisions of this go far outside the region of criminal law, because it interferes with the civil rights of both employers and employees, which have no connection with the criminal law in any aspect: "Employers and employees shall give at least thirty days notice of an intended change" - that is a provision as between employers and employees where the terms of the agreement it is quite true must involve 10 employees but it affects the civil rights of employers and employees where the contract of employment in terms provides that the conditions of the employment may be changed from time to time at the will of the employer.

LORD SALVESEN: Will you assist me on a matter that is causing me some difficulty. Do you challenge the Trade Disputes Act of 1872?

MR SRUART BEVAN: Except as to its criminal provisions which are declared to be criminal provisions I challenge it. A great many of the provisions of that Act are as to the constitution of Trade Unions.

LORD SALVESEN: I rather fancied you must because if you do not, if you admit the legality of the Dominion Parliament to pass an Act of that description, it seems to me to follow that they may qualify it by subsequent legislation on the same topic.

3

MR STUART BEVAN: I do take that Act as being ultra vires in many of its respects.

VISCOUNT HALDANE: Your fourth proposition is that this is not an amending Act ; it is an Act for other purposes?

MR STUART BEVAN: That is so, it is an Act which regulates the rights of masters and men; it declares what the position as between masters and men shall be notwithstanding that the terms of the agreement of employment set up a different state of things from that declared by the Act to be binding upon the parties. It is the broadest and most complete evasion of the civil rights of an employer and employee, and it purports to be from the very construction of the Act. When one looks at its structure it does not start off as a criminal Act does by declaring certain ~~kkkx~~ acts to be criminal and punishable by fine and imprisonment Then come the ancillary provisions which without that earlier provision of the Act would never have any effect. It says if you do not do the things you are called upon to do by this Act you shall be liable to a penalty to be imposed in this particular case, and in that particular case. That is the sanction which the Act provides.

LORD SALVESEN: You have the civil right to combine. Then according to the law as it stood in 1867 this is conferring a civil right rather than withdrawing it?

MR STUART BEVAN: In my submission not. I am going to try and satisfy your Lordships in a moment that at the time of the passing of the Lemieux Act strikes were lawful, and strikes are not made lawful for the first time by the provisions of this Act. I will refer to it in a moment. My ~~section~~ second contention which I shall have to elaborate further later on is, that it is not the position of things in 1867 which has to be looked at to determine whether this ~~is~~ legislation or that is intra or ultra vires; you must look at the position when the statute, which is being attacked, was passed. Let me take an example. Civil rights within the province are matters that vary from time to time according to the particular legislation

of the particular Provinc , and what may have been a civil right in 1867 in the Province may well have ceased to be a civil right in 1906. Similarly there may be some civil rights created in the Province by the Provincial Legislature after the year 1867, and to test the position as to whether at the time of the passing of the Lemieux Act civil rights are interfered with, one must look at existing civil rights at the date of the alleged interference, because it would be a matter of academic interest, to put it at the highest, to say whether any particular legislation in the year 1906 interfered with civil rights as they existed in 1867. I am coming back to that in a moment, if I may develop my submission on section 57. Looking at page 30 for the moment, there is this interference created by the first three lines of the section. No matter what the contract between the parties is, 30 days notice at least must be given for a change of conditions. It has a tremendously wide scope. Supposing a workman were being employed in workshop A, and the master said: I am going to employ you in workshop B, that would be a change in the conditions of employment, and the workman would say: No, I must have at least 30 days notice of your intention to transfer me to workshop B; it is making an alteration in the conditions of my employment; I am dissatisfied with it, and I shall apply for a Board.

MR CLAUSON: The words are "in respect of wages or hours".

MR STUART BEVAN: Yes, it is only another illustration. Supposing the contract of employment provided for the working hours each day to be such a number, 7, 8, 9 or 10, or whatever it may be, the employer from time to time shall decide that would be the contract between the parties, and the workman would be bound by the decision of his employer. This at once tears up the contract for 30 days at least and for longer, because if the Board sits after the 30 days its report may be much more

than the 30 days, the contract entered into by the parties is torn up and a new contract is substituted by the provision of the Legislature, and it goes on:"and in the event of such intended change resulting in a dispute, until the dispute has been finally dealt with by a Board, and a copy of its report has been delivered through the Registrar to both the parties affected, neither of those parties shall alter". I am going back to page 23, the condition of employment qith respect to wages or hours. That, in my submission, is an invasion of civil rights in the Province, but it does not end there.

LORD SALVESEN: That is only in the event of its being the result of a strike or lockout.

MR STUART BEVAN: Yes, not in the event of the Local Authorities or the Minister of Labour certifying that a strike is likely, but in the event of one of the parties to the dispute saying that a dispute is likely, which is a very different thing. As a matter of fact the case must be judged by its particular facts, although if I succeed here the the decision will be a far reaching one. In this case the evidence as I shall show your Lordships in a moment makes it very doubtful as to whether there would ever have been a strike at all.

VISCOUNT HALDANE: If they say that was the purpose of this Act that may be used against it.

MR STUART BEVAN: Yes, but it xxyx shows what little value there is in the declaration as to a pending strike.

VISCOUNT HALDANE: It may be that this statutory provision xx has averted strikes.

MR STUART BEVAN: I do not know about that, because a statutory provision was invoked here when the appointment was made, the Board was restrained from sitting, and there has never been a strike. MayI go on with section 57, because it does seem to me to ne of the utmost importance. Will your Lordships look at page 23 section 57.

LORD ATKINSON: Assuming it was illegal to do this, and there is

a statute saying you shall not do it for 30 days, is that criminal legislation?

MR STUART BEVAN: If this legislation declares strikes to be illegal I might have more difficulty then presents itself to my mind at the moment. This Act has not declared strikes to be illegal, and in order to invoke criminal law as a justification for this Act, in my submission the Act must declare strikes to be illegal, and it does nothing of the kind. Indeed it recognise the rights of the citizen to strike, and all the Act does in effect, in my submission, is to say that if you do a perfectly legal thing, which the criminal law allows, within the close season, within the 30 days, you shall be liable to a penalty. In my submission that is a direct interference with the civil right which is recognised by the law in Canada to strike, and to dispose of your labour as you think best. If the Statute provided that strikes were illegal that would be another matter. Such a case may arise when there is Dominion legislation declaring all strikes and lockouts to be illegal, or to be illegal unless first sanctioned by the Minister of Labour. That is a criminal enactment declaring a certain act on the part of employers or employees to be illegal, but this Act falls short of ~~this~~ that altogether. Throughout the whole of the 60 odd sections of the Act the legislation recognises the strikes as being ~~illegal, but~~ legal under the provisions of the Lemieux Act, and legal by reason of the provisions of the criminal code, because strikes are expressly excepted from the criminal acts set out in the criminal code.

LORD WRENBURY: Either the prohibition or allowance of strikes is Dominion legislation or it is not?

MR STUART BEVAN: Yes.

LORD WRENBURY: Which do you say it is?

MR STUART BEVAN: I should think it was Dominion Legislation in exercising the powers under section 91 (27).

LORD WRENBURY: You say it is Dominion Legislation?

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: You must say so having regard to your first

proposition?

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: And that the common law position was removed by the Act of 1872, because it is within the jurisdiction of the Dominion Parliament to legislate with regard to strikes being legal or illegal.

MR STUART BEVAN: This ~~ex~~ has not declared strikes to be illegal at all. It recognises the right of the citizen to strike; it controls the action of the citizen in the exercise of his civil right to strike.

LORD WRENBURY: Every legislation interferes with the rights of a citizen?

MR S UART BEVAN: Yes.

VISCOUNT HALDANE: You have to make sections 91 and 92 work somehow.

MR STUART BEVAN: These are civil rights not within section 91. If it was within section 91 that would be another matter. I place no reliance upon interference with section 91. My learned friend is pressed because he is endeavouring to bring ~~mx~~ it within section 91, because it is criminal law. If the Dominion Legislature had enacted that all strikes shall be illegal throughout Canada, I do not think I could have complained before your Lordships that that legislation was ultra vires, because it is creating a criminal offence; it is making a strike a crime. If it has said anybody guilty of striking shall be liable to imprisonment that would be ~~mx~~ criminal law. This is not criminal law in my submission at all, because it recognises the right of the subject to strike, and what this particular legislation, the Lemieux Act, does in fact, is to say: We recognise your right to strike;that is a civilright which you have; we are going to interfer with the exercise of that civil right to strike. It recognises the right to strike, but suspends the exercise of that right.. That is how I should put it.

VISCOUNT HALDANE: It makes a strike illegal sub modo?

MR STUART BEVAN: Yes.

LORD ATKINSON: There is a close time for striking.

fol

MR. STUART BEVAN: Yes, but a strike is legal, because as soon as the close time has expired the interference with the civil right of the citizen to strike disappears. A strike is, after all, only the exercise of the liberty of the subject to dispose of his labour as he will. It is not only the question of the right to strike here, though that is my main contention. This Act, which is said to be legislation with regard to criminal law, upon a little closer examination of section 57, shows that it imposes all sorts of restrictions upon civil rights that in no sense can be regarded as having anything to do with criminal law. It is that which I am endeavouring to develop by reference to section 57 on page 23. I will go on after the amended part: "neither of the parties nor the employees affected shall alter the conditions of employment with respect to wages or hours, or on account of the dispute do or be concerned in doing, directly or indirectly, anything in the nature of a lockout or strike, or a suspension or discontinuance of employment or work, but the relationship of employer and employee shall continue uninterrupted by the dispute". So that the position would be this, and I must judge of the position by putting particular cases, that even if the person invoking the appointment of a Board was able to make his statutory declaration as to the probability or the certainty of a strike, if a Board was appointed, and after the appointment of the Board the possibility of a strike disappeared, none the less the two parties would be tied to their agreement; they would continue the relationship of employer and employee until the Report of the Board was issued. It is to be observed, and here, again, I am relying on this as supporting my contention that section 57 goes far outside anything that can be regarded as within the scope of the criminal law, there is no penalty imposed, and I submit it is a direct interference with civil rights.

LORD ATKINSON: What do you say about sections 58 and 59?

MR. STUART BEVAN: Section 58 only deals with employers declaring a lockout; section 59 deals with employees going on strike; but the

relationship of employer and employee provided for in section 57 is to be declared to continue uninterruptedly. He is exercising his civil rights, and it is not declared to be a criminal offence; it is not declared to be subject to a penalty, and yet my learned friend's whole contention is that this Act from beginning to end is an enactment relating to the criminal law which can only be tested by seeing whether that is so, and the result of a careful reading of section 57 shows that it does not attempt or purport to attempt to create ~~in~~ a criminal offence; it imposes no penalty, but it creates a statutory interference with the civil right of the employer to continue the employment of his employee. That is only a subsidiary point. My main point is that it is impossible, taking a proper view of the statute, looking at its structure, having only at the end these penalties, which in certain cases are imposed as a sanction for the purpose of making the statute effective, it is impossible to describe this as a criminal statute competent to the Dominion Legislature to pass under section 91 of the Act. That, again, is what we find in the Trade Union Act of 1872. If it was a criminal Act the heading would be: "An Act to amend and relating to the criminal law." I am not going to trouble by further consideration to the scheme and structure of the Act, but I do respectfully submit, if this statute was looked at in the ordinary way, to see whether it was a contribution to the criminal law of Canada, apart from the serious questions that arise under section 91 and section 92, could anybody describe this as a criminal statute? Supposing a division was set up between criminal and civil Acts, in which column would this statute find its place? That, in my submission, is the answer to Sir John Simon's point, which is a necessary point for his case, if he has to distinguish this case from your Lordships' judgment in the Board of Commerce case.

That, my Lords, leaves me to deal with the point which was so ably argued by my friend Mr. Duncan, that is, that it is the aspect of the Act which has to be looked at. If that is

the true view, I suppose it can be said that this is hardly legislation which is not in the Dominion interest, taking all the enumerations of section 92. I suppose from one point of view the Dominion would be interested in having uniform legislation throughout the Dominion, and, therefore, it is insufficient in my submission that the subject matter of the legislation is not confined to one province only, but extends to all the provinces, and, in fact, my learned friend contends that these two sections must be read together, as if somewhere or other in section 91 or in section 92, or by the combined operation of the two sections, there is an express or implied reservation that in all these matters, never mind whether they fall into section 92 or not, the moment they become of Dominion interest they must be treated as being within section 91. May I deal with that? Great importance attaches to the language of section 92,

LORD ATKINSON: A subject of the Dominion has an actual interest in the legislation?

MR. STUART BEVAN: Certainly.

LORD DUNEDIN: Does not it become a pure question of degree?

MR. STUART BEVAN: I submit we get assistance from the terms of section 92. It provides: "That the Provincial legislature may exclusively make Laws in relation to Matters coming within the classes of subjects next hereinafter enumerated."

LORD WRENBURY: Each is expressed to be exclusive of the other?

MR. STUART BEVAN: Yes, I do not attach too much importance to that.

VISCOUNT HALDANE: That was the origin of the doctrine of aspects.

MR. STUART BEVAN: Yes. One of the enumerations in section 92 in express terms recognises that the conduct of local works and undertakings ~~xxx~~/or the regulation of local works and undertakings may be of Dominion-wide interest, and in that case express provision is made. I am referring to head 10 of section 92, which seems to throw some light upon the intention of the legislature. Among matters exclusively given to the provinces is head 10 of section 92: "Local Works and Undertakings other than such as are of the

following Classes: (A) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with anyother or others of the Provinces, or extending beyonds the Limits of the Provinces: (B) Lines of Steam Ships between the Province and any British or Foreign Country. (C) Such Works" -- here is the Dominion-wide interest expressly provided for -- "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." It is only in the case of local works and undertakings that in certain circumstances the right is given to the Dominion Parliament to take them out of section 91. I pray that in aid, because in no other case is that right given to the Dominion Parliament, and the legislature, in the case of local works and undertakings, transport, railways and steam ships, recognises that, though primarily they are x of local interest, and are local works and undertakings that should be assigned to the province, nevertheless they may have assumed such an importance from a Dominion point of view that they are to be taken out of section 92 and treated as if they were in section 91. I rather gathered from your Lordship that it might be said that the fact of finding the exceptions under head 10 was partly against my submission or idea of it.

LORD WRENBURY: It is another indication that the Dominion Parliament is, as between the two, the greater; they are mutually exclusive.

MR. STUART BEVAN: Yes, but when one finds one in a particular enumeration out of sixteen yx the event of the topic becoming one of Dominion-wide importance, being recognised, you do not find such a recognition under any other heads. That, I submit, is material to my statement.

VISCOUNT HALDANE: I think the case discussed in Hodge v. The Queen was this. The province had regulated the liquor traffic by setting up all sorts of subordinate restrictions. It was declared by this Board that that was in the exclusive control of the province,

notwithstanding what was decided in Russell v. The Queen, and when the Dominion went on to try to get rid of this by getting that kind of restriction the provinces said merely in one case it was declared by this Board that that was ultra vires.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: It is not everything that is good for more than one province; it must be something within the meaning of head 10, where it refers to a work wholly situated within the province, which is declared to be for the general advantage of Canada.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: Supposing they set up in Canada a Cordite Factory to supply ammunition for the whole Dominion, Ottowa might say: That is for the advantage of Canada, or more than one Province.

MR. STUART BEVAN: May I take an example nearer home. May I take local electricity works?

VISCOUNT HALDANE: You might set up a generating station for two provinces?

MR. STUART BEVAN: Yes. Clause (C) of head 10 is "Such Works" -- that is local works and undertakings, I suppose, of any character -- "as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

VISCOUNT HALDANE: Supposing a river was flowing through a province and furnishing a lot of power, and then goes through another province. The river flows through the first province and furnishes generating power, a great deal more than is necessary for the purposes of the province, could not Parliament says This is a work set up for the benefit of two or three provinces, and we shall declare it so?

MR. STUART BEVAN: Yes. That case is expressly provided for. There is to be a declaration by the Parliament of Canada that it is for the general advantage, and until they do that I submit it is quite clear from section 92, and particularly from the words of head 10

6

(C), that there is no power to legislate so as to interfere with any of the matters or trench upon any of the matters in section 92. I have admitted, and I have never attempted to argue this case otherwise, that if you find a subject within both enumerations, the Dominion rights prevail. That is why my learned friends have been so anxious to bring in the Criminal Law, an aspext which had not occurred to me, though I might have dealt with it incidentally, to be the position under section 91. Property and civil rights in the province are liable to be interfered with every day. When one looks at the enumerations of section 91 one sees at once how the industrial sections fall very largely to be dealt with by the Canadian Government. Your Lordships see in section 91 the Postal Services, Banks, Criminal Law and Dominion Railways are all given to the Dominion Parliament, and incidentally they could deal with the labour situation on Dominion Railways of in the shipping trade.

Now, may I go to another branch of the argument. The regulation of labour and the prevention of strikes, even though it involves trenching upon civil rights in the provinces, is one which has ~~to~~ become a Dominion-wide matter, which can hardly be supported when one sees what a very wide and effective hand the Dominion Parliament has over all this, owing to the enumerations of section 91. Your Lordships will remember the case of The Attorney General for Canada v. The Grand Trunk Railway Company, in 1907 Appeal Cases.

VISCOUNT HALDANE: That was with regard to railways?

MR. STUART BEVAN: Yes, and this is very relevant, I submit, on the question of the Dominion-wide importance of the topic legislated for by the Lemieux Act. The whole of the railway labour question falls to be legislated upon by the Dominion Government by virtue of enumeration 10 of section 10, the one I have been dealing with upon another branch of my submission; "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the

Provinces, or extending beyond the Limits of the Province".

Those are assigned back from section 92 to section 91. Therefore, t
the whole of the labour situation, as is shown by the contracting

out case, which is a decision of your Lordships' Board, and the

whole of the legislation with regard to labour unrest falls

to be dealt with by the Dominion Government, and yet, when one

comes to look at the Lemieux Act, at page 12, of the Appendix,

it says that employer means any person, and so on, including

railways.

That is in the Joint Appendix at page 12 under the definition of employer: "Employer means any person, company or corporation employing ten or more persons and owning or operating any mining property, agency of transportation or communication, or public service utility, including, except as hereinafter provided, railways" and so on. That I think is the only part of the Act I am not challenging, if it is confined to Dominion Railways I am not challenging the right of the Dominion to legislate for Dominion Railways with respect of the labour aspect of the Railway organisation; that they are entitled to do under Section 92 10 (A).

LORD SALVESEN:- That would mean you would say this Act would be saved so far as it regarded the Dominion Railways.

Mr STUART BEVAN:- Yes.

LORD SALVESEN:- That is the Railways not operating entirely within one Province.

Mr STUART BEVAN:- Yes, I concede that, but they do not get that because it is criminal legislation; they do not get it because it is trade or commerce, they get it under the express reservation to them of Dominion Railway Legislation, which has been held in 1907 Appeal Cases to deal with such industrial matters as the right of employees to contract out .

Now while one is on sections 91 and 92 there is another matter that was raised in my learned friend Mr Duncan's argument that I desire to deal with; he drew attention to section 92 and to the last enumeration No. 16 "Generally all matters of a merely local or private nature in the Province", and contended and cited authority to your Lordships for it, that number 16, when regarded with any of the other preceding 15 enumerations, was exclusive, that they were all exclusive the one of the other. I agree with regard to 16 and any one of the numbers from 1 to 16, but from 1 to 16 are not mutually exclusive. 16 would be local matters not precisely dealt with

under numbers 1 to 15 but dealing with numbers 1 to 16, and applying the present case my contention is it comes under at least three of those enumerations.

LORD WRENBURY:- You say No. 16 ought only to be looked at on the word "Generally"; you may say we have hitherto detailed specific matters , now we add "generally".

VISCOUNT HALDANE:- Yes, not restricted but sweeping up.

Mr STUART BEVAN:- I cannot say , taking the one we have heard so much of in this case "property and civil rights within the Province", I can bring myself under that and also 16 because 16 refers to matters not specifically dealt with in numbers 1 to 15.

LORD ATKINSON:- It sweeps up.

Mr STUART BEVAN:- It sweeps up. It does not prevent me from presenting my case that I come under section 92 either under 8 or 10 or 15, or under all three of them; that is my submission, that I come under all three of them, that it is not only an interference with property and civil rights in the Province, but it is an interference with Municipal Insitutions in the Province, and Local works and undertakings.

VISCOUNT HALDANE:- I think "the imposition of punishment by fine , penalty or Imprisonment" for infraction of a Provincial law.

Mr STUART BEVAN:- Yes, I am obliged, that is No. 15 as well. Having submitted that point I am really indifferent as to what head I come under as long as I find somewhere in Section 92 an umbrella. I have perhaps put No. 15 more to the forefront than I ought, but I venture to submit it is very important. Any one of them is equally important. Here was a Municipal Institution.

LORD ATKINSON:- It is a local undertaking.

Mr STUART BEVAN:- It is a local undertaking which is outside the class of these local undertakings which by that exception in enumeration 10 are thrown back into section 91.

LORD SALVESEN:- Not dealing with a Municipal Institution as such.

Mr STUART BEVAN:- I am dealing with that quite shortly. Here we are a Municipal Institution carrying on this work; the Municipal Institution is the creation of the Provincial Legislature. Is it to be said ~~that~~ in a case like that all the Provincial Legislature can do is to create the Municipal Institution, but that the rights and obligations and powers of the Municipal Institution, the creature of the Provincial Legislature, are to be determined by Dominion Legislation? I submit not. When the creation of Municipal Institutions is given to the Provincial Legislature surely the powers and rights of the Institution are to be defined by the Legislature that creates them. It is an impossible sort of thing that one Legislature should create an Institution and another Legislature should say what powers that Institution should have, and my submission is that I come here within "Municipal Institutions".

LORD SALVESEN:- The powers that are interfered with here, you say, are those that flow from the Common Law Statute from the creation of this Institution as a Municipal one?

Mr STUART BEVAN:- The powers as to the Municipal Institution are with reference to the terms of employment of their workmen, and among other things: they have power to employ workmen, and, I submit, power to decide what they will pay the workmen and the conditions of employment as between themselves and those workmen; that is a civil right; it is a right that every citizen has, and a right that every Municipal Institution has.

LORD SALVESEN:- How are they different from any ordinary employer in this respect?

Mr STUART BEVAN:- They could not do anything that is contrary to the Criminal Law; that I should not suggest for a moment;

A/4

but when the Provincial Legislature has the right to create the Municipal Institution it has the right to say what that Municipal Institution shall do, and the means by which it shall do it as long as there is an enforcement of any provision of any Criminal statute.

VISCOUNT HALDANE:- It looks as if the Dominion Legislature legislating here had assumed that the employers might lockout and the workmen might strike, and they said, if we set up this Board we impose a restriction as to title to lockout which is to become operative under certain conditions.

Mr STUART BEVAN:- They might just as well say, if this legislation is open to the Dominion Legislature, there is great industrial unrest, or always a chance of great industrial unrest, and we think things will be much easier if no one was to be employed for more than 6 hours a day, it would tend to relieve the position and everything would go much more smoothly; that, in my submission , would be an invasion of civil rights.

VISCOUNT HALDANE:- They may have thought, as was thought at the time of the gas stokers strike , that the law is obsolete, the general provisions of English Common Law against strikes and combinations, just as they thought here, that the Act of 1871 had done all that was necessary, and they may have thought it was absolute and just, supposing it was a construction upon the hypothesis that there was not a general right.

Mr STUART BEVAN:- I have had an opportunity, of looking at it with the assistance of my learned friend Mr Duncan, and I think he will check me if I am wrong, he takes the view with regard to the question of combination of workmen and employers and whether they are legal in Canada, that I am bound to submit to your Lordships. As far as the limited time at one's disposal for research has gone I have been unable to discover that there is any Canadian enactment re-producing the terms of section 3

A/S

of the Trade Unions Act of 1871. Sections 496, 497 and

498 of the Criminal Code would seem to deal with the matters

sufficiently for our purposes today, and would seem to

establish that before the passing of the Lemieux Act a

strike was not illegal.

C.C.
b/1.

LORD DUNEDIN: It might be said to your comfort, there was a strong body of opinion that at common law a combination was not indictable as a conspiracy, for it did not lead at or was not with a view to the breaking of contracts, and that was the prevailing view taken in the case of Allen v Flood.

MR STUART BEVAN: Yes.

LORD DUNEDIN: It is possible your Canadian lawyers may have taken that view.

MR STUART BEVAN: I am very much obliged to your Lordship for that reminder, I had forgotten it for a moment. I really think the Code carries it further, because section 498 deals with penalties for conspiracy. May I read the section in full, because this is important. I wish to establish, if I can, that at the date of the passing of the Limeaux Act, a strike was a lawful thing, and it is not only by certain provisions of the Limeaux Act that a strike is a lawful thing.

LORD ATKINSON: You have a better title than the legality now.

MR STUART BEVAN: A better title than the Limeaux Act. Section 498 says: "Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees, or arranges with any other person, or with any railway, steamship, steamboat or transportation company, (a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or (b) to restrain or injure trade or commerce in relation to any such article or commodity; or, (c), to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or, (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance

b/2

upon person or property. 2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees". Now reading that with (b) which makes or makes it a criminal offence to restrain or injure trade or commerce in relation to any such article or commodity, one finds that even where trade or commerce is restrained or injured, the section shall not be applicable to combinations of workmen or employees restraining or injuring trade or commerce, for their own reasonable protection as such workmen or employees. I think the only difference in the result is that it must be done reasonably.

VISCOUNT HALDANE: It is not affirmative, it is not repealing any existing law, but you say it is only a Code and it recognises what may be done.

MR STUART BEVAN: Yes. My submission is that having regard to section 498, sub-section 2, "Nothing in this section shall be construed to apply" a prosecution for conspiracy or striking of workmen must necessarily fail and they could not be convicted; something must turn on whether there was reasonable protection affecting the position. It is not if they had reasonable ground for supposing it is for their protection, but for their own reasonable protection.

LORD DUNEDIN: I am not inclined to agree with you there. It seems to me the sub-section only means you shall not bring a prosecution under this section if the sub-section applies, and, therefore, you have got to go the whole length of saying that no prosecution for conspiracy here, apart from the common law, should ever be brought unless you brought it within the provisions of the section.

MR STUART BEVAN: Section 498.

LORD DUNEDIN: That I do not follow. It seems to me you might have prosecutions quite apart from that. The provisions of the section necessarily create a new offence. Suppose the first part of the section had never been passed at all. You have to

b/3

say no such thing as a prosecution for criminal conspiracy would ever be possible at all; that I cannot follow.

MR STUART BEVAN: I appreciate your Lordship's criticism.

LORD ATKINSON: In this Code you have a number of these things dealt with, and then the workmen are exempted if they have reasonable excuse.

MR STUART BEVAN: I am obliged. Your Lordship will observe this, that if a prosecution were instituted against strikers for conspiracy, they would be charged with conspiring to injure trade or commerce in relation to certain articles or commodities.

LORD ATKINSON: If they said : The wages are too low, we want an increase, and if we do not get it we will do the particular thing--our wages are low and we strike in order to get an increase -----

MR STUART BEVAN: We stop the output of a certain commodity which injures commerce in that commodity. It is recognised in the evidence that the effect of the occurrence of a strike is to diminish trade and commerce, it does not need evidence to show that--so that it would be very difficult, I respectfully submit, to suggest a plainer case of workmen striking for increase of wages with the result that the manufacturer of a particular commodity was interfered with, and it would be impossible, I submit, to obtain a conviction under the Criminal Act against those workmen for striking.

LORD ATKINSON: Does the Code say anything as to no offence save those dealt with ?

MR STUART BEVAN: No; section 10 of the Code says: "The criminal law of England, as it existed on the seventeenth day of September, one thousand seven hundred and ninety-two, in so far as it has not been repealed by any Act of Parliament of the United Kingdom having force of law in the province of Ontario, or by any Act of Parliament of the late provinces of Upper Canada,or of the province of Canada,still having force of law, or by this Act of any other Act of the Parliament of Canada,and as altered,varied, modified or affected by any such Act,shall be the criminal

law of the province of Ontario." So that the English common law, which of course would govern the position in the year 1792, as affected by section 498 of the Code, would be the law relating to conspiracies at the date of the passing of the Limeaux Act in Canada.

LORD ATKINSON: There is a very awkward consequence under that; if a Statute was passed in England altering the common law in any respect, then do you say this Act would extend the unaltered common law to Canada or the common law altered by statute ?

MR STUART BEVAN: The unaltered law. The only statute to alter the common law would be an Act of Parliament of the United Kingdom having the force of law in Canada.

LORD ATKINSON: That must be so. It looks very much as if in section 498 (2) the Legislature thought that workmen might combine for any ordinary purpose.

MR STUART BEVAN: Yes, and that seems to be recognised by the language of the Limeaux Act, not enacting it for the first time, but recognising the effect of section 498, and section 498 contemplated the English common law as it stood in 1792.

LORD ATKINSON: If they did injure trade or commerce provided they had reasonable excuse, that is not a criminal offence.

MR STUART BEVAN: For their own reasonable protection; that is very wide. That, as I say, seems to have been recognised by the framers of the Limeaux Act, and if strikes were illegal in Canada, contrary to my submission, on the effect of section 498, it is a little difficult to understand the provisions of the Limeaux Act, they would be quite unnecessary; if they were illegal they would not be stopped by a Board of Conciliation and an inquiry, and by a Report at the end of the Inquiry, upon the issue of which the strike may be resumed if in fact a strike was illegal. It is on this ground, I submit, that before the Limeaux Act came into operation it was so; there was the Act passed in 1892, long before the passing of the Limeaux Act.

LORD ATKINSON: These particular provisions are reproduced from an Act passed in 1892.

MR STUART BEVAN: I am obliged. With regard to the evidence, my friend Mr Duncan referred your Lordships to certain passages in the evidence, but I am not going to deal with it at any length.

There are one of two things I should like to draw attention to in the cross-examination of the Minister of Labour, Mr Murdock. His cross-examination begins on page 92. Your Lordships will remember that one of the justifications sought for by the Respondents for the passing of this Act was the fact that at the time the particular Board in this case was applied for the Canadian militia were busily occupied in another Province in regard to a strike there, steelworkers who are not within the Act, and that is the explanation why one of the enumerations that they claim to come under in section 91 is No. 7: "Militia, military and naval service and defence". At first sight that seems rather remote from the topic under discussion, but my learned friend relied on that position, that it was necessary for I suppose the proper disposal of the militia at this crisis that the Board should be granted. Mr Murdock is cross-examined on page 92 at line 40. This goes to emergency as well: "Have you found in the City of Toronto Labour Unions unreasonable or revolutionary? (A) I lived there for about 20 years, and observed them to be about as intelligent and law-abiding and steady as can be found anywhere. (Q) It would take a good deal to move them from their usual conduct? (A) It would take a real reason. (Q) The Nova Scotia strike itself was in the end settled without bloodshed, was it not? (A) I think so. (Q) And the coalminers there returned to their duties in obedience to their contract under the direction of their leaders? (A) Yes. (Q) And in Drumheller did you have any serious revolutions? (A) No. They went back to work in a couple of days on the instructions of Mr Sherman and other officers. (Q) You had no special fear for Toronto on account of those two strikes? (A) There was no undue or serious alarm, as may have been indicated at any time. (Q) In Toronto or in Ontario? (A) No." He is asked about the available forces. He is asked: "(Q) Do you think if the Militia did not turn out when ordered that we have not enough

police to make them turn out? (A) You might have. (Q) The police in Toronto can keep order under all ordinary conditions? (A) Very effectively, I understand. (Q) And there are Provincial Police, as well. (A) Yes. (Q) And any wrongful acts would be promptly suppressed? (A) They would, I hope, be taken care of. (Q) And you think they would be taken care of? (A) Yes, I think so. (Q) Do you give the existence of a strike in Nova Scotia and Drumheller as the reason for giving this order for a Board of Conciliation that you would not otherwise have made? (A) Not altogether; I have only mentioned that as a part of the conditions that existed at the time. (Q) But those were present at the time, and actuated you in giving the order? (A) I had to have in mind all these matters. (Q) You did have them in mind? (A) Yes. (Q) But you say those were not your only reasons? (A) No." Then my Lords there is the question as to whether a strike was threatened at the time the Board was applied for, and on page 96 the Minister of Labour is asked about a telegram to Mr Gunn who was the spokesman of the Union, the Plaintiffs witness, sent him on June 29th. Now June 29th was seven days after the application for the Board. The application was dated the 22nd. Your Lordship remembers section 15 of the Act to which Mr Clauson drew attention, provided for a statutory declaration that a strike was probable, and that a Board would probably avert the threatened strike, and here Mr Gunn puts the position quite plainly in his telegram to the Minister of Labour on page 96, line 25: "The Minister of Labour, Ottawa, Ontario" -- it is dated June 29th, 1923 -- "Toronto Hydro Electric operating officials using coercion on men to get them to say if they will go on strike Saturday. No strike as yet been threatened by men. Men feel that coercion is an attempt to make them drop application for board. Please take up with Hydro Commission and see if action can be stopped". That shows that the position was not critical at this time, if seven days after the Board was applied

for they did that. My friend says he thinks, I do not so read it, that has reference to another strike. I am not sure about that, it says: "Toronto Hydro Electric operating officials using coercion on men to get them to say if they will go on strike Saturday. No strike as yet been threatened by men". That is the passage Im rely on, and I submit is is sufficient for my purpose to say, it does not indicate that the national position is in Toronto at that date seven days after the Board was applied for, was acute. On page 60 at line 20 the learned trial judge says: "He" -- that is the witness, Gunn -- said they agreed that rather than offend public opinion at the time they would not strike". It does not look as if there was any case of emergency made out.

LORD ATKINSON:- I suppose most people admit the Canadian system such as it set up would be perhaps more convenient and more effective, but that is an entirely different thing from saying that the respective Provinces could not on their own behalf set up a system which would be adequate.

MR STUART BEVAN:- Yes, and there is a great deal to be said for the preference--- that is not dealing with sections 91 and 92, but as a matter of business of the Provinces interested; I should have thought there would be a good deal to be said for the Provincial Legislature which would be in touch with Provincial feeling, and has their hand on the pulse of things being better able to deal with the matter.

VISCOUNT HALDANE:- In all those labour disputes the stopping of a strike depends a good deal on whether the Minister can get alongside the men, and whether he knows them, and can ~~take~~ talk to them as familiar friends; you have a better chance of that if you are all local than if you are spread over a huge Dominion?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- After all, Canada is more than 3,000 miles

from one side to the other, and it is not very easy for a Labour Minister to be in touch with everybody.

MR STUART BEVAN:- No, my Lord, and, of course, we do find that the Government of Ontario has passed similar legislation, and is alive to the position, and intended to deal with it. A good deal of criticism has been levelled at the Government of Ontario.

VISCOUNT HALDANE:- They apparently omitted the fine provision possibly purposely. It has been a question whether that should be enforced, and I understand in Canada it has been enforced very little.

MR STUART BEVAN:- One apprehends, if one may surmise, the reason why the provision of the Ontario Act has not been invoked is because there has been this other statute, the Dominion statute, and as a matter of convenience if the Dominion is operating one statute the Province cannot very well operate another, and that may be the reason why one of the other Provinces who had some industrial disputes Act either did not renew it -- it was passed to operate for a certain time -- or repealed it, I do not know which it was; that may be the practical reason not affecting in the least in my submission the position to-day as to whether the statute is <u>intra vires</u> the Dominion Parliament, or <u>ultra vires</u> the Dominion Parliament. That brings me to the last matter I desire to deal with. In my submission the complete answer to the Respondents argument is afforded by the judgment in the <u>Board of Commerce</u> case. Your Lordships will remember how the points here were raised there, "trade and commerce","criminal law", not in the aspect in which Sir John Simon presents it, I have dealt with that; the reason for the new aspect is I submit afforded by the exigencies of the case created by the <u>Board of Commerce</u> case decision; "trade and commerce", "criminal law", "national emergency", which in my submission is only another way

of putting Dominion-wide importance. In that case if Dominion-wide importance is to be given effect to, and the aspect of the legislation has to be looked at, one would have thought there would, at any rate, have been a good deal more to be said for the point than in the present case. Each Province here is fully capable of dealing with its industrial situation. I am leaving out of account what must be the position if a national crisis arises, emergency legislation, but in this legislation which is directed to all sorts and conditions in the specified industries which is not to apply to meet a particular emergency but to apply for all time, or at any rate till the Statute is repealed, it is very difficult to see that there was even as much Dominion wide interest as in the Board of Commerce case, the profiteering case. One can see it there if Dominion wide interest is the test, because the food-producing Provinces would probably be more reluctant to legislate against the abuse which was aimed at than the food-consuming Provinces, and it might have been said with more force there than possibly here: Oh, Provincial Legislation would not avail, the thing has passed such dimensions that the Dominion has had to legislate; what would have been the good of three or four Provincial Legislatures dealing with the food problem when in the food producing Provinces the legislation set up ignored the critical situation of the country altogether; I do not say it would be correct, I submit it would not have been at all, but there is a good deal more to be said for Dominion legislation in such a case as that if the legislation of different ~~Provinces~~ Provinces would be different, than there is to be said here, where the interest of all the Provinces in industrial disputes would be the same, namely, to allay them by such sedatives as there were easily available. In my submission, putting aside the question of criminal law inx the wide aspect which I have dealt with, and I hope satisfied your Lordships can have no application here, this case is, I submit

concluded by the Board of Commerce case.

VISCOUNT HALDANE:- Their Lordships will take time to consider the advice they will humbly tender to His Majesty.

----------oOo----------

5

IN THE PRIVY COUNCIL.

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

Between: 2,925

TORONTO ELECTRIC COMMISSIONERS

and

SNIDER & OTHERS.

and

THE ATTORNEY GENERAL OF CANADA & THE ATTORNEY GENERAL OF ONTARIO.

FIFTH DAY.

Monday, 24th November, 1924.