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VISCOUNT HALDANE:- Before you begin, it might be convenient to say this: The practice of the Board is to hear just two counsel a side normally and when two Governments are here the usual thing is that the leader for the private appellants and counsel for their Government should be heard, and similarly with the Respondents, but I am not sure how matters stand in that respect. You, Mr Bevan, appear for the private appellants and also appear for the Government of Ontario?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- Then it is quite simple in that case, there are two counsel on your side?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- With regard to the other side it is not so clear; Sir John Simon appears for the private Respondents.

SIR JOHN SIMON:- Yes, I appear with my friend, Mr Duncan, for the Respondents.

VISCOUNT HALDANE:- Mr Clauson appears for the Attorney General of Canada?

SIR JOHN SIMON:- Yes; that is a very important aspect of the case.

VISCOUNT HALDANE:- I see Mr Duncan used the labouring oar in the Courts below and might naturally wish to add something to your argument, and in that case their Lordships will depart from their usual practice and hear you Sir John and also Mr Duncan, and then also hear Mr Clauson. Probably Mr Duncan will not find it necessary to be very long, but that depends, of course, on the argument that you, Sir John, address to this Board.

SIR JOHN SIMON:- Might I say this to relieve the Board, and to save the time of the Board, what I should propose to do in any part I am called upon to take would not be to trench on the evidence side of it. It may be we shall have to have some discussion, but as your Lordships have intimated that course I should propose to leave with my friend Mr Duncan whether he did or did not deal

with that, but your Lordships would not expect me to deal with the possibly rather complicated matter of the evidence if it becomes important.

VISCOUNT HALDANE:- If it becomes important; it may not be important. That brings me to the second observation I wish to make. It is a very delicate case, and a very difficult and serious one, and I think it must turn to a large extent at any rate on what this Board and the Courts of Canada have already decided on the construction of sections 91 and 92. That being so, I am afraid you will have to take us through the authorities. There is nothing earlier than Russell v The Queen that we need look at if my recollection does not deceive me, but I have not had the books before me. I think Hodge v The Queen is in the same volume?

MR STUART BEVAN:- It is 9 Appeal Cases.

VISCOUNT HALDANE:- You can tell us what was in the McCarthy Act and what was decided without reasons there, I think it is in the discussion of that bound volume where some of the observations that were made about Russell v The Queen occur, but you must not take observations made by the Judges, no matter how eminent, as of the same weight, when only made in conversation, as the delivered judgments, and you will be very sparing in the citation of sentences of Lord Herschell & Lord Watson and what they said in that case. Do you remember what year the McCarthy case was; it was after Hodge v The Queen?

MR STUART BEVAN:- I had proposed, with your Lordships' approval, to start with the latest decisions of your Lordships.

VISCOUNT HALDANE:- I think you may assume we know the latest ones.

MR STUART BEVAN:- I am relying upon those as summarising many of the earlier decisions.

VISCOUNT HALDANE:- I will tell you why that is dangerous, in

all those cases we had been addressing ourselves to particular questions, and we have had in mind to try not to decide any more than was necessary for the decision of each case. The result is it is only in that way you can work out the general principles.

LORD DUNEDIN:- If it is allowable to quote one's own judgment, there is a certain judgment of mine in a Workmen's Compensation case which is often quoted by other people as to how you said something in a decided case and then something else is decided and you push on and push on until at the end you get something which if you had the Statute alone you would think would never come under it.

MR STUART BEVAN:- Then, my Lord, I will start with the earlier cases.

VISCOUNT HALDANE:- I think in that case it would probably be the best to see exactly what was decided in Russell v The Queen.

MR STUART BEVAN:- If your Lordship pleases. There is one matter which falls to be dealt with before I refer your Lordship to Russell v The Queen and the later cases, and that is the evidence which occupies a good many pages of the Appendix. The evidence was directed to showing a case of public emergency, but in none of the judgments was the decision in favour of the Respondents based upon that ground at all.

VISCOUNT HALDANE:- I know, in the Manitoba Pulp case, their Lordships decided that war overrides everything, and it affects Canada as a whole in the result. We had to consider peace, order and good government under the circumstances of the presence of the war which are outside political heads, and when that has once been done the point at which Legislation is to cease must be a matter of statesmanship, it is impossible for a Court to say as well as the Government can when that is to stop; that is all that was decided. Now is what emerges here, or in any other case, compatible to the emergency of war? In Russell v The Queen they seem to have thought there was such an emergency, and that

has been a subject of much comment. Here it is of the greatest importance to have something like a settled principle applying to all Canada, but we have to ask ourselves whether under the head of "civil rights" in section 92 it would not be at least competent to the Province to pass some legislation stopping the workmen or employers as the case may be from asserting their "civil rights" in a limited part. If you come to the conclusion that that was the effect of the Act, then no matter how important its purpose it is a thing that could be done by the Province, and if so, it could not be done under section 91 unless you could find in section 91 in a subject or head such as "trade or commerce" something that enabled you to do it. That is why it is important to find out what "trade and commerce" means at the outset.

MR STUART BEVAN:- With your Lordship's permission may I deal with the authorities first and refer to the evidence later on, or if it is relied upon by my learned friends, perhaps by way of reply?

VISCOUNT HALDANE:- I think that will be the best way. We have looked at the evidence and know broadly what it is.

LORD ATKINSON:- What will you begin with?

MR STUART BEVAN:- I can begin with Russell v The Queen or The Citizens Insurance Company of Canada v Parsons which is in the same report.

VISCOUNT HALDANE:- Which came first?

MR STUART BEVAN:- The Citizens Insurance Company of Canada v Parsons is in the 7th Appeal Cases at page 96.

VISCOUNT HALDANE:- Then we will take that first.

LORD ATKINSON:- You will not omit to deal with Lord Watson's judgment in 1896 Appeal Cases?

MR STUART BEVAN:- That is on my list, and I will deal with it. The Citizens Insurance Company v Parsons is of importance in my

submission because it deals with the meaning of the words "regulation of trade and commerce". The particular passage is on page 112 of the report. The Board deals with the words "regulation of trade and commerce" on page 112.

VISCOUNT HALDANE:- You had better read the head note at page 96, and then go to the judgments.

MR STUART BEVAN:- If your Lordship pleases. "Sections 91 and 92 of the British North America Act, 1867, must, in regard to the classes of subjects generally described in section 91, be read together, and the language of one interpreted and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain and give effect to all of them. Each question should be decided as best it can, without entering more largely than is necessary upon an interpretation of the statute. Held that: In No. 13 of section 92, the words 'property and civil rights in the province' include rights arising from contract (which are not in express terms included under section 91) and are not limited to such rights only as flow from the law, e.g., the status of persons".

VISCOUNT HALDANE:- I note that the words "civil rights" are to be read generally as including rights arising from contract.

MR STUART BEVAN:- Yes. "In No. 2 of section 91, the words 'regulation of trade and commerce' include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and, it may be, general regulation of trade affecting the whole dominion; but do not include the regulation of the contracts of a particular business or trade such as the business of fire insurance in a single province, and therefore do not conflict with the power of property and civil rights conferred by section 92, No. 13".

VISCOUNT HALDANE:- Let us see what that means. The Dominion cannot touch the rights as to fire insurance in a single province.

MR STUART BEVAN:- Yes, fire insurance was the business touched

by that particular legislation. The proposition is that it does not include the regulation of contracts of a particular business or trade. Now this Industrial Disputes Act is only directed to a particular class of business and trade, works of public utility, and many businesses and trades are outside the scope of the Act altogether, and strikes may take place in any other trade than those enumerated in the Industrial Disputes Act, and the Act has no application at all.

VISCOUNT HALDANE:- Of course, there is no attempt here to regulate the civil rights of employment in a single Province.

MR STUART BEVAN:- No; it is an attempt to regulate particular trades in all the Provinces, the particular trades. What happened in fact, as is shown by the evidence in this case, is that there were sympathetic strikes which are relied upon by the Respondents as creating a position of public emergency, but the sympathetic strike in many cases was in a trade to which the Industrial Disputes Act had no application at all.

VISCOUNT HALDANE:- That would not matter if it was a general principle and it was desirable to regulate disputes all over Canada, and there was power to do it.

MR STUART BEVAN:- That is not what it endeavours to do; it is only industrial disputes in particular trades.

VISCOUNT HALDANE:- Even if you take particular trades, as long as they are all over Canada it would not matter.

MR STUART BEVAN:- They are all over Canada, but it is a particular trade.

VISCOUNT HALDANE:- Can you tell me this from memory? Parson's case only decided that you could not affect fire insurance in a particular Province, but suppose you attempted to regulate fire insurance all over Canada, was that the subject of the decision in the Insurance case later?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- That you could not?

MR STUART BEVAN:- Yes, that you could not.

VISCOUNT HALDANE:- Very well. Parson's only took us so far?

MR STUART BEVAN:- Yes. Then going back to the head note: "Consequently:- (Ontario)Act 39 Victoria, Chapter 24, which deals with policies of insurance entered into or in force in the Province of Ontario for insuring property situate therein against fire, and prescribes certain conditions which are to form part of such contracts, is a valid Act; applicable to the contracts of all such insurers in Ontario, including corporations and companies, whatever may be their origin, whether incorporated by British authority or by foreign or colonial authority. Held, further, that the said Ontario Act is not inconsistent with Dominion Act 38 Victoria, Chapter 20, which requires all insurance companies whether incorporated by foreign dominion or provincial authority to obtain a license, to be granted only upon compliance with the conditions prescribed by the Act".

VISCOUNT HALDANE:- Does that remain law?

MR STUART BEVAN:- That, as far as I have been able to discover remains the law.

VISCOUNT HALDANE:- That is to say, license?

MR STUART BEVAN:- Yes: "Held, further, that according to the true construction of the Ontario Act, whatever may be the conditions sought to be imposed by insurance companies, no such condition shall avail against the statutory conditions, and the latter shall alone be deemed to be part of the policy and resorted to by the insurers, notwithstanding any conditions of their own, unless the latter are indicated as variations in the manner prescribed by the Act". I do not think I need trouble with that, that deals with the particular provisions of the particular Act.

Then the judgment of their Lordships begins on page 103 and was delivered by Sir Montague Smith. I do not think I need read anything before page 112, the second paragraph.

VISCOUNT HALDANE:- Just one moment, I think you must look at page 108.

MR CLAUSON:- Would your Lordships also look at page 107, it is a statement which your Lordships will find repeated in other cases, and it might be convenient just to take it?

MR STUART BEVAN:- "The scheme of this legislation, as expressed in the first branch of section 91, is to give to the dominion parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature" (Reading down to the words) "With the same object, apparently, the paragraph at the end of section 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of section 92".

VISCOUNT HALDANE:- That is one of the statements of the Judicial Committee that they have overruled?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- It extends to the whole of the subjects in section 92?

MR STUART BEVAN:- Yes: "Notwithstanding this endeavour to give pre-eminence to the dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament. Take as one instance the subject 'marriage and divorce', contained in the enumeration of subjects in section 91; it is evident that solemnization of marriage would come within this general description; yet 'solemnization of marriage in the province' is enumerated among the classes of subjects in section 92, and no one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the legislatures of the provinces".

VISCOUNT HALDANE:- That has been decided in the Marriage case reported about 1913 Appeal Cases?

MR STUART BEVAN:- Yes: "So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in section 91; but, though the description is sufficiently large and general to include 'direct taxation within the province, in order to the raising of a revenue for provincial purposes', assigned to the provincial legislatures by section 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one".

VISCOUNT HALDANE:- I rather think on that it has been held that the Dominion may tax directly ~~or~~ as well as indirectly, while the Province can only tax directly; it is concurrent power.

MR STUART BEVAN:- Yes: "With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces" etc etc (Reading down to the words) "Section 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had done before, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws".

VISCOUNT HALDANE:- Before you pass from the paragraph at the top, does that mean Quebec can have its laws altered as regards rights flowing from status?

MR STUART BEVAN:- I do not so read it.

VISCOUNT HALDANE:- I suppose not. I suppose property and civil rights, including rights flowing from status, are left wholly to section 92. What effect is given to section 94? Can you alter it as regards rights flowing from status? I should like to look at section 94?

MR STUART BEVAN:- On page 110 about one-third from the bottom of the page in the last paragraph the effect of the section is given: "By that section the parliament of Canada is empowered to make provision for the uniformity of any laws relative to 'property and civil rights' in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the Courts in these three Provinces, if the provincial legislatures choose to adopt the provision so made. The province of Quebec is omitted from this section". So that he gives the effect of the section.

VISCOUNT HALDANE:- Is that so? What I want to get at is, what it imports; it may make provision for the uniformity of any laws relative to "property and civil rights"; that must include rights following from contract.

MR STUART BEVAN:- Yes, status too I should say.

VISCOUNT HALDANE:- As regards Quebec, Quebec is not touched by this section at all?

MR STUART BEVAN:- No.

VISCOUNT HALDANE:- What I want to get at is what Sir Montague Smith meant by this: "If, however, the narrow construction of the words 'civil rights', contended for by the appellants were to prevail, the dominion parliament could, under its general power, ~~to make~~ legislate in regard to contracts in all and each of the provinces and as a consequence of this the province of Quebec, though now governedby its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject yo have its law on that subject altered by the dominion legislature". It must be under section 91. What does he mean? What provision in section 91 does he allude to, is it "trade and commerce"?

MR STUART BEVAN:- I think "trade and commerce", because trade and commerce was one of the matters relied upon in this case.

VISCOUNT HALDANE:- My difficulty is, he has not said so.

MR STUART BEVAN:- I think it appears/as one goes on. On page 112 he considers the meaning of "regulation of trade and commerce"

upon which the Dominion was relying. I think it will appear so.

LORD DUNEDIN:- I think you will find what Lord Haldane wants in the argument of Sir Farrer Herschell on page 101.

MR STUART BEVAN:- Yes: "Section 94 omits Quebec from the uniformity of legislative concurrent power; compare sections 93 and 95. That throws light on the meaning of the expression in section 92, No. 13; which is to be construed in its narrower sense".

VISCOUNT HALDANE:- He is referring to "trade and commerce" as covering the whole Dominion?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- Excluding all rights except those following from status?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- Where does he say that contract is included in section 91?

MR STUART BEVAN:- May I just read it: "Section 94 omits Quebec from the uniformity of legislative concurrent power; compare sections 93 and 95. That throws light on the meaning of the expression in section 92, No.13; which is to be construed in its narrower sense, and not so as to affect or cut down the exclusive control over trade, commerce, and contracts given to the dominion parliament".

VISCOUNT HALDANE:- That means that "civil rights" cannot include trade and commerce and contracts?

MR STUART BEVAN:- That is so. That must be limited to status.

VISCOUNT HALDANE:- It is all an argument for the wide reading of "trade and commerce"?

MR STUART BEVAN:- Yes.

LORD ATKINSON:- He says: "Section 94 omits Quebec from the uniformity of legislative concurrent power; compare sections 93 and 95. That throws light on the meaning of the expression in section 92, No. 13; which is to be construed in its narrower

sense, and not so as to affect or cut down the exclusive control over trade, commerce and contracts given to the dominion parliament. Contract, moreover, is not included in that chapter of the Civil Code which deals with civil rights".

MR STUART BEVAN:- Yes. Sir Montague Smith is dealing with that argument when he refers to section 94 on page 110 of the judgment, and he goes on on page 112 to deal with the words "regulation of trade and commerce".

VISCOUNT HALDANE:- What does Sir Farrer Herschell mean to say about section 94? What does he say it covers? He has already said "trade and commerce" in section 91 covers everything. What is the use of section 94?

LORD MUNEDIN:- He says section 94 throws light on the true meaning of section 94, No. 13, that is "civil rights". The point is whether "trade and commerce" so monopolise the whole subject as to cut down any question of civil rights in respect of "trade and commerce".

VISCOUNT HALDANE:- What I want to get at is what he said that section 94 said?

MR STUART BEVAN:- Sir Farrer Herschell relied on section 94 as throwing light on the meaning of section 92, No. 13 "civil rights".

VISCOUNT HALDANE:- How does it throw light?

MR STUART BEVAN:- If I may say so with great respect to the argument reported here, I do not think it did. If Sir Farrer Herschell was relying on section 91, the section the Respondents rely upon here, it was unnecessary to invoke section 94 at all.

VISCOUNT HALDANE:- That is what is troubling me.

MR STUART BEVAN:- The passage in the judgment which I think comes on page 112 expresses quite clearly the view taken as to the position.

VISCOUNT HALDANE:- I think the meaning of it is this, that section 91 "regulation of trade and commerce" cannot have the

wide meaning contended for by the appellants because if it had it would enable regulation of Quebec civil rights notwithstanding that Quebec is left out of section 94.

MR STUART BEVAN:- Yes, it may be that. May I read on because I think the matter becomes plain from the judgment. I am reading at page 111, a little below the middle of the page: "The next question for consideration is whether, assuming the Ontario Act to relate to the subject of property and civil rights, its enactments and provisions come within any of the classes of subjects enumerated in section 91. The only one which the Appellants suggested as expressly including the subject of the Ontario Act is No. 2 'the regulation of trade and commerce'. A question was raised which led to much discussion in the Courts below and this bar, viz., whether the business of insuring buildings against fire was a trade". I do not think I need read that passage, it was decided that it was. Then on page 112: "The words 'regulation of trade and commerce', in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades" etc etc (Reading down to the words) "It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade". That is the passage I rely upon. That has been repeated and followed in many decisions that followed the Citizens Insurance Company v Parsons.

VISCOUNT HALDANE:- I have a note which says: "8 Appeal Cases, page 8".

MR STUART BEVAN:- I will send for it; I am told it is the Attorney General v Mercer.

VISCOUNT HALDANE:- That is the case about mineral rights.

MR STUART BEVAN:- I am told it is in Cameron at page 322.

VISCOUNT HALDANE:- My reference is obviously wrong because it is a reference to an English appeal.

MR STUART BEVAN:- The case on page 8 is Nobel's Explosives Company v Jones.

VISCOUNT HALDANE:- It cannot be that.

MR STUART BEVAN:- It deals with the importation and transhipment of a patented article.

LORD DUNEDIN:- I think you will find it is page 767.

VISCOUNT HALDANE:- I cannot find anything that bears on this point.

MR STUART BEVAN:- My friend Mr Lawrence will be good enough to look at the report and see if there is anything relevant to this particular matter.

LORD ATKINSON:- "It was contended that all escheats really belonged to the Province and it was decided that that was not so, that the casual benefit derived from escheats in the Province went to the Province under section 109".

VISCOUNT HALDANE:- I do not think it has anything to do with it.

LORD ATKINSON:- Lord Selborne gave the judgment.

LORD DUNEDIN:- This is it: "At the date of passing the British North America Act, 1867, the revenue arising from all escheats to the Crown within the then province of Canada was subject to the disposal and appropriation of the Canadian Legislature, and not of the Crown. Although section 102 of the Act imposed upon the Dominion the charge of the general public revenue as then existing of the provinces; yet by section 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the provinces". It was, so to speak, a competition between the Dominion and the Province for the revenue arising

from escheats to the Crown.

VISCOUNT HALDANE:- I do not think it has much to do with this.

LORD DUNEDIN:- No. It only comes in on those sections dealing with taxation; it is a commentary upon them.

LORD ATKINSON:- They contended that the Dominion had the right to get these escheats in the name of the Crown in order to enable it to discharge the debts?

MR STUART BEVAN:- Yes. If I may go back to page 113 of the 7th Appeal Cases and read this passage about 10 lines down, it is the important part of this judgment in relation to my argument; I think I did read half of it: "It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of section 92." There are passages in later judgments which indicate that this sentence in the judgment of Sir Montague Smith has been read and followed: "It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade". What follows is merely an instance.

LORD ATKINSON:- Is that so: "such as the business of fire insurance in a single province".

MR STUART BEVAN:- I do not think, having regard to the way this is referred to in later judgments, the words "such as the business of fire insurance in a single province" really add anything to it, it was merely an example. The broad proposition is, that the authority to legislate for the regulation of trade and commerce

does not comprehend the "power to regulate by legislation the contracts of a particular business or trade".

VISCOUNT HALDANE:- You must be very careful about that; what the new Act purported to regulate was the contracts of a group of businesses, a number of businesses, it was not the particular business.

MR STUART BEVAN:- Public utility businesses.

VISCOUNT HALDANE:- And other things too, but it is very general.

MR STUART BEVAN:- Yes, it includes a very small proportion of the businesses carried on in the Provinces.

LORD ATKINSON:- Do not the following words seems to indicate it was not by mistake that the words "in a single province" were put in; it says: "and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of section 92."

MR STUART BEVAN:- I shall have to invite your Lordship's attention to other passages dealing with "regulation of trade and commerce" in other judgments. I think the illustration given there was founded upon the facts of the particular case. Your Lordships will see in some of the later judgments this is referred to again and again: "Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the dominion parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects; questions of this kind, it may be observed, arose and were treated of by this Board" in other cases. Then I do not think there is anything further in that judgment on the question material to the present case. The rest of the judgment deals with the true construction of the Ontario Act not with the question of general principle.

VISCOUNT HALDANE:- He did say apparently that he thought the legislation to require all Insurance Companies to obtain licenses from the Dominion Minister was legitimate.

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- He does not pronounce on it, but he says it is not inconsistent with the authority of the Legislature of the Province of Ontario to legislate in relation to the contracts which corporations may enter into in that Province. I do not think there is anything else.

MR STUART BEVAN:- No, I do not think there is anything further in that judgment. That judgment is valuable for the construction put upon the words.

VISCOUNT HALDANE:- That is right, but in those days, in the days when Chief Justice Ritchie and Mr Justice Taschereau sat in the Supreme Court ~~and~~ the tendency was to set up the Dominion authority and Mr Justice Taschereau gave a judgment in that case on which Sir Montague Smith comments on page 116, and it might be worth while reading a few words of that.

MR STUART BEVAN:- Yes: "Mr Justice Taschereau, in the course of his vigorous judgment, seeks to place the plaintiff in the action against the Citizens Company in a dilemma" etc etc (Reading down to the words) "so that the denial of one power involves the denial of the other".

VISCOUNT HALDANE:- One sees what he means.

MR STUART BEVAN:- Yes. There are two appeals and the construction of the particular statute is dealt with in the rest of the judgment.

Then in the same volume is the case of Russell v The Queen at page 829.

LORD ATKINSON:- Was the result of that, that neither the Dominion Parliament nor the provincial legislature can interfere with the contracts of one particular industry?

MR STUART BEVAN:- Certainly; that the Dominion Parliament cannot.

VISCOUNT HALDANE:- The Province can.

MR STUART BEVAN:- The Province could interfere, but the Dominion Parliament cannot.

LORD ATKINSON:- If the Province can, that must obviously be insuring Companies within the Province.

MR STUART BEVAN:- Undoubtedly; your Lordship will remember the wording of section 92.

LORD ATKINSON:- It must be so; they have no jurisdiction over anything outside.

MR STUART BEVAN:- Quite so; I do not contend that for a moment. That is expressly limited by "property and civil rights within the Province".

Now we get to Russell v The Queen which was an exceptional case, and really stands alone. The Dominion legislation in that case was with regard to the sale of intoxicating liquors, and it was held that such legislation was within the competency of the Dominion Parliament.

VISCOUNT HALDANE:- The Canadian Temperance Act, otherwise known as the Scott Act. That is so, is it not, Mr Duncan?

MR DUNCAN:- Yes.

VISCOUNT HALDANE:- It is sometimes called one way and sometimes the other.

MR DUNCAN:- Yes, my Lord.

MR STUART BEVAN:- Russell v The Queen is at page 829 of the same volume: "Held, that the Canada Temperance Act, 1878, which in effect, wherever throughout the Dominion it is put in force, uniformly prohibits the sale of intoxicating liquors except in wholesale quantities or for certain specified purposes, regulates the traffic in the excepted cases, makes sales of liquors in violation of the prohibitions and regulations contained in the Act criminal offences, punishable by fine and for the third or subsequent offence by imprisonment, is within the legislative competence of the Dominion Parliament. The objects and scope of the Act are general, viz., to promote temperance by means of

a uniform law throughout the Dominion. They relate to the peace, order, and good government of Canada, and not to the class of subjects 'property and civil rights'". That was the ground of the decision, and that has been recognised ever since.

VISCOUNT HALDANE:- Look at the last sentence.

MR STUART BEVAN:- "Provision for the special application of the Act to particular places does not alter its character as general legislation".

VISCOUNT HALDANE:- That, I think, was somewhat dealt with by the decision in the MaCarthy Act case.

MR STUART BEVAN:- Yes, that is so. In that particular case the ground for the decision which really stands by itself is as expressed in the head note that the Act did not relate to property and civil rights at all, that it was dealing with drink which would fall into the same category as poisons and explosives and so forth, and it was necessary for the good government of the Dominion that this particular legislation should be passed.

VISCOUNT HALDANE:- In fact, that temperance was in the general Canadian interest?

MR STUART BEVAN:- Yes.

VISCOUNT HALDANE:- And therefore the matter was outside the Province.

LORD DUNEDIN:- That the right to have a glass of beer was not a civil right.

VISCOUNT HALDANE:- Yes, but of course it involved a great deal more than the right to have a glass of beer. We had better have the judgment. You had better begin at the middle of page 833.

MR STUART BEVAN:- "The preamble of the Act in question states that 'it is very desirable to promote temperance in the dominion, and that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors'. The Act is divided into three parts. The first relates to 'proceedings for bringing the second part of this Act into force'; the second to

'prohibition of traffic in intoxicating liquors'; and the third to 'penalties and prosecutions for offences against the second part'" etc etc (Reading down to the words) "Sub-section 2 provides that 'neither any license issued to any distiller or brewer' (and after enumerating other licenses), 'nor yet any other description of license whatever, shall in any wise avail to render legal any act done in violation of this section'". I do not think I need read the particulars of the sections. The third part of the Act (section 100) provides for conviction and penalties. Then at the top of page 835: "The effect of the Act when brought into force in any county or town within the Dominion is, describing it generally, to prohibit the sale of intoxicating liquors, except in wholesale quantities, or for certain specified purposes, to regulate the traffic in the excepted cases, and to make sales of liquors in violation of the prohibition and regulations contained in the Act criminal offences, punishable by fine, and for the third or subsequent offence by imprisonment. It was in the first place contended, though not very strongly relied on, by the Appellant's counsel, that assuming Parliament of Canada had authority to pass a law for prohibiting and regulating the sale of intoxicating liquors, it could not delegate its powers, and that it had done so by delegating the power to bring into force the prohibitory and penal provisions of the Act to a majority of the electors of counties and cities. The short answer to this objection is that the Act does not delegate any legislative powers whatever." I think I may pass on to the last paragraph but one on that page: "The general question of the competency of the Dominion Parliament to pass the Act depends on the construction of the 91st and 92nd sections of the British North America Act, 1867, which are found in Part VI of the statute under the heading 'Distribution of Legislative Powers'". Then section 91 is set out. Then just above the middle on page 836

his Lordship continues: "The general scheme of the British North America Act with regard to the distribution of legislative powers, and the general scope and effect of sections 91 and 92, and their relation to each other, were fully considered and commented on by this Board in the case of the Citizens Insurance Company v Parsons" etc eto (Reading down to the words) "if the Act does not come within one of the classes of subjects assigned to the Provincial Legislatures, the Parliament of Canada had not, by its general power 'to make laws for the peace, order, and good government of Canada', full legislative authority to pass it". Therefore the vital question was: Did it fall within section 92. "Three classes of subjects enumerated in section 92 were referred to, under each of which, it was contended by the appellant's counsel, the present legislation fell" etc etc (Reading down to the words) "The Act in question is not a fiscal law". Then unless your Lordship desires it I do not think I need deal with the part of the judgment that deals with clause 9, it does not seems to be relevant to the present case, and in that case no question of principle was laid down from which I think any assistance is to be got here.

MR CLAUSON:- At the top of page 838 there is a passage which is several times referred to in the subsequent cases.

MR STUART BEVAN:- Yes, five lines from the top of page 838: "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 tp 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".

MR CLAUSON:- Would you mind reading on?

MR STUART BEVAN:- Certainly: "Their Lordships think that the right construction of the enactments does not lead to any such inconvenient consequence. It appears to them that legislation of the kind referred to, though it might interfere with the sale or use of an article included in a license granted under sub-section 9, is not in itself legislation upon or within the subject of that sub-section, and consequently is not by reason of it taken out of the general power of the Parliament of the Dominion".

LORD DUNEDIN:- With all respect to Mr Clauson I do not think that has anything to do with the question we have here. You must remember what they were at in this case was, they were first of all trying to argue it fell within one of the provisions under section 92. Really all the judgment comes to is this: They say we do not think it comes within section 92; one of the things in 92 they wanted to hang it on was the license thing. Therefore, what they actually decided there was, having found that it does not fall in anything in 92, they say it became unnecessary to say whether it fell under anything in 91 because the moment you are out of 92 then the general powers of the Dominion prevail. I hope I was not rude, but I really do not think that that bit has anything to do with what we have to consider.

MR CLAUSON:- I suggest that sentence which my friend was beginning to read has been referred to in the aspect cases, something which from one aspect may be considered to come under section 92; that is the only reason I thought your Lordships would like to have the passage.

VISCOUNT HALDANE:- They say the power to restrict by the power of imposing licenses is not a power to be used for prohibiting the wider thing, the use of arms.

MR STUART BEVAN:- That is all.

LORD ATKINSON:- Lord Watson points to that, the Province might exact a fee for giving a license for carrying arms, but the Dominion might pass legislation dealing with the possession of arms

if likely to be used for seditious purposes.

VISCOUNT HALDANE:- Yes.

MR STUART BEVAN:- Now we go to the bottom of page 838: "Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects 'Property and Civil Rights'" etc etc (Reading down to the words) "What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety".

LORD ATKINSON:- It occurs to me that it would be legitimate for the Dominion to pass an Act to say that petrol should not be stored within a certain distance of an inhabited house.

VISCOUNT HALDANE:- Yes. This is the crucial ground of the decision.

MR STUART BEVAN:- Yes: "That is the primary matter dealt with, and though incidentally the freedom of things in which men may have property is interfered with, that incidental interference does not alter the character of the law" etc etc(Reading down to the words) "Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded". Lord Atkinson put that illustration last time. "Laws of this nature designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights" etc etc (Reading down to the words) "exclusively to the Parliament of Canada".

VISCOUNT HALDANE:- That is the passage that has been the subject of so much comment. Where are you to stop, if that is right?

MR STUART BEVAN:- Yes: "It was said in the course of the judgment of this Board in the case of the Citizens Insurance Co.of Canada v Parsons that the two sections (91 and 92) must be read together, and the language of one interpreted, and, where necessary modified by that of the other." etc etc (Reading down to the words "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".

VISCOUNT HALDANE:- Now you see what was not property and civil rights. You remember that is the ground on which the case has been put later, and the explanations given in the subsequent appeals. That merely means that it is within peace order and good government of Canada and not cut down by anything in section 92.

MR STUART BEVAN:- That was outside section 92 altogether.

VISCOUNT HALDANE:- Yes, but on the other hand, you remember what Sir Montague Smith says about "trade and commerce". Does he say it is within "trade and commerce"?

MR STUART BEVAN:- No. If your Lordship will look at the last page it says: "Their Lordships having come to the conclusion that the Act in question does not fall within any of the classes of subjects assigned exclusively to the Provincial Legislature, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in section 91".

VISCOUNT HALDANE:- They do not dissent, but they do not affirm it.

MR STUART BEVAN:- No, I had better read it: "In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges, who held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, 'the regulation of trade and commerce', enumerated in that section, and was, on that ground, a valid exercise of the legislative power of the Parliament of Canada".

LORD DUNEDIN:- It is very simple, as long as you do not get out of section 92 it does not matter whether it comes within the enumerated subjects in section 91 or the general peace order and good government of 91.

VISCOUNT HALDANE:- It may be within "trade and commerce" or within criminal law, but it is not necessary to decide it.

LORD DUNEDIN:- It may be simply within peace, order and good government.

VISCOUNT HALDANE:- That is what they say it is.

MR STUART BEVAN:- When I come to peace, order and good government, in dealing with some of the later decisions, my submission will be that if the legislation comes within 92 the interests of peace, order and good government law are not sufficient. If it comes within 92 the Dominion cannot justify legislation on the ground merely that it is in the interest of peace, order and good government; it is vital to my case that I am within 92.

VISCOUNT HALDANE:- He does say, does not he, it is not within "property and civil rights"; he says so on page 838 in the bottom paragraph.

MR STUART BEVAN:- He says: "Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects 'Property and Civil Rights". The reason is this:

"It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances".

VISCOUNT HALDANE:- Now where is Hodge v. The Queen?

Mr STUART BEVAN:- In 9 Appeal Cases at page 117.

VISCOUNT HALDANE:- Is there any other case in between?

Mr STUART BEVAN:- No.

VISCOUNT HALDANE:- The important point in Hodge v. the Queen was this, they put a restriction on the sale of liquor. I think if I remember right no public house was to be made without low windows so that people in the street could see who was having a glass of beer at the counter. Those restrictions the Committee held to be within the power of the Provinces.

Mr STUART BEVAN:- Yes, that is so.

LORD ATKINSON:- It was held that they could make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns etc, and it was said that that does not interfere with the general regulation of trade or commerce but comes within numbers 8, 15 and 16 of section 92.

VISCOUNT HALDANE:- The judgment in that case was delivered not by Sir Barnes Peacock as stated but by Lord FitzGerald.

Mr STUART BEVAN:- Yes.

VISCOUNT HALDANE:- You might just read the head note.

Mr STUART BEVAN:- "Subjects which in one aspect and for one purpose fall within section 92 of the British North America Act, 1867, may in another aspect and for another purpose fall within section 91. Russell v. The Queen (7 Appeal Cases,829) explained and approved. Held, that 'The Liquor License Act of 1877, chapter 181, Revised Statutes of Ontario', which in respect of sections 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns &c., does not in respect of those sections interfere with 'the general regulation of trade or commerce', but comes within Nos. 8, 15 and 16, of section 92 of the Act of 1867, and is within the

powers of thw provincial legislature".

VISCOUNT HALDANE:- There that, so far as it goes, avoids the question whether it was within "peace, order and good government" by reason of it being outside section 92; they said it is within section 92, and, therefore, not within "peace,order and good government".

LORD DUNEDIN:- Personally I should have thought the rubric was put the wrong way round. Russell v. The Queen had already settled that liquor falls within section 91, then you say, following the ~~Citizens Insurance Company v. Parsons,~~ they said notwithstanding it falls within section 91 yet it may have a certain application under section 92. If writing that head note I should have reversed the sentence .

Mr STUART BEVAN:- Yes; that it was within section 91 was decised by Russell v. The Queen.

VISCOUNT HALDANE:- Yes, that was decided by Russell, that it was within "peace, order and good government". That is all.

Mr STUART BEVAN:- Yes, and could only be so decided upon the view that it came within section 91 and was not within section ~~x~~ 92 at all.

LORD DUNEDIN:- Because, as they said, it was within 91 and not within 92, but it is really the Citizens Insurance Company all over again. Although you may have a thing which in a general aspect is under 91, yet there may be what you may call sub-divisions of the aspect which would fall under 92.

VISCOUNT HALDANE:- Yes, that is why they put in the two aspects. It was Lord FitzGerald who delivered this judgment.

Mr STUART BEVAN:- Yes. May I just refer to the Judgment which begins on page 121. I do not think I need read anything until the middle of page 128, I do not think anything earlier than that is directly relevant. "Their Lordships do not think

it necessary in the present case to lay down any general rule or rules for the construction of the British North America Act" &c. (reading down to the words) "The principle which that case and the case of the Citizens Insurance Company illustrate is, that subjects which in one aspect and for one purpose fall within section 92 , may in another aspect and for another purpose fall within section 91".

LORD DUNEDIN: I must apologise to the author of the head note, if he is alive, or to his executors if he is dead, but, none the less, I think, with deference, Lord Fitzgerald was wrong in putting it in that way.

MR. STUART BEVAN: The judgment continues: "Their Lordships proceed now to consider the subject matter and legislative character of sections 4 and 5 of 'the Liquor License Act of 1877, chapter 181, Revised Statutes of Ontario.'", etc., etc. (Reading to the words, page 131) "As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted." I do not think there is anything further I need read, because it goes to another point.

VISCOUNT HALDANE: There is a sentence or two which, I think, you might read, on page 132. It does not bear on what we are immediately on, but on what we shall come to, the position of the provincial Parliament under the statute. I mean the passage beginning: "When the British North America Act enacted".

MR. STUART BEVAN: If your Lordship pleases. "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or

resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

VISCOUNT HALDANE: You see what that means. It meant something less obvious in those days than it means now. It meant that a provincial Parliament, as set up under the British North America Act of 1867, is a co-ordinate party and a legally and constitutionally co-ordinate party with the Dominion. True it is that the Governor-General appoints the Lieutenant-Governor, but when the Lieutenant-Governor is appointed he is the direct representative of the Crown.

MR. STUART BEVAN: Yes. I ought perhaps to have read that passage. Then, my Lords, the next case is the Attorney General for Ontario v. The Attorney General for the Dominion, in 1896, Appeal Cases, at page 348.

VISCOUNT HALDANE: That is a very important case.

MR. STUART BEVAN: Yes, the judgment of the Board was delivered by Lord Watson.

LORD DUNEDIN: You are leaving out two cases in 1894. No doubt those two cases are dealt with in the judgment which I gave, but, after all, they were the cases on which I founded my judgment.

MR. STUART BEVAn: I will refer to that.

VISCOUNT HALDANE: We had better see what is in those cases.

MR. STUART BEVAN: I am sorry I had not brought them with me. One is Tennant v. The Union Bank of Canada, in 1894, Appeal Cases, at page 31, and the other is The Attorney General of Ontario v. The Attorney General of Canada.

VISCOUNT HALDANE: We will come to that later.

MR. STUART BEVAN: Those are the cases Lord Dunedin referred to.

LORD DUNEDIN: I referred to them because both the judgment of the Board, which I delivered, and which was concurred in, among other people, by Lord Macnaghten and Sir Arthur Wilson, went upon those two cases. I put it in rather broader words, but I was not laying down anything new.

VISCOUNT HALDANE: It only comes to this, that things which come within

section 91 are things as to which section 91 prevails, although they are also within section 92.

LORD DUNEDIN: It comes to this, that, if both parties have legislated and they come into conflict, then the Dominion must get the best of it.

VISCOUNT HALDANE: I think that has been understood throughout.

MR. STUART BEVAN: In Tennant v. The Union Bank of Canada, the fourth paragraph of the head-note is this: "The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in section 91, is of paramount authority even though it trenches upon the matters assigned to the provincial legislature by section 92."

VISCOUNT HALDANE: That is clear.

LORD DUNEDIN: I do not want you to cite these cases particularly, only if we are supposed to he having a chronological history of them these two cases come first.

MR. STUART BEVAN: I ought to have referred to them.

VISCOUNT HALDANE: They are on a principle that is not in dispute.

LORD DUNEDIN: I do not think you need read them, because they are really dealt with in the case I decided.

MR. STUART BEVAN: If your Lordship pleases. The other case, the Attorney General of Ontario v. The Attorney General of Canada, is reported in the same volume at page 189. I ought to say at once that my friend Mr. Geoffrey Lawrence and I have not provided ourselves with a complete least of all the decisions. We have dealt with trade and commerce as being a matter material to this appeal, and we have endeavoured to find all the decisions in which trade and commerce is discussed.

VISCOUNT HALDANE: I think we shall remember them when we come to them. What is the next case?

MR. STUART BEVAN: The one I am anxious to remind your Lordships of is Lord Watson's judgment in 1896 Appeal Cases, at page 348. The head-note is this: "The general power of legislation conferred upon the Dominion Parliament by section 91 of the British North

America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance; and must not trench on any of the subjects enumerated in section 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion."

LORD ATKINSON: That is a very important statement.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: It is the body politic of the Dominion?

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: That is not a bad expression, because that covers the case of war.

MR. STUART BEVAN: Yes, it covers emergency cases. It is really putting it very nearly as high as the emergency cases.

VISCOUNT HALDANE: Yes, it is very nearly.

MR. STUART BEVAN: "Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or provincial legislation."

VISCOUNT HALDANE: That was a very important point in those days, because it was suggested that the Dominion could repeal, and this case says: No, because it is a purely co-ordinate party. Each party has no power to repeal a statute. All it can do is to say it is unlawful.

MR. STUART BEVAN: "Accordingly the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864 (27 &28 Victoria, Chapter 18) was ultra vires the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order and good government of Canada; Russell v. The Queen followed; but not as regulating trade and commerce within section 91, subsection 2, of the Act of 1867; Citizens' Insurance Company v. Parsons distinguished and Municipal

Corporation of Toronto v. Virgo followed. Held, also, that the local liquor prohibitions authorized by the Ontario Act (53 Victoria, chapter 56), section 18, are within the powers of the provincial legislature, But they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886."

VISCOUNT HALDANE: My recollection is that that was as to the distinction which is drawn between prohibition and licensing.

MR. STUART BEVAN: Prohibition and regulation. There are a number of questions, and the judgment refers to the seventh question as the most important one. May I read the seventh question, which is to be found at the bottom of page 349? "Has the Ontario Legislature jurisdiction to enact section 18 of Ontario Act, 53 Victoria, chapter 56, intituled 'An Act to improve the Liquor Licence Acts', as said section is explained by Ontario Act, 54 Victoria, Chapter 46, intituled 'An Act respecting local option in the matter of liquor selling'?." Then the judgment, which was delivered by Lord Watson, begins on page 355.

VISCOUNT HALDANE: Then he states what the local Acts were which gave the power to license. Then he gives the substance of the Scott Act, that is the Canada Temperance Act of 1886. You had better read that, I think.

MR. STUART BEVAN: If your Lordship pleases. "Their Lordships think it expedient to deal, in the first instance, with the seventh question, because it raises a practical issue, to which the able arguments of counsel on both sides of the Bar were chiefly directed, and also because it involves considerations which have a material bearing upon the answers to be given to the other six questions submitted in this appeal. In order to appreciate the merits of the controversy, it is necessary to refer to certain laws for the restriction or suppression of the liquor traffic which were passed by the Legislature of the old province of Canada before the Union, or have since been enacted by the Parliament of the Dominion, and by the Legislature of Ontario respectively. At the time when the British North America Act of 1867 came into

operation, the statute book of the old province contained two sets of enactments applicable to Upper Canada, which, though differing in expression, were in substance very similar."

VISCOUNT HALDANE: Mr. Duncan,will correct me if I am wrong, but I think that is after the great change following ~~if~~ Lord Durham's Report, when Parliamentary institutions, representative institutions, were given to the United Province of Upper and Lower Canada, but with the legislature, which sat sometimes in Upper Canada and Sometimes in Lower Canada. Then at a certain stage the Government, which was representative, was made responsible. That was before Quebec? I think it was still Upper and Lower Canada at that time?

MR. DUNCAN: Yes. The division was made in 1791 into Upper and Lower Canada, and each of them was given a legislature. In 1841 the two provinces were united after the rebellion. I think Lord Durham's Report had reference to what was ultimately passed as the British North America Act.

VISCOUNT HALDANE: No, that did not come until the Conference of 1864. Lord Durham's Report is much earlier than that. It was in the 30's, I think. I think you will find that Upper and Lower Canada were united by statute.

MR. DUNCAN: Yes, in 1841.

VISCOUNT HALDANE: Then there was a Parliament, but it sat sometimes at Toronto and sometimes at Montreal or Quebec, and it made laws which were different in Upper and Lower Canada. Then they were separated, and a legislature was assigned to each, and I think that was some time before the British North America Act.

MR. DUNCAN: I think not, my Lord.

VISCOUNT HALDANE: You are probably right. Anyhow, when the British North America Act was agreed on, they were defined, and a sharp distinction was made.

MR. DUNCAN? Yes.

VISCOUNT HALDANE: At this stage what Lord Watson says, no doubt rightly, is that the statute book of the old province contained

two sets of enactments applicable to Upper Canada, that is to say, the Parliament of the United Provinces had passed laws relating to Ontario?

MR. DUNCAN: Yes.

VISCOUNT HALDANE: That is really what it means.

MR. DUNCAN: Yes, the statutes on their face show that it is applicable to the part of the Province which formerly was the Province of Upper Canada.

MR. STUART BEVAN: On page 356, at the top, Lord Watson says: "The most recent of these enactments were embodied in the Temperance Act, 1864 (27 & 28 Victoria, chapter 18), which conferred upon the municipal council of every county, town, township, or incorporated village, 'besides the powers at present conferred on it by law', power at any time to pass a by-law prohibiting the sale of intoxicating liquors, and the issue of licences therefor, within the limits of the municipality.", etc., etc. (Reading to the words, page 358) "and (3) as to every municipality having a municipal by-law which is included in the limits of, or has the same limits with, any county or city in which the second part of the Canada Temperance Act is brought into force before the repeal of the by-law, which by-law, in that event, is declared to be null and void."

VISCOUNT HALDANE: Let us pause for a moment to enable us to understand this. There was an Act in force in the Province of Ontario under the old law which enabled local regulation, and even local prohibition to take effect. Them came the Scott Act, which was a Dominion Act, and then the Dominion appears to have repealed the ~~Province~~ provisions of the old Local Temperance Act of 1864 and also enacted prohibition. I want to get at how they had jurisdiction to do that. I think it must have been in this way -- Mr. Duncan will correct me if I am wrong in the matter -- the British North America Act in effect, I think, says that the legislative power of the Parliament of Canada extends to all laws, which, if the Province had been there after confederation, as it was before,

would have been within Dominion jurisdiction, and said, with regard to all others, that, if the Province had Dominion over those laws and ~~by~~ had them, in existence, then the Provincial legislature may deal with them as being merely provincial laws. There is a section in the British North America Act which, I think, is to that effect. If that is right, then what the Dominion did here was to say: We are acting in the case of these prohibition laws of the Province in such a fashion that we are only exercising powers which we now possess over a subject matter which is now ours. We are not interfering with anything that is passed by the ~~legislation~~ legislature of the New Province. Is that right?

LORD DUNEDIN: I think in this case the Dominion had certainly expressly repealed the old provincial Act of 1864, and it was held that that was bad.

VISCOUNT HALDANE: They could not do that, because, partly at least, that was within provincial competence after Confederation. That is what I mean, they proposed to repeal everything that was exclusively within Dominion powers, but they left everything that was the other way. That is how I read what Lord Watson says.

MR. STUART BEVAN: Section 129 of the British North America Act deals with the continuance of existing laws: "Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissioners, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act."

VISCOUNT HALDANE: That is what I thought.

MR. DUNCAN: In that connection there is a case which my learned friend has not referred to, which, I think, is quite important, Bobie v. Temporalities Board, in 1882, Appeal Cases, in which their Lordships held that an Act of the Province of Canada before the Union, which affected Church property in both Quebec and Ontario, could not be repealed by the Province of Quebec, because the Act was one Act applicable to both Provinces, and, although it dealt with property and civil rights, the only legislature which could repeal it was the central legislature competent to deal with the matter from the point of view of both Provinces.

VISCOUNT HALDANE: I remember that case very well.

MR. STUART BEVAN: Going back to the judgment of Lord Watson in 1896 Appeal Cases, at page 358 he says: "With the view of restoring to municipalities within the province whose powers were affected by that repeal the right to make by-laws which they had possessed under the law of the old province, the Legislature of Ontario passed section 18 of 53 Victoria, chapter 56, to which the seventh question in this case relates.", etc., etc. (Reading to the words, page 361) "If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate, to the exclusion of the provincial legislatures."

VISCOUNT HALDANE: That sentence of Lord Watson marked the water shed. Up to then the trend had been in favour of the Dominion under the guidance of the Supreme Court. Then Lord Watson set up a new tendency, and then it followed almost as much the other way. Whether it has now got more equalised I do not know.

MR. STUART BEVAN: I am going to refer your Lordships to the latest decisions, and I submit that the tendency is still the tendency

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that one finds in this judgment.

VISCOUNT HALDANE: You will have to demonstrate that with some illustrations on the minds of their Lordships sitting here. It is merely a question of tendency, and it cannot govern the decision in each particular case. Each case must be taken on its own merits.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: But undoubtedly in those days, and the days of Chief Justice Strong and Chief Justice Ritchie in the Supreme Court most cases were decided upon the principle which Lord Watson denounces there.

MR. STUART BEVAN: Yes. "In construing the introductory enactments of section 91, with respect to matters other than those enumerated, which concern the peace, order and good government of Canada, it must be kept in view that section 94", etc., etc. (Reading to the words) "But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion."

VISCOUNT HALDANE: You observe what Lord Watson says: It is not within regulation of trade and commerce, and he not obscurely says that if he had had to decide the question whether it was within peace, order and good government, he would find it, having regard to the principles of construction laid down, a very difficult thing to say that Russell v. The Queen was wrong.

MR. STUART BEVAN: Yes, it was a different statute, of course, but the provisions had substantially been re-enacted in the statute which was before Lord Watson.

VISCOUNT HALDANE: If it was valid it was there occupying the field, and it put certain difficulties in the way, which he gets round.

MR. STUART BEVAN: He says: "The judgment of this Board in Russell v. The Queen has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to

the peace, order and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament. In that case the controversy related to the validity of the Canada Temperance Act of 1878; and neither the Dominion nor the Provinces were represented in the argument. It arose between a private prosecutor and a person who had been convicted, at his instance, of violating the provisions of the Canadian Act within a district of New Brunswick, in which the prohibitory clauses of the Act of 1878 were in all material respects the same with those which are now embodied in the Canada Temperance Act of 1886; and the reasons which were assigned for sustaining the validity of the earlier, are, in their Lordships' opinion, equally applicable to the later act."

VISCOUNT HALDANE: Which of those two Acts, Mr. Duncan, of 1878 and ~~1886~~ 1886, was called the Scott Act?

MR. DUNCAN: I am not sure; one I think was called the Dunkin Act; I am not sure which it was.

VISCOUNT HALDANE: I think it must have been the second one; I think the Scott Act was the earlier one.

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MR STUART BEVAN: "It therefore appears to them that the decision in Russell v. Reg. must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provisional area within the Dominion, must receive effect as valid enactments relating to the peace, order and good government of Canada. That point being settled by decision" -- that is the Russell case -- "it becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886 as being an Act for the 'regulation of trade and commerce' within the meaning of No. 2 of Section 91. If it were so, the Parliament of Canada would, under the exception from section 92 which has already been noticed, be at liberty to exercise its legislative authority, although in so doing it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of section 91" -- that is the regulation of trade and commerce -- "were discussed by this Board at some length in Citizens Insurance Co. v. Parsons, where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament" etc (Reading to the words at page 367) "In like manner, the express repeal, in the Canada Temperance Act of 1886, of liquor prohibitions adopted by a municipality in the province of Ontario under the sanction of provincial legislation, does not appear to their Lordships to be within the authority of the Dominion Parliament". That, of course, deals with a different aspect of the matter, and I do not know that on the point I am now making my submission on it is directly relevant, but I will read it if your Lordships think it will be of any assistance.

VISCOUNT HALDANE: I do not think you need; it is in effect a decision that there is no power of repeal in either, but the Courts must say which statute is valid and how far.

MR STUART BEVAN: Yes, really I think I have read all Lord Watson's

Judgment, except that on page 369 there is a passage.

VISCOUNT HALDANE: I was looking to see if there was anything on page 368.

MR STUART BEVAN: I do not think so.

VISCOUNT HALDANE: I think it may be worth while reading at the bottom of page 368.

MR STUART BEVAN: If your Lordship pleases. "It thus appears, that, in their local application within the province of Ontario, there would be considerable difference between the two laws; but it is obvious that their provisions could not be in force within the same district or province at one and the same time".

VISCOUNT HALDANE: Does not that apply to the Ontario Act here and to the Lemieux Act. If they are both in operation at the same time, and there is inconsistency, they could not both be in opposition.

MR STUART BEVAN: Yes: "In the opinion of their Lordships the question of conflict between their provisions which arises in this case does not depend upon their identity or non-identity, but upon a feature which is common to both" etc (Reading to the words page 370) "But their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the Province of Ontario where the prohibitions of the Canadian Act are not and may never be in force. In a district which has by the votes of its electors" -- This again, I think, all turns upon the special provisions of the Act. The option is to be exercised locally upon the votes to be taken as called for by the Act, and I do not think there is anything further I need read.

VISCOUNT HALDANE: Take the analogy here. It is said that in that case if the Dominion had put in operation by means of a vote of the electors this Scott Act, and if on the other hand the Province had put its Temperance Act into force by a similar vote, there would have been a conflict.

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: And one or other would have had to go .

MR BEVAN: Yes.

VISCOUNT HALDANE: Then he goes on to say if the Dominion were competent to pass the Canadian Temperance Act that would prevail.

MR STUART BEVAN: Undoubtedly.

VISCOUNT HALDANE: Have we got further than that here. He says there is no repugnancy between the two laws when the provisions of the Canadian Act have not been adopted by the local electors.

MR STUART BEVAN: It does not go further than that. Perhaps I had better read to the end.

VISCOUNT HALDANE: What he says is that the form of the Canadian Act does not debar the Province from setting up and putting into operation a local Act so long as its own general Act does not come into operation itself.

MR STUART BEVAN: Perhaps I had better read to the end: "In a district which has by the votes of its electors rejected the second part of the Canadian Act, the option is abolished for three years from the date of the poll" etc (Reading to the words) "that its provisions are or will become inoperative in any district of the province which has already adopted, or may subsequently adopt, the second part of the Canada Temperance Act of 1886". Un-less your Lordships desire I will not read the part with regard to the other questions.

VISCOUNT HALDANE: No, I do not think that is material This was a case of answering questions submitted by Order in Council to the Supreme Court.

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: It was an appeal from their judgment.

MR STUART BEVAN: Yes. The principles laid down in that judgment, as your Lordships will see in a few moments, have been followed in the later judgments.

VISCOUNT HALDANE: Let us see what it decided: first of all, that the Canadian legislation would not have taken place under trade

and commerce.

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: Nobody seems to have suggested criminal law here. It must have taken place under peace, order and good government as being of a nature that concerned the Dominion as a whole, but then they said whether it was such as to affect the body politic was a difficult and delicate question, which apparently they rejoiced in being relieved from having to decide affirmatively by what had been laid down in Russell v. The Queen.

MR STUART BEVAN: Yes; the next case I want to refer to is in 1907 Appeal Cases, at page 65, The Grand Trunk Railway Co. of Canada v. Attorney General of Canada. That is the case in which the Judgment of the Board was delivered by Lord Dunedin.

VISCOUNT HALDANE: That is the case which Lord Dunedin has referred to.

MR STUART BEVAN: Yes, it is a railway case.

VISCOUNT HALDANE: What do you say that decided?

MR STUART BEVAN: It is an application of what had already been laid down by Lord Watson. The particular legislation in this case was held to be valid as being legislation ancillary to through railway legislation, which was one of the matters fallin to the Canadian Parliament under section 91, although it affected civil rights; it came within section 92; it also came within section 91, and therefore section 91 prevailed.

VISCOUNT HALDANE: It is only through railway legislation that comes under the Dominion.

MR STUART BEVAN: Yes; the head note is this: "Held, that the Dominion Parliament is competent to enact section 1 of Canadian statute 4 Edward 7, chapter 31, which prohibits 'contracting out' on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants".

VISCOUNT HALDANE: The reporter has not taken the trouble to

tell us what the point of the railway legislation was.

MR STUART BEVAN: It was prohibiting contracting out on the part of Railway Companies from their liability to pay damages to their employees for personal injury.

VISCOUNT HALDANE: That was a Dominion Act?

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: Did the Provincial Act say that they might?

MR STUART BEVAN: I do not think as far as I remember the case that there was in fact any Provincial legislation upon the matter at all.

VISCOUNT HALDANE: Then what was the point?

MR STUART BEVAN: The point was, this was an interference with civil rights.

VISCOUNT HALDANE: That the employees were people within the Provinces.

MR STUART BEVAN: Yes, it was an interference with civil rights within the province, and the Board held: Yes, that is perfectly true, and you come within section 92 on that ground, but the matter is also within section 91, and therefore section 91 prevails, although the legislation affects the civil rights within the Province.

VISCOUNT HALDANE: The material parts seem to be in the middle of page 68.

MR STUART BEVAN: Yes, may I begin at page 67: "The question in this appeal is as to the competency of the Dominion Parliament to enact the provisions contained in section 1 of 4 Edward VII, c. 31, of the Statutes of Canada". etc (Reading to the words page 68) "As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers". -- and I mastrespectfully submit an interference with contracts of employment between masters and men -- "In the factum of the appellants it is (inter alia) set forth that the law in question might 'prove very injurious to the proper maintenance and

operation of the railway. It would tend to negligence on the part of the employees, and other results of an injurious character to the public service and the safety of the travelling public would necessarily result from such a far reaching statute'. This argument is really conclusive against the appellants. Of the merits of the policy their Lordships cannot be judges. But if the appellants' factum properly describes its scope, then it is indeed plain that it is properly ancillary to through railway legislation". I rely, of course, upon that as I do upon the earlier judgment of Lord Watson.

Then, my Lords, there is another case of the Attorney General of Manitoba v. Manitoba Licence Holders' Association reported in 1902 Appeal Cases at page 73.

VISCOUNT HALDANE: This was Lord Macnaghten's judgment in which he upheld the Provincial Act.

MR STUART BEVAN: Yes, it does not deal with trade and commerce.

VISCOUNT HALDANE: Does it add anything at all?

MR STUART BEVAN: I do not think it does; it follows Lord Watson's judgment in 1906.

VISCOUNT HALDANE: It is said that the Province had power to pass the legislation which was virtually prohibitive legislation in the Province; it was legislation of a restrictive kind going so far that it virtually came to prohibition of the retail though not of the wholesale trade, and it was also decided that although it might go outside the Province, that was no objection to an Act which was within the Province's powers.

LORD DUNEDIN: There ~~have~~ had been no Dominion Legislation?

MR STUART BEVAN: No.

MR DUNCAN: Lord Macnaghten expressed the view that that case fell rather under No. 16 than under No.13.

VISCOUNT HALDANE: No. 16 is local matters within the Province?

MR DUNCAN : Yes.

VISCOUNT HALDANE: I do not think it adds to the matter.

MR STUART BEVAN: I do not think it does.

LORD ATKINSON: He held it was, although it might interfere with the business operations outside the Province.

MR STUART BEVAN: Yes.

LORD DUNEDIN: I do not quite understand your remark that that case in which I gave judgment in 1906 helps you; I am not saying it does not help you, but I do not see how it helps you.

MR STUART BEVAN: Your Lordship held that the legislation came both within section 91 and section 92, and the application of the principle which was laid down in the very early cases, in that case section 91 prevails.

VISCOUNT HALDANE: It really did not want any dicision for that; section 91 says that railway matters are within the competency of the Dominion Parliament, and Lord Dunedin said this would extend to the arrangements which a Railway Company makes with its servants.

MR STUART BEVAN: Yes.

LORD DUNEDIN: How does it help you; I do not think it does. You want to say that the Dominion Legislation is bad?

MR STUART BEVAN: If I said it helps me that is not a very happy phrase; it does not either help me or my learned friend.

VISCOUNT HALDANE: You read it for our edification?

MR STUART BEVAN: I read it because it is a comparatively recent decision.

LORD DUNEDIN: I do not think it did anything except that it put in rather shorter form what had been decided before.

Viscount Haldane
~~LORD ATKINSON~~: It is a very sound statement of the existing law. You are getting on to the narrow part of the path now. It is plain from reading the Attorney General for Ontario v. The Attorney General for the Dominion that the Board at any rate did not lay much stress either upon trade and commerce or upon criminal law.

MR STUART BEVAN: No.

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VISCOUNT HALDANE: Lord Watson intimated not obscurely that there were difficulties, but that he was relieved from considering ~~it,~~ the Russell case. The other side have to show, not you, that this touches the body politic in such a sense what we want now is such authority as you can give us on the meaning of that word.

LORD DUNEDIN: It is really a case of :Not guilty but do not do it again.

MR STUART BEVAN: I got most assistance from what I may call the profiteering case, the Board of Commerce case.

VISCOUNT HALDANE: We shall have to come to that, and we shall have to come to the Manitoba case.

MR STUART BEVAN: Yes. I am going to make the submission that the interests of the body politic being affected, and the cases where public emergencies or public dangers have been considered really fall under the same head.

VISCOUNT HALDANE: You are going to say they are the same thing.

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: Before we come to these cases we had better for a moment consider at large the kind of inquiry that arises. You must remember that the ProvinceSare co-ordinate with the Dominion except in all matters which fall within their scope legislatively, that is to say, they are in a sense like independent Kingdoms with very little Dominion control over them. It is open to them in every case to pass legislation ~~xxx~~ restricting strikes as being restrictions of civil rights, and it is open to all of them to pass the same legislation, or to pass legislation for the same object in different ~~terms.~~ forms.

Mr Stuart Bevan: Yes

VISCOUNT HALDANE: And they ~~xxx~~ have done that with regard to Companies with provincial objects. The legislation is different in the different Provinces. But is there anything inherent in this subject which makes it necessary in the interests of the body politic, to use a short phrase, that there should be identical legislation passed for the whole

of Canada.

MR STUART BEVAN: I submit not.

VISCOUNT HALDANE: The other side say Yes.

MR STUART BEVAN: Yes, my Lord, looking at the evidence, which if necessary I shall ask your Lordships to consider, there is nothing in my submission which makes it a Dominion matter.

VISCOUNT HALDANE: I am not sure that I agree with you about that. I have looked at the evidence. Undoubtedly a Trade Union today is not the local thing which it used to be. It may be national or it may be International. That may not be a reason for dealing with it with the broad power of the Dominion, but it is a reason which must be taken into account as explaining the Lemieux Act.

LORD ATKINSON: Supposing there was an Act in each Province somewhat similar to this, would it be competent for the Dominion to as it were combine all those and pass one Act for the whole country being practically what was done in each Province?

MR STUART BEVAN: I do not think it would be competent.

LORD ATKINSON: That would seem to be unifying the legislation.

VISCOUNT HALDANE: Yes, but where is their power; the provinces are absolutely independent.

LORD ATKINSON: You would dispute that, Mr. Bevan?

MR STUART BEVAN: I should dispute that, my Lord.

LORD SALVESEN: Before unifying it would involve repeal, and that is beyond the power of the Dominion.

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: You would have to find power to legislate. No doubt if a great national emergency came, if the trade unions were to go in rebellion against the State, it would be competent for Canada to pass a general Act putting an end to the trade unions by some such means, but that would be a new legislation.

MR STUART BEVAN: I should not contest that if industrially there was such a state of affairs in the Dominion, that the safety of the Dominion was threatened unless the industrial

situation was dealt with vigorously and promptly, that the Dominion has power in such a case as that.

LORD DUNEDIN: Supposing there was a universal strike against supplying provisions to anybody, so that the whole country would be starved?

MR STUART BEVAN: Yes, war, famine, insurrection, all those matters but the Act must be passed as and when the occasion arose. If there is the situation which threatened, and unless the Act is passed, then and there, and there are some appropriate or effective means of dealing with the situation ----

LORD DUNEDIN: That would be just as much an emergency as the Great War.

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: After the Adjournment do you think the best plan would be to go straight on, or to take the Pulp case; perhaps that would be safer, because that is the negative.

MR STUART BEVAN: Yes, my Lord.

(Adjourned for a short time)

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VISCOUNT HALDANE:- Now we will go to the Pulp case.

Mr STUART BEVAN:- Yes, my Lord, that is in 1925 Appeal Cases at page 695, it is the Fort Frances Pulp & Power Company Ltd . v. The Manitoba Free Press Company Ltd and others. The question there was as to the validity of Dominion Legislation War Measures, Emergency Legislation, controlling throughout Canada the supply of paper for printing, and incidentally the question arose, whatever the question might be during the war with regard to such legislation, whether the continuance of the enforcement of the provisions of that legislation after the war could be supported on the ground of emergency.

VISCOUNT HALDANE:- We said it was a question for the Government and we could not judge of it, that it was impossible to form any judgment of what considerations had to weigh with the Government, not only that but the terms of the proclamation and whether this legislation endured till the Government said it was no longer necessary. There is a case from the United States Supreme Court of Hamilton v. Kentucky Distilleries Co, which is reported in 251 United States Reports at page 146. I know that it is at the House of Lords Library and I think we should have it.

LORD DUNEDIN:- You were saying a little time ago that you thought that what I might call the exceptional cases, of which this is the first, were really in the same category as the cases that Lord Watson says may be local questions and grow so large as to become an Imperial question.

Mr STUART BEVAN:- Yes.

LORD DUNEDIN:- I am not ~~saying~~ satisfied you are right in saying those relate to different ~~xxxxxx~~ instances of the same thing; I do not say I have made up my mind, but my impression is that they are different things .

Mr STUART BEVAN:- I will deal with them on both views, that they are the same, and if I am wrong on that, that they are

different; very much the same considerations up to a point will apply to both. It may be that in what I may call the national emergency cases one must go a little further than in the other class.

VISCOUNT HALDANE:- It cannot arise here, where Parliament is supreme and where at the beginning of war it always passes emergency legislation. It did arise in the United States and was decided to arise in Canada. In the United States, at the time of the Civil War, there was a decision of the Supreme Court that these things could not be done particularly with regard to proclamations freeing slaves and passing legislation for even the non slave States, that slaves coming there should be free, and in the Scott case the Chief Justice decided that the Federal Government had no power, but the President swept all that away and said : We are in the middle of war, we are fighting for the ~~xixxx~~ life of the United States, and whatever may be the restrictions on the Constitution which has no reserved powers in the Federal Government, this puwer must be applied, and public opinion supported it. I have got here now the recent case as to the late war, and we will see if it throws any light on it when we come to it.

Mr STUART BEVAN:- That is referred to by your Lordship in the Fort Frances case. The Fort Frances case, if I may read the head note, says this: " Under sections 91 and 92 of the British North America Act, 1867, the Dominion Parliament has an implied power, for the safety of the Dominion as a whole, to deal with a sufficiently great emergency, such as that arising from war, although in so doing it trenches upon property and civil rights in the Provinces, from which subjects ~~xx~~ it is excluded in normal circumstances. The enumeration in section 92 is not repealed in such an emergency, but a new aspect of the business of Government emerges. The Dominion Government,

which in its Parliament represents the people of Canada as a whole, must be deemed to be left with considerable freedom to judge whether a sufficiently great emergency exists to justify an exercise of the power:- Held, accordingly, that the Canadian War Measures Act, 1914, and Orders in Council made thereunder during the war for controlling throughout Canada the supply of newsprint paper by manufacturers and its price, also a Dominion Act passed after the cessation of hostilities for continuing the control until the proclamation of peace, with power to conclude matters then pending, were ultra vires". The Judgment of the Appellate Division was affirmed on a different ground.

VISCOUNT HALDANE:- You observe that all this legislation arose under the Canadian War Measures Act of 1914, which was at the beginning of the war, and executive powers conferred by that Act were deemed to have continued as long as the Government needed them.

Mr STUART BEVAN:- Yes.

VISCOUNT HALDANE:- There was a fear that there might arise dissatisfaction and consequently the ~~peace measure~~ press must be control and accordingly the Paper Control was set in operation.

Mr STUART BEVAN:- Yes.

VISCOUNT HALDANE:- You had better perhaps read the Judgment.

Mr STUART BEVAN:- The Judgment of your Lordships' Board was delivered by Lord Haldane on page 698. Does your Lordship desire me to read the statement as to the legislation and proclamations and Orders ?

VISCOUNT HALDANE:- If you can do it shortly.

Mr STUART BEVAN:- The head note sets out what the position was. There was the Canada War Measures Act of 1914 and certain Orders in Council were made under that Statute regulating the supply of paper.

VISCOUNT HALDANE:- Under that not only the price was controlled but the supply of paper.

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Mr STUART BEVAN:- The quantities they could have.

VISCOUNT HALDANE:- To keep a hand over newspapers.

Mr STUART BEVAN:- Yes.

VISCOUNT HALDANE:- That was done originally soon after 1914 and it went on. I do not think you need read all this through.

Mr STUART BEVAN:- I will go to page 705 unless your Lordships desire otherwise.

VISCOUNT HALDANE:- I think that is right.

Mr STUART BEVAN:- "The question, therefore, becomes one of constitutional law, as to whether the procedure thus established had a valid basis. This depends, in the first place, on whether the two statutes already quoted were intra vires of the Dominion Parliament" &c. (reading down to the words) "But questions may arise by reason of the special circumstances of the national emergency which concern is nothing short of the peace, order and good government of Canada as a whole". That is why I ventured to link the two things together in view of the passage in the judgment in the Fort Frances case. Then: "The overriding powers enumerated in section 91, as well as the general words at the commencement of the section, may then become applicable to new and special aspects which they cover of subjects assigned otherwise exclusively to the Provinces".

VISCOUNT HALDANE:- With regard to all the rights and powers enumerated in section 91, that must refer to an extension of the normal meaning of those things.

Mr STUART BEVAN:- Yes.

VISCOUNT HALDANE:- Of course the general overriding power did apply?

Mr STUART BEVAN:- Yes. "It may be, for example, impossible to deal adequately with the new questions which arise without the imposition of special regulations on trade and commerce of a kind that only the situation created by the emergency

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places within the competency of the Dominion Parliament. It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within section 91, because in their fullness they extend beyond what section 92 can really cover".

LORD WRENBURY:— They are pregnant words are they not?

Mr STUART BEVAN:- Yes.

LORD WRENBURY:- Those words contain a principle.

Mr STUART BEVAN:- Yes. May I read them again: "It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within section 91 because in their fullness they extend beyond what section 92 can really cover". Then the Judgment goes on: "The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the State as a whole" &c. (reading down to the words) "The operation of the scheme of interpretation is all the more to be looked for in a constitution such as that established by the British North America Act, where the residuary powers are given to the Dominion Central Government, and the preamble of the statute declares the intention to be that the Dominion should have a constitution similar in principle to that of the United Kingdom".

VISCOUNT HALDANE:- No doubt Lord Dunedin will tell us, because he was in the case, in the De Keyser case all that was decided was this, that the prerogative power of the Crown had originally existed, that was not continued, but it was said when you have passed legislation dealing with the same subject matter, then once the ~~most~~ paramount power is superseded by Legislative Regulations. That does not touch this. What is said here is that the prerogative power is retained for the Dominion Central Parliament in a sufficient emergency,

but it must be a really sufficient emergency.

Mr STUART BEVAN:- Yes. "Their Lordships, therefore, entertain no doubt that however the wording of sections 91 and 92 may have laid down a framework under which, as a general principle, the Dominion Parliament is to be excluded from trenching on property and civil rights in the Provinces of Canada" &., (reading down to the words) "In saying what is almost obvious, their Lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and expressed in such decisions as that in October, 1919, in Hamilton v. Kentucky Distilleries Co.".

VISCOUNT HALDANE:- Need you read further?

Mr STUART BEVAN:- No. I am sorry I have not the American Report.

VISCOUNT HALDANE:- I have it now and I will tell you what is in it.

LORD DUNEDIN:- I think it is evident that it would be easier to arrive at the result, against you, you know, in Canada than it would in America because in America the Supreme States came together and they gave the United States such power as they thought fit to by the original constituting instrument, but in Canada it began from the other end.

Mr STUART BEVAN:- Yes, it did.

VISCOUNT HALDANE:- It was a Delegation.

Mr STUART BEVAN:- Yes.

VISCOUNT HALDANE:- You may say this, that in Canada the Provinces which were quite separate from each other for the most part, when the Constitution was founded, came together, and at their Conference they handed over the problem of agreeing as to general lines to Parliament to solve for them; Parliament gave it back, but it was really something quite different. I have here the American case of Hamilton and I will tell you

what it is. This is the head note: 1. "Although the United States lacks the police power, this being reserved to the States, it is none the less true that when the United States exerts any of the powers conferred upon it by the Federal Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by the state of its police power, or that it may tend to accomplish a similar purpose". 2. "The war power of the United States, like its other powers, and like the police power of the states, is subject to applicable constitutional limitations; but the 5th amendment to the Federal Constitution imposes, in this respect, no greater limitation upon the national power than does the 14th Amendment upon state power". Then No. 3: "If the nature and conditions of a restriction upon the use or disposition of property are such that a state could, under the police power, impose it consistently with the 14th Amendment without making compensation, then the United States may, for a permitted purpose, impose a like restriction consistently with the 5th Amendment without making compensation". Then No. 4: "Private property was not taken for public purposes without compensation, contrary to U. S. Constitution, 5th Amendment, by the enactment by Congress, in the exercise of the war power, of the provisions of the War-time Prohibition Act of November 21st 1918, fixing a period of seven months and nine days from its passage, during which distilled spirits might be disposed of free from any restriction imposed by the Federal government, and thereafter permitting, until the end of the war and the termination of demobilization, an unrestricted sale for export, and, within the United States, sales for other than beverage purposes". Then No. 5: "Assuming that the implied power of Congress to enact such a measure as the War-time Prohibition Act of November 21st, 1918, must depend not upon the existence of a

technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace, but upon some actual emergency or necessity arising out of the war or incident to it, the power is not limited to victories in the field and the dispersion of the hostile forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils whichhave arisen from its rise and progress". Then No. 6: "The Federal Supreme Court may not, in passing upon the validity of a Federal statute, inquire into the motives of Congress, nor may it inquire into the wisdom of the legislation, nor may it pass upon the necessity for the exercise of a power possessed" Then No. 7: "It requires a clear case to justify a court in declaring that a Federal Statute adopted to increase war efficiency has ceased to be valid, on the theory that the war emergency has passed and that the power of Congress no longer continues". Then No. 8: "The War-time Prohibition Act of November 21st, 1918, cannot be said to have ceased to be valid prior to the limitation therein fixed, viz., 'the conclusion of the present war and thereafter until the termination of demobilization', on the theory that the war emergency has passed, where the Treaty of Peace has not yet been concluded, the railways are still under national control by virtue of the war powers, other war activities have not been brought to a close, and it cannot even be said that the man power of the nation has been restored to a peace footing". Then No. 9: "The existing restriction on the sale of distilled spirits for beverage purposes, imposed by the War-time Prohibition Act of November 21st, 1918, was not impliedly removed by the adoption of the 18th Amendment to the Federal Constitution, which, in express terms, postponed the effective date of the prohibition of the liquor traffic thereby imposed, until one year after ratification". Then No. 10: "The war with Germany

cannot be said to have been concluded within the meaning of the War-time Prohibition Act of November 21st, 1918, merely by reason of the actual termination of activities". Then No.11: "The provision of the War-time Prohibition Act of November 21st, 1918, that it shall not cease to be operative until the 'conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President', is not satisfied by passing references in various messages and proclamations of the President to the war as ended, and to demobilization as accomplished, nor by newspaper interviews with high officers of the Army, or with officials of the War Department". That is the substance of the decision. The Judgment was given by Mr Justice Brandeis and I think this may be read: "That the United States lacks the police power and that this was reserved to the states by the 10th Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose". Then he quotes a vast number of authorities. "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations" - then he quotes more authorities - "If the nature and conditions of a restriction upon the use or disposition of property are such that a state could, under the police power, impose it consistently with the 14th Amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the 5th Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency".

I think I need not go into the details because the head note

which I have read goes into the question of when the war

came to an end and so on. You see it is plain that it was

thought that in the Constitution of the United States

although theoretical police power was with the States, there

was power which was inherent and power which interfered with

State rights and property and so on.

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MR STUART BEVAN: I am indebted to your Lordship. The purport of it was, I think, to be gathered from the reference to it in the Fort Frances case. May I make one or two observations on the Fort Frances case? Your Lordship, in the Judgment of the Board, does not distinguish between the legislation for peace, order and good government as referred to in the Russell case, and legislation which the emergency of the situation calls for for the purposes of peace, order and good government. Your Lordship deals with it under that head.

LORD ATKINSON: That is for peace, order and good government in the new condition of things.

MR STUART BEVAN: Yes, my Lord, in the new condition of things, but the position was not dealt with as it might have been on one view of the Russell case, which respectfully, I submit would be the wrong view, it was not dealt with upon an independent ground; apart altogether from the emergency of the situation produced by the war, this matter of paper ~~concentration~~ conservation and regulation and prices has passed out of the domain of local and provincial affairs and has become a question of Dominion importance. In one view it would have been open to the Respondents, I think it wasthere, who were supporting the decision of the Supreme Court, to have based their argument upon the two grounds, first of all national emergency, the exceptional conditions, war insurrection, or whatever it may be, and, secondly, ~~xkx~~ apart from that altogether, we may be wrong about that, but this particular topic for legislation has passed out of the domain of local interest and has passed into a far wider question, a Dominion wide question. Now your Lordship dealt with the two matters as if the bigger included the less, and if I may respectfully submit it, that is in fact the position, and in law is the position, and it seems to me to have been recognised by Counsel for the Respondents there, because in the argument which is set

out on page 698, your Lordship sees precisely how it was put. Mr Tilky was for the Respondents and he says: "Having regard to the special circumstances existing in 1914 the Act of that year and the Orders were valid. The paper mills were scattered through the Provinces, and there were newspaper publishers in all the x Provinces. The control of the trade, which the evidence shows was necessary, could only be effected by Dominion legislation. Control of prices was a necessary part of the control of the trade. Sections 91 and 92 must be read so as to enable legislation necessary in existing circumstances to be passed by the Dominion"-- those being the circumstances of emergency -- "if it cannot be passed effectively by the Provinces. The Board of Commerce case recognises that exceptional circumstances, such as those arising from war, may take a subject out of the enumeration in section 92 and into the general words of section 91. The Act of 1919 was passed by the Dominion to wind up transactions arising under emergency legislation which it had validly passed". Then I need not trouble with the rest. It is upon another point. In my submission, the whole case was argued and proceeded and was decided upon one ground alone, emergency.

LORD ATKINSON: That was emergency of war, and the results of war, but may there not bem, if I may use the expression, civil emergency, for instance, plague ?

MR STUART BEVAN: Yes.

LORD ATKINSON: It may extend, may it not, so far that it would justify the Dominion in passing Acts to deal with it, even although they may entrench upon the civil right of the Province.

MR STUART BEVAN: I should not dispute that for a moment. I should concede that in the case of emergency, peril of the interests of the Dominion threatened by a national strike, possibly accompanied by violence or something of that kind; in the case of national peril, Dominion legislation would be perfectly x appropriate and would be intra vires, but that occasion has yet to arise, and when it does arise the position will be considered, but it

is no part of my argument to-day that one must rule out of consideration in this matter the results of any labour trouble in the Dominion producing, in fact, a state of national peril, in which circumstances the Dominion Parliament would have to intervene in the interests of the Dominion.

LORD ATKINSON: They might strike and make a certain railway communication impossible, such as ~~xxx~~ on the Canadian Pacific Railway, or some other railway, and that would reduce very soon the population to starvation.

MR STUART BEVAN: That would be emergency, but one must wait for the emergency to happen, or to be threatened or imminent.

VISCOUNT HALDANE: Take Lord Atkinson's illustration and develop it. The Canadian Pacific runs right through Canada. Supposing in one Province the railwaymen struck, that might reduce the whole trunk line to impotence and might mean starvation in Canada. Would that be such a national emergency, or must yuu leave it outside?

MR STUART BEVAN: That would of course fall within sections 91 and 92, and section 91 would prevail; the particular case which Lord Atkinson puts would.

VISCOUNT HALDANE: Is there any other case that we could find of the same kind?

LORD WRENBURY: The emergency point is this, as I understand it, that the circumstances are such as that you could infer that the Dominion Parliament ought to have control of it for the protection of those who are in the separate Provinces of Canada. May not that principle also extend to any case in which the subject is one of such magnitude, or it may become by degrees of such magnitude that it is rather for the Dominion than the Province to legislate; that is the true principle; I am struggling to get at some principle.

MR STUART BEVAN: I should submit not, because it is open ~~x~~ to the Provincial Legislatures to deal with the matter themselves, and the Provincial Legislatures dealing with the matter themselves,

if they deal with it effectively, the question will never become one of such magnitude at all.

LORD ATKINSON: You would admit, if the network of Trades Unions of Railway Servants extended over several Provinces, that at all events if there was an outbreak, or if there was a strike, they would be entitled to pass a law dealing with the strike ?

MR STUART BEVAN: Yes.

LORD ATKINSON: But you say not in anticipation ?

MR STUART BEVAN: I say not in anticipation.

LORD ATKINSON: They cannot take precautions for a possible future strike, but they may do it for the purpose of dealing with an existing strike.

VISCOUNT HALDANE: In an acute emergency ?

LORD ATKINSON: That depends; the possible recurrence of the strike may be an emergency if it is threatening.

MR STUART BEVAN: It may well be that it is competent to the Dominion Parliament to legislate with regard to strikes, but that the Statute shall not come into operation unless an Order in Council, or something of that kind is passed, to be passed in the case of a national emergency or bringing the provisions of the particular statute relating to strikes into immediate force.

LORD ATKINSON: Take the question of a statute such as this, which does not punish the striker in any way, but establishes the system of conciliation, and only exercises compulsory powers to make persons attend the sitting of that Committee and produce their books, and not to take any action pending the decision of the Strike Conciliation Committee.

MR STUART BEVAN: That is an interference with civil rights which, in my submission, cannot be justified on any ground other than emergency.

LORD ATKINSON: No doubt it is consequential interference with civil rights, but it is not the direct object of the statute, it is consequential interference so that they will not permit the man to leave the service till a certain time, and you can insist upon a man producing his books if he declines to produce them

and give your agent authority to enter his premises and search, and it may be a very objectionable thing. That is the coercion necessary to make the Conciliation Act work and not the object of it.

MR STUART BEVAN: I must concede that at once, it is not the object of it; with no particular purpose in view, it is not an attempt to interfere with civil rights, but it is an attempt to arrive at a settlement of industrial disputes by conciliation, which involves this interference with rights.

LORD ATKINSON: I quite agree.

MR STUART BEVAN: I cannot put it higher than that. In conceivable circumstances, such legislation might well be intra vires the Dominion.

LORD ATKINSON: Following the example of the emergency case, are not you entitled to say the Government of the country is the best judge whether this legislation is now needed, or must we wait for an outbreak ?

MR STUART BEVAN: In my submission not. When one looks at the nature of these provisions, at the nature of the remedy which is provided in these provisions, reading the statute, one is left, if I may put it in this way, with a feeling: Well, if this matter is of such Dominion wide interest, and the matter in respect of which the Dominion Parliament is legislating is one of such emergency, all one x can say is that the remedy proposed or provided by the Statute is wholly inadequate to the emergency, because what does it all come to ? Nothing at all. It all depends upon whether the parties consent to arbitration. If they do not, all that can happen is that the Board of Conciliation will meet and endeavour to bring the parties together; if it fails, the parties will revert to the position they occupied before the Board of Conciliation was appointed, and time will be lost, and I suppose the feeling between employer and employee may be very much inflamed by the delay and the attempts that have been made to bring them together, and the position will be worse than

before, and there is no machinery provided by the Act for putting an end to the industrial dispute.

LORD ATKINSON: Conciliation is quite a desirable thing, but it may interfere with civil rights so far as it is necessary to carry it out.

MR STUART BEVAN: All these attempts to settle industrial disputes, or induce the parties to industrial disputes to settle them for themselves, must depend upon local conditions, local feeling, the nature of the employment and so forth, and one would have thought that they were matters essentially for the Provincial Governments to deal with, who are in touch with local feeling.

LORD WRENBURY: Supposing the legislation was an endeavour to deal with an organised system of seditious propaganda being used in Ontario and also elsewhere in Canada, a state of things not growing up as an emergency suddenly, but developing by degrees, and it was necessary to interfere with it, would not that be such a subject matter as the Dominion could properly deal with.

MR STUART BEVAN: That might fall under "Criminal Law" or call for an amendment of the Criminal Law.

LORD WRENBURY: I was thinking of a thing that develops by degrees, it is not an emergency.

MR STUART BEVAN: Sedition would be directly against the Government.

LORD ATKINSON: Take a national strike that would paralyze everybody.

MR STUART BEVAN: In that case I should concede that with a national strike imminent, it well might be held to be <u>intra vires</u> the Dominion Parliament to legislate to prevent it, or ameliorate the conditions arising out of the strike, but that is not the case here.

LORD WRENBURY: It is whether it is a sudden; is there any particular feature in its being sudden, an emergency, or danger of a strike ?

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MR STUART BEVAN: In my submission, yes, because in such a case as this, the interests of civil rights and property must be subordinated to the national interest. This piece of legislation which we attack here makes a wide invasion of civil rights without the justification afforded by emergency, and it applies in the case of strikes which have no prospect at all of provoking sympathetic strikes elsewhere; it provides: If there are only ten men first and last interested in the particular trade dispute that has arisen, and the invasion of the civil rights is in no sense commensurate with the good or public welfare to the Dominion that is hoped to be obtained by the particular piece of legislation.

LORD ATKINSON: You really admit that the position may be such as to justify it ?

MR STUART BEVAN: I think it might well be.

LORD ATKINSON: But you say it all depends upon the imminence, the dimensions, and the character whether it is the subject for Dominion legislation or not ?

MR STUART BEVAN: That must be.

LORD ATKINSON: I suppose it must be.

MR STUART BEVAN: That is my submission. I can even go a step further than that; I should like to consider this a little more fully, but at the moment I think I could concede this, that legislation of this kind might well be passed with the proviso that it was to come into effect if and only when the Dominion Government, by Order in Council, or other machinery, declared such a state of emergency and danger to have arisen, that the operation of this statute should then begin, and that the provision of the statute should be directed to the particular emergency that had arisen; I think I could concede that.

LORD ATKINSON: Many of the Judges here say that strikes lead to riots and disturbances; is the answer that there is no prospect of that in this case ?

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MR STUART BEVAN: If there was in this particular case, I submit that would not render the legislation intra vires because the legislation was not directed to this particular case, or any particular case, but it is in such wide terms,and embraces so many people and so many occupations in so many different circumstances ------

LORD ATKINSON: Their object is to establish machinery for conciliation.

MR STUART BEVAN: Perhaps once in one hundred,or in one thousand times,the employment of the machinery would be justified, whereas on the balance of the occasions it would be wholly unjustified, because the strike was a small one, or the dispute was a small one, which,in the ordinary course, would be settled between the parties and would not spread elsewhere, and would not lead to any general strike throughout the Dominion.

LORD ATKINSON: You said you would refer to the evidence to show that that was an exaggeration.

MR STUART BEVAN: I must refer to the evidence. Your Lordships will appreciate this, that it is only partial in its application, ig it only refers to certain trades.

VISCOUNT HALDANE: A good many trades.

MR STUART BEVAN: A good many trades,what may be conveniently called public utilities;there are many trades outside it.

LORD ATKINSON: ~~There~~ They are the vital instruments of communication for carrying food.

MR STUART BEVAN: There is this to be observed on the evidence. On the evidence, a strike amongst steel-workers was referred to as being a matter important to consider when the application to this Board of Conciliation in this particular case was made.

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LORD WRENBURY: Is it proper to describe these trades as of great public importance?

MR STUART BEVAN: Certainly. Of great importance in the particular Province.

LORD WRENBURY: Are not all industries of importance in that respect?

MR STUART BEVAN: Yes, but the supply of electricity is of supreme importance to the City of Toronto. Whether a City is properly supplied with electricity is of importance to any other City. I was going to point out the curious result, one gets from the application of a statute of this kind to the particular case. When the Board of Conciliation was applied for it was pointed out in the evidence that there was a strike among steel workers somewhere else in the Dominion, many hundreds of miles away from Toronto, and one of the reasons for appointing the Board was suggested to be the unsettled state of industries in general. The steel workers were outside the provisions of this Act altogether; it had no operation at all on them and therefore to get the result in the case of a comparatively few, I think the total number was something between 300 and 400 electrical workers, there was this compulsory reference to the Board, whereas in the case of many thousands of steel workers in another part of the country, their work I should have thought just as much of public importance as the providing of Toronto with electric light, there was no power to apply the Act.

LORD ATKINSON: The result of their striking would not be so immediate.

MR STUART BEVAN: No, but it would be disastrous to the trading community.

LORD ATKINSON: If the railway men strike, and the writers of comic songs strike, the railway men's strike would be more serious than the strike of the writers of comic songs.

MR STUART BEVAN: Certainly. In this case the evidence was

irrespective of the particular circumstances of the case. We called responsible people who said that if these people who were affected by the dispute had gone out on strike, Toronto would not have been plunged into darkness; they could have carried on, and it would apply in the case of the Toronto Commissioners, or any other Commissioners employing many thousands of men. If 10 of those men only had a quarrel, or one of the men had a quarrel with his employer, the subject matter of the quarrel affecting 10 of them, 10 of the many thousands, this Act would automatically come into operation, and the Board would be competent, although the remaining thousands in the Toronto Commissioners' employment were entirely indifferent to the strike, and were to be relied upon to take no part in it. It is the generality of the application of this Act that I am contending renders it ultra vires the Dominion Parliament, because it is an interference with civil rights in the Province, without reference to the particular circumstances of the dispute that may have arisen. A violent interference with the civil rights without reference to the evil that it is hoped to cure by that interference.

LORD ATKINSON: There is much in that.

MR STUART BEVAN: I should think if the statute is to be national, the evil ought to be national, and it is to be observed that in the reported cases there is only one case, because it is not true of the Russell case, that really falls into another category, putting that on one side, the only case where interference with civil rights has been justified, where section 91 confers in express terms rights upon the Dominion, is the pulp case, which was a case of war emergency. The case that I rely on in support of my argument is the other war case, the Board of Commerce case.

VISCOUNT HALDANE: There we approached it from the other side.

MR STUART BEVAN: That is reported in 1922 1 Appeal Cases, at

page 191. If ever there was a case in which this doctrine that a particular matter had ceased to be in the local and Provincial interest, but had become one of Dominion interest, this was the set of circumstances in which that doctrine might have been invoked, because it had to deal with a matter no less serious and of no less importance than profiteering in food, a matter which one would have thought the Dominion were closely interested in. This was sort of emergency legislation, if I may so call it, enacted after the war in 1919, designed to keep down the price of food, and to ensure proper and fair distribution of food throughout the Dominion. The head note is: "The Combines and Fair Prices Act, enacted by the Parliament of Canada in 1919, authorised the Board of Commerce, created by another statute of that year" etc (Reading to the words) "The power of the Dominion Legislature to pass the Acts in question was not aided by section 91, head 2 (trade and commerce since they were not within the general power; nor by section 91, head 27 (the criminal law) because the matter did not by its nature belong to the domain of criminal jurisprudence". That case on the contention of the parties to the dispute raises the very point that the present case raises.

VISCOUNT HALDANE: I see it was raised by a special case in the Supreme Court, and the six Judges of the Supreme Court were evenly divided, so that we did not get much assistance.

MR STUART BEVAN: No, my Lord, and being deprived of that assistance you came to the conclusion that the contentions I am making in this case applied to the facts in that case were correct, and in my submission there is no distinction between that case and this case, except that legislation directed against profiteering, and these various matters which are set out in the head note, would at first sight/at any rate seem to be more of Dominion importance as affecting the interests of the Dominion at large than the matters which are the subject matter of this legislation which we attack here. It was not decided or contended. As I shall point out in a moment there were two grounds upon

which this Dominion legislation could be looked at, first of all, the ground of emergency caused by war, famine, plague, or anything else; it was war in these cases, because it was the period just following the war. It was not contended that the matter must be looked at from that point of view, and if the Court took the view that the circumstances were not such as to constitute an emergency justifying the legislation, it was open to the appellants I think in that case to advance the alternative views, that putting aside altogether the question of emergency, such a matter as profiteering and the regulation of food supplies, was a matter which in the circumstances then existing was essentially a matter of Dominion interest. The separate point was never taken, nor could it in my opinion be taken, because in truth it wasnot a separate point, and the emergency point which loomed so large in these two later decisions of your Lordships' Board is only a way of expressing in the altered circumstances of the time what is really to be gather-ed from the decision in the Russell case of ~~those~~ years ago; it is simply a devebpment of it.

VISCOUNT HALDANE: You say it was the magnitude.

MR STUART BEVAN: Yes.

VISCOUNT HALDANE: Not so much the quality as the quantity.

MR STUART BEVAN: Yes. the quantity. Before I go to your Lordships judgment, may I read the arguments of my learned friend Mr. Newcombe and Mr. Mathew on page 192. They appeared for the Attorney General of Canada, and it is interesting to see the points that were taken. "It was within the powers of the Parliament of Canada under sections 91 and 101 of the British North America Act, 1867, to constitute the Board of Commerce" --

VISCOUNT HALDANE: What is section 101?

MR DUNCAN: The establishment of Courts of Dominion jurisdiction.

MR STUART BEVAN: "The Combines and Fair Prices Act dealt with public evils prevailing throughout the Dominion, not matters which were of a merely local nature, or otherwise competent to

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any Provincial Legislature". etc (Reading to the words) "The criminal provisions were to be administered by Provincial Courts" and so forth -- "within section 91, head 27 of the criminal law".

Those are the arguments for the Attorney General for Canada.

VISCOUNT HALDANE: Were all the points taken; was tradex and commerce taken?

MR STUART BEVAN: Yes, trade and commerce, criminal law, and emergency.

VISCOUNT HALDANE: So that the three points were taken.

MR STUART BEVAN: Yes, but the comment I make is, that one of the points was not split into two, namely, emergency, and the second point, whether that is right or wrong, still there is the matter of Dominion wide interest which has really passed out of the province of the Provincial Legislature. Separately, as I respectfully submit, there is the argument which I ventured to put a little earlier in the day, that the considerations as applied to what is a matter of Dominion interest, and what is a matter justified by the emergency of the case, are really stating the same points in two different ways.

LORD ATKINSON: You say it must have a wider extent, be abnormal in its ~~natural~~ nature, and so threatening or injurious in its operation.

MR STUART BEVAN: Undoubtedly, I am obliged to your Lordship, that is the way in which I desire to put it.

The judgment of the Board was delivered by Lord Haldane and is at page 193. Your Lordship having dealt with the nature of the legislation says then at page 196: "In these circumstances the only substantial question which their Lordships have to determine is whether it was within the legislative capacity of the Parliament of Canada to enact

the statutes in question".

Then the next paragraph deals with the restrictions empowered by the statute.

LORD ATKINSON: The whole point of the judgment is after referring to those cases, it says their Lordships do not find any evidence that the standard of necessity referred to has been reached.

MR STUART BEVAN: I am coming to that. On page 197 Lord Haldane says: "The first question to be answered is whether the Dominion Parliament could validly enact such a law. Their Lordships observe that the law is not one enacted to meet special conditions in wartime. It was passed in 1919, after peace had been declared, and it is not confined to any temporary purpose, but is to continue without limit in time, and to apply throughout Canada". The same observation can be made with regard to the legislation in this case: "No doubt the initial words of section 91 of the British North America Act confer on the Parliament of Canada power to deal with subjects which concern the Dominion generally" etc (Reading to the words) "This result was the outcome of a series of well known decisions of earlier dates, which are now so familiar that they need not be cited".

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VISCOUNT HALDANE: Pausing there for a moment, what does that mean, that the regulation of trade and commerce did not by itself enable interference with subjects specified in the enumerations of section 92, but, if there was anything under this head of section 91 which could interfere, such as Dominion companies, then regulation of trade and commerce should be prayed in aid of the powers so conferred upon the Dominion.

MR. STUART BEVAN: That I think is what it means, as is shown in the John Deere Plow case, where the judgment was delivered by your Lordship.

VISCOUNT HALDANE: That was the case of a company incorporated by the Dominion of Canada under the powers which are expressly given to it in section 91. Under section 92 there are companies with provincial objects. Is there anything about companies with non-provincial objects in section 91; I am not sure that there is.

MR. STUART BEVAN: No, there is not.

VISCOUNT HALDANE: Still, it is within their power, because there is no enumeration in section 92 of companies with non-provincial objects, and, therefore, they remain under peace, order and good government of Canada.

MR. STUART BEVAN: May I read a passage from the judgment in the John Deere Plow case, which is reported in 1915 Appeal Cases, at page 330. The passage I want to refer to is on page 340.

VISCOUNT HALDANE: Perhaps we had better finish the Board of Commerce case first.

MR. STUART BEVAN: Yes, I will come back to the John Deere Plow case. On page 198 the judgment goes on: "For analogous reasons the words of head 27 of section 91 do not assist the argument for the Dominion. It is one thing to construe the words 'the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters', as enabling the Dominion Parliament to exercise exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take

an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application."

VISCOUNT HALDANE: If that is right, it is quite distinct.

MR. STUART BEVAN: Yes, one gets that again in a later judgment of this Board, in the Reciprocal Insurers case.

VISCOUNT HALDANE: That is Mr. Justice Duff's judgment?

MR. STUArT BEVAN: Yes. "For analogous reasons their Lordships think that section 101 of the British North America Act, which enables the Parliament of Canada, notwithstanding anything in the Act, to provide for the establishment of any additional Courts for the better administration of the laws of Canada", etc., etc. (Reading to the words) "Such a case, if it were to arise would have to be considered closely before the conclusion could properly be reached that it was one which could not be treated as falling under any of the heads enumerated. Still, it is a conceivable case" -- my friend says here, in this case, and I contest it -- "and although great caution is required in referring to it, even in general terms, it ought not, in the view their Lordships take of the British North America Act, read as a whole, to be excluded from what is possible.", etc., etc. (Reading to the words) "But even this consideration affords no justification for interpreting the words of section 91, sub-section 2, in a fashion which would, as was said in the argument of the other side, make them confer capacity to regulate particular trades and businesses."

VISCOUNT HALDANE: I have been wondering what there is to be said for distinguishing the present case of the Lemieux Act from that. No doubt it was very important to pass the Lemieux Act, and no doubt it was very important to pass the Combines Act, but, in the case of both, it looks as if the same reasons applied, excluding the case of an emergency and regarding them as coming within

the jurisdiction of the province.

MR STUART BEVAN: Yes, I submit that concludes the matter. The Dominion wide importance of the matter cannot be minimised, because it was food, which was essential to the well being of the community. Certain Provinces produced more food than others in Canada, and it may be that provincial legislation was inadequate, or might be thought to be inadequate.

VISCOUNT HALDANE: We shall hear Sir John Simon and Mr. Duncan, but, so far as opening the facts to us, I do not know what you can open in the present instance anything further. There seems to be a considerable analogy between the reasons for the Combines Act and the reasons for the Lemieux Act.

MR. STUART BEVAN: Yes, and the same criticisms were directed to the legislation in the Board of Commerce case by your Lordships' Board as must be directed, I submit, to the legislation in this case.

VISCOUNT HALDANE: In the Combines case it was not a question of convenience or expediency, but of emergency only.

MR. STUART BEVAN: Yes.

VISCOUNT HALDANE: But at the same time there was the difficulty of distinguishing Russell v. The Queen.

MR. STUART BEVAN: Yes, and your Lordship says: "It has been applied with reluctance" and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal."

VISCOUNT HALDANE: If Russell v. The Queen was to be taken literally to be right in the spirit as well as in the letter Mr. Duncan would have a strong case; the case would have got him easily over the fence, if it had been all that it was once thought to be.

LORD DUNEDIN: If Lord Watson had had Russell v. The Queen to decide after his own case he would have decided it the other way.

MR. STUART BEVAN: Sir Montague Smith said there were special facts which justified the conclusion they came to in that particular case. Your Lordships remember how they likened drink to explosive

and dangerous noxious drugs.

VISCOUNT HALDANE: Has Mr. Lawrence looked through the McCarthy case to see whether anything was said about Russell v. The Queen? It might be just as well to look and see whether their Lordships relaxed and let themselves go on Russell v. The Queen at any point.

MR. STUART BEVAn: I have here the case of the Dominion Licence Act 1883 and 1884, in the Privy Council in 1885.

VISCOUNT HALDANE: Was I in that case?

MR. STUART BEVAN: Yes, my Lord.

VISCOUNT HALDANE: My recollection is that many things were said in the course of the argument, and one reason why the Board did not give judgment was that they did not want to say things in the judgment which were said in the argument.

MR. STUART BEVAN: My friend Mr. Lawrence draws my attention to a reference by Lord Davey, or as he was, to the Russell case: "What was the decision in Russell v. The Queen", etc., etc. (Reading to the words) "or carrying arms".

LORD DUNEDIN: I do not see that that carries you very far. Poison and arms are very bad things; so, according to this case, is liquor; so here are trade disputes.

MR. STUART BEVAN: Then Sir Montague Smith says this: "That is the ground of the decision, that it did not fall within any of the matters in section 92. Rightly or wrongly that is the decision."

VISCOUNT HALDANE: He did not say it was criminal law.

MR. STUART BEVAN: No. Answering, if I may, Lord Dunedin, I should submit that the circumstances in the two cases are very different. The position in Russell v. The Queen was that the drink problem had become a very serious one, and the unlimited access to drink was as dangerous to the state as unlimited access to noxious drugs, and so forth. That was dealing with a state of things constituted by the drink position as it existed at the time of the legislation, and it may very well be that drink had been carried to such an alarming extent, and was being so gravely

abused that some legislation was necessary in the Dominion interest.

LORD ATKINSON: It is only when it is urgently required in the public interest.

VISCOUNT HALDANE: "Urgently" wants definition.

LORD ATKINSION: There is no other word you can use.

VISCOUNT HALDANE: The life of the State must be in some way supposed to be in peril; perhaps it was in the liquor case, but it must be imperilled in some way such as by war.

MR. STUART BEVAN: Your Lordship says it is a question of public interest. For "a question of public interest" I should like to substitute "of dominion wide interest", because it is only if the interest is Dominion wide that the Dominion Legislature can begin to think whether it has power to legislate.

LORD DUNEDIN: I can quite see that in the case of a fanatical tee-totaler there is no question in the world that is so important as preventing me drinking a glass of beer or whisky; but it is not everybody's view, and, if you do not look with extreme eyes, it is very difficult to my mind to draw the distinction between the importance of having a general temperance system and the importance of having a general system for regulating trade disputes.

MR. STUART BEVAN: The question that your Lordship puts to me invites the answer that one must look at it with local eyes, with eyes that know the locality and the needs of the situation in the particular district.

VISCOUNT HALDANE: Take the slave trade. In the United States the Slave Trade existed only in certain States; it existed in three of the Northern States, but in all the other Northern States it did not, and it existed in the organised Southern States, but not in the new ones south of California. It was said slavery was such aniniquity that the United States must put it down or go to war with the States that would not obey them. On the other hand the Southern States said: Slavery is an institution as old

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as Christianity, and older, and it is within our rights. President Cleveland would not take the Northern view. He said: I am not going to war on account of the ~~xxx~~ slavery, but I am going to war for the Union, and he drew a great distinction between the question of slavery and the question of maintaining the Union. He never would admit that to put down slavery was a justifiable reason, and yet to a great many people in the North it was everything.

LORD ATKINSON: In the Russell case no evidence was given as to the extent to which intoxication was rampant; it was merely the existence of the possibility to get drunk.

MR. STUART BEVAN: Now, I will go to the John Deere Plow case, which is in 1915 Appeal Cases, at page 330. That deals very fully with trade and commerce.

VISCOUNT HALDANE: The importance of this case is that it was trade and commerce only. My recollection is that the Dominion had power to incorporate companies with non-provincial objects, Dominion companies they are called, and then we said the regulation of trade and commerce enables them to make illegal any State regulation with regard to property and civil rights which conflicts with that.

MR. STUART BEVAN: Yes. The passage is on page 340. It is referred to in your Lordship's judgment in the Board of Commerce case. "Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in Citizens Insurance Company v. Parsons on head 2 of section 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head must, like the expression, 'Property and Civil Rights in the Province', in section 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that

the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade." That is the passage your Lordship had in mind. I pray it in aid in another connection. Your Lordship will remember that when I opened this case ~~it~~ I put it to your Lordships on various grounds with regard to section 92, I relied not only on property and civil rights in the provinces, which is enumeration 13, but on enumeration 8 "Municipal Institutions in the Province.", and, having regard to this passage in the John Deere Plow case, at page 340, if it be established that the Dominion Parliament could create such companies then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade. I respectfully desire to put it in another way with regard to Municipal Institutions. If it be established that the Provincial Parliament can create municipal institutions, which is undoubtedly the case here, then it becomes a question of interest to the Provincial Parliament in what fashion the municipal institutions, which they have created, and which they alone can create, can be permitted to trade. That is why I rely on the additional enumeration, that is a separate and independent point from property and civil rights, the enumeration upon which I have appeared to rely more than the other, but it is an important part of my argument.

VISCOUNT HALDANE: The John Deere Plow case says that regulation of trade and commerce comes in when you have the power aliunde.

LORD DUNEDIN: It is really a carrying out of the Railways case. The power there was ancillary to railway legislation, and this power was ancillary to forming companies.

MR. STUART BEVAN: Yes, my Lord, and so this power here is ancillary to the power of the Provincial Legislature to create municipal institutions.

(Adjourned to Thursday next at 10.30 a.m.).

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IN THE PRIVY COUNCIL.

On Appeal frpm the appellate Division of the SUPREME COURT OF ONTARIO.

Between:

TORONTO ELECTRIC COMMISSIONERS

and

SNIDER & OTHERS.

and

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

S E C O N D D A Y.

Tuesday, 18th November, 1924.