

In the Privy Council.

July, 1914.

JOHN DEERE PLOW COMPANY, LIMITED

AND

THEODORE F. WHARTON

AND

JOHN DEERE PLOW COMPANY, LIMITED

AND

GARNET W. DUCK

(CONSOLIDATED APPLALS)

AND

THE ATTORNEY-GENERAL FOR THE DOMINION
OF CANADA

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE
OF BRITISH COLUMBIA.

Notes of Proceedings.

Blake Redden
17 Victoria Street
En

CHARLES RUSSELL & CO..

37, NORFOLK STREET,

STRAND, W.C.

In the Privy Council.

COUNCIL CHAMBER,
WHITEHALL.

Present—

THE RT. HON. THE LORD CHANCELLOR

(Viscount HALDANE OF CLOAN)

THE RT. HON. LORD MOULTON

THE RT. HON. LORD SUMNER

THE RT. HON. SIR CHARLES FITZPATRICK

AND

THE RT. HON. SIR J. WILLIAMS.

15th July 1914.
UNIVERSITY OF LONDON

W.C.1.

31 OCT 1956

INSTITUTE OF ADVANCE

LEGAL STUDIES

BETWEEN

JOHN DEERE PLOW COMPANY,

LIMITED (Defendants) ... *Appellants*

AND

THEODORE F. WHARTON (Plaintiff) *Respondent*

—AND—

JOHN DEERE PLOW COMPANY,

LIMITED (Plaintiffs) ... *Appellants*

AND

GARNET W. DUCK (Defendant) ... *Respondent*

(Consolidated Appeals).

—AND—

THE ATTORNEY-GENERAL FOR THE
DOMINION OF CANADA

AND

THE ATTORNEY-GENERAL FOR THE
PROVINCE OF BRITISH COLUMBIA

Intervenants.

FIRST DAY.

Mr. F. W. WEGENAST, instructed by Messrs. LAWRENCE
JONES & Co., Counsel for the Appellants.

Mr. E. LAFLEUR, K.C., instructed by Messrs. LINKLATER,
ADDISON & BROWN, Counsel for Wharton and Duck.

Mr. E. L. NEWCOMBE, K.C., and Mr. RAYMOND ASQUITH,
instructed by Messrs. CHARLES RUSSELL & Co., Counsel for the
Attorney-General for Canada.

THE RT. HON. SIR ROBERT FINLAY, K.C., and Mr. GEOFFREY
LAWRENCE, instructed by Messrs. GARD, ROOK & Co.,
Counsel for the Attorney-General for British Columbia.

(From the Shorthand Notes of CHERER & Co., 8, New Court,
Carey Street, W.C.)

Mr. WEGENAST : I appear for the Appellant Company, my Lords. It is a Company duly incorporated under Letters Patent granted under the seal of the Secretary of State for Canada and empowered to carry on throughout Canada the business of dealers in agricultural implements *inter alia*. In pursuance of its powers the Company has been carrying on such a business in different parts of Canada, and the issue in this appeal is the validity of the Provincial Statute which challenges its right to carry on business in the Province of British Columbia.

The LORD CHANCELLOR : Let me see whether I have got the point. The Company is a Dominion Company.

Mr. WEGENAST : Yes, my Lord.

The LORD CHANCELLOR : And it has the power under Dominion legislation to carry on business anywhere in Canada.

Mr. WEGENAST : That would be begging the question.

The LORD CHANCELLOR : The question is, can the Province of British Columbia impose a condition ?

Mr. WEGENAST : Yes, my Lord, that is the issue. For the purpose of my submission I would like to put it in a slightly different aspect.

The LORD CHANCELLOR : Put it in your own way.

Mr. WEGENAST : No, my Lord, I do not think I could admit that, under my submission, that is the issue. I shall try to develop that phase very shortly.

The LORD CHANCELLOR : You are contending for Dominion law being sufficient—

Mr. WEGENAST : Yes, my Lord.

Lord MOULTON : That you have a right to existence and trading in British Columbia or anywhere else in Canada.

The LORD CHANCELLOR : Is that your case ?

Mr. WEGENAST : Yes, my Lord, but it is stating it perhaps more broadly than I should care to state it.

The LORD CHANCELLOR : State it in your own way.

Mr. WEGENAST : The appeal, as your Lordships are aware, is a combination of two appeals combined at the direction of this Court. The first case is that of a shareholder in the Appellant Company bringing an

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action against the Company for an injunction to restrain the Company from carrying on business in British Columbia on the ground that such business is beyond the power of the Company. Chronologically, however, the second case, that of Duck, was the first to arise, and that is the case where the Company is suing for damages for breach of contract to deliver certain goods in British Columbia. It is admitted that the Company was carrying on business in British Columbia and that the contract in question was made in British Columbia. Nothing turns on the facts of the case further than as they raise the issue of the validity of the Provincial Statute.

The LORD CHANCELLOR : It was an action for breach of contract.

Mr. WEGENAST : Yes, my Lord.

The LORD CHANCELLOR : The question was whether it was *ultra vires* to enter into that contract.

Mr. WEGENAST : Yes, my Lord, and whether it was competent for the Company to maintain an action in the Provincial Courts.

Lord MOULTON : In other words whether you are an outlaw.

Mr. WEGENAST : Yes, my Lord.

Lord MOULTON : Whether you have a right to come to the Court of British Columbia and sue for debts.

Mr. WEGENAST : Absolutely, that is one way in which I desire to put it.

Sir CHARLES FITZPATRICK : Is that one way of putting it ? Is not the question whether you have a right to come to the Courts of British Columbia to sue for debts without having previously conformed to the Statute ?

Mr. WEGENAST : No, my Lord ; I think the case should be stated more broadly, because on the facts the issue is whether the Company can go into the Province at all. Under the conditions as shown by the correspondence which forms part of the case, which has been submitted by the Attorney-General for British Columbia, the issue is whether the Province can exclude the Company entirely.

Lord MOULTON : I misunderstood you ; I was not expressing any opinion. I thought they held that you

were not a person who had a right to appear in the Courts.

Mr. WEGENAST : Yes, my Lord.

Lord MOULTON : I understood that was because you had not a license and that there was a power to refuse a license.

Mr. WEGENAST : Yes, my Lord, or to impose such conditions as interfered, under my submission, with the status of the Company and with the rights granted by the Dominion.

The LORD CHANCELLOR : It looks to me as if it was quite the same question, in substance, in both cases.

Mr. WEGENAST : Yes, my Lord ; I should, perhaps, say that the cases are being conducted on an absolutely friendly basis. I am instructed that Duck's case originally was begun at arm's length, but that the object of the parties has been to bring the issue as clearly as possible before the Courts as to what are the rights of this Company under its Dominion Charter, and what are the qualifications, if any, imposed by the Provincial Statute.

The LORD CHANCELLOR : There is really one question only. You will arrange about it. It is their Lordships' practice to hear only two Counsel on each side where it is the same question.

Mr. WEGENAST : Yes ; of course I am assuming that for the purposes of the appeal the cases are combined.

Lord MOULTON : It is not a question of taxation, is it—of refusal to pay ? It is no question of mere refusal to pay a fee.

Mr. WEGENAST : No, my Lord.

Lord MOULTON : It is a power claimed to prevent a Company that is formed by the Dominion legislation from doing business in British Columbia.

Mr. WEGENAST : Yes, my Lord.

Lord SUMNER : Is this registration, as to which there was a bar to your recovering your debt against Mr. Duck, a thing that can be refused to you if you apply properly, or is it a thing which you are entitled to if you will only submit to go to the Registry Office and put your name down on the Register ?

Mr. WEGENAST : It was refused. We were asked to change our name.

Sir ROBERT FINLAY : On the ground that there was another company of the same name.

Mr. WEGENAST : Yes.

Lord SUMNER : It may be that the question is equally fundamental whether it is a bare formality to which you refuse to submit or whether your fear is a reasonable one that you will put yourself within the reach of some arbitrary refusal, but the business of the thing appears to be that you just would not register.

Mr. WEGENAST : No, my Lord. May I refer at this stage at once to the correspondence which has been filed ? It is on page 5 of the Appendix. The first letter is a letter from Messrs. McPhillips & Wood, who were acting for the Company.

Sir ROBERT FINLAY : I do not think your Lordships have got this : this is a supplementary Appendix.

Mr. WEGENAST : "To the Registrar of Joint Stock Companies." "We are sending enclosed Petition of the above-named Company for registration in this Province, Affidavit of H. W. Hutchinson, copy of the Charter of the Company and of its By-laws, Power of Attorney appointing Mr. H. S. Wood of this firm attorney, Notice of head office of Company, Notice of head office in British Columbia, and our cheque for \$277.50 the amount of your fees." Then the Registrar replies under date of 31st March : "I have your letter of the 29th instant enclosing papers in support of an application for a license for the above Company. 'John Deere Plow Company' of Illinois has already been registered in this Province, and, I am unable in view of the provisions of the Companies Act to register your Company with the same name. Would it not be well for your Company to obtain supplementary letters patent adding some word to its name so that it may be distinguished from the Company already registered." Then the next letters are of no particular significance. No. 6 on page 7 is a letter to the Registrar from Messrs. McPhillips & Wood : "We have your letter of the 3rd instant referring us to the amendment of Section 18 of the Companies Act passed this year, and note that this amendment seems to absolutely prohibit the above

Company from becoming registered in British Columbia. Does this mean that this Company, which is incorporated by the Dominion Parliament and authorised to carry on business throughout the Dominion of Canada, is absolutely prohibited from carrying on its business in this Province, unless supplementary letters patent are obtained changing its name?" Then the Registrar replies on the 6th April: "I have yours of the 4th instant. I do not see any escape from the conclusion you appear to have come to, after perusal of the amendment to Section 18 of the Companies Act, passed this year." Now there is some further correspondence between the solicitors for the Company and the Attorney-General which is largely in the nature of argument. The only object I would have in referring to it is to show that there is nothing in the nature of an estoppel against the Company; the Company took the position they were not required to register.

The LORD CHANCELLOR: Why did they apply for registration?

Mr. WEGENAST: They said that in a letter. I will read it, it is on page 8 in the second paragraph: "As the writer has advised you personally he does not think that the Provincial Statute, which, in effect, provides that a Dominion Company's contracts shall be invalid unless it registers in British Columbia, is *intra vires* of the Provincial Legislature, but notwithstanding that opinion he advised the registration of this Company."

The LORD CHANCELLOR: He wanted to get rid of the controversy, but the whole question now is whether it is necessary for this Company to register.

Mr. WEGENAST: Yes, my Lord.

The LORD CHANCELLOR: That is the whole question. That depends upon whether it was *intra vires* of the Dominion Parliament to enable it to carry on business anywhere without any conditions, and whether, conversely, it was within the power of the Provincial Parliament to prohibit it unless it had been given permission.

Mr. WEGENAST: Yes, my Lord; I should like to add this qualifying phrase.

Lord MOULTON: I do not think we have much to

do with whether they acted for a good or bad reason—is not it a question whether they say: You shall not carry on business?

Mr. WEGENAST: It is a question whether the Province has a right to impose conditions of this particular kind or by this particular avenue.

Sir CHARLES FITZPATRICK: You mean to say it is a question whether or not Section 18 is *intra vires* or *ultra vires* of the powers of the Provincial Legislature.

Mr. WEGENAST: Not Section 18 alone.

Sir CHARLES FITZPATRICK: That is the chief section, is not it?

Mr. WEGENAST: Yes, my Lord, in this particular instance, but there are other sections which quite conceivably—

Sir CHARLES FITZPATRICK: You must remember that the whole question is already before this Court practically in the Companies Reference. If you narrow this issue to a particular question in this case it might be useful perhaps.

Lord MOULTON: If there is going to be a general Reference on this, how is it that you want to argue this? Do you know, Sir Robert Finlay?

Sir ROBERT FINLAY: On the Reference the report is in the 48 Supreme Court of Canada Reports, page 208. I understand the Attorney-General of Canada proposes to apply for leave to appeal on that Reference here.

Lord MOULTON: Would not it be better that the two should be heard together?

Mr. NEWCOMBE: That is for your Lordships to say. Your Lordships are aware of the questions; they have been before this Board on another point, as to the jurisdiction of the Crown to submit questions to the Court. The questions were somewhat criticised upon that occasion as being rather broad and abstract and difficult to answer in the absence of any concrete facts. By mere accident this case arose pending that Reference. The Judgment was given in the Supreme Court, I think, last November, and it is the intention of the Government, at a convenient time, to ask your Lordships for leave to appeal. In the meantime here is a case which raises the issues to which at least one of those questions is directed in a very concrete form. It is for

your Lordships, of course, to direct as to whether it is more convenient to dispose of the issue here or to stand it over for argument with the general questions.

The LORD CHANCELLOR : I will say at once we do not like having things piecemeal, Mr. Newcombe, and if you think that the issue before us in this case disposes of the question between the Government of Canada and the Government of the Province, *cadit questio*.

Mr. NEWCOMBE : I think it disposes of one question. Of course there are many questions involved in that Companies Reference.

The LORD CHANCELLOR : It may dispose of one question and it may dispose of a good deal that is important in the others.

Mr. NEWCOMBE : It might do that.

Sir ROBERT FINLAY : Might I suggest this : I understand that there are a good many other questions in the Reference besides this.

Mr. NEWCOMBE : In the Companies Reference—I have so stated.

Sir ROBERT FINLAY : What I would suggest is, if this case could be heard but Judgment not given until after the Companies Reference comes on.

The LORD CHANCELLOR : It is not a very satisfactory course.

Sir ROBERT FINLAY : If my friend is accurate in saying that there are a good many other questions in it, is it convenient to hear the two together ?

Lord MOULTON : Would not it better to have one argument ?

Sir ROBERT FINLAY : I am in your Lordships' hands.

The LORD CHANCELLOR : Is the Reference one as to the power of the Province ? Perhaps you could tell us, Mr. Newcombe.

Mr. NEWCOMBE : No. 6 of the questions referred.

The LORD CHANCELLOR : Will you read the questions ?

Mr. NEWCOMBE : All the questions ?

The LORD CHANCELLOR : Yes.

Mr. NEWCOMBE : No. 1 : " What limitation exists under the ' British North America Act, 1867,' upon the power of the provincial legislatures to incorporate com-

panies? What is the meaning of the expression 'with provincial objects' in section 92, Article 11, of the said Act?" It is an exclusive Provincial power. We ask the meaning of the words "Provincial objects."

"Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?"

"(2) Has a company incorporated by a Provincial Legislature under the powers conferred in that behalf by section 92, Article 11, of the 'British North America Act, 1867,' power or capacity to do business outside the limits of the incorporating Province? If so, to what extent and for what purpose?"

"Has a company incorporated by a Provincial Legislature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such Provincial incorporation, to buy or sell or grind grain outside of the incorporating Province?"

"(3) Has a corporation constituted by a Provincial Legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts—

"(a) within the incorporating Province, insuring property outside of the Province?"

"(b) outside of the incorporating Province, insuring property within the Province?"

"(c) outside of the incorporating Province, insuring property outside of the Province?"

"Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country? Do the answers to the foregoing enquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating Province?"

"(4) If in any or all of the above-mentioned cases, (a), (b) and (c), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases, on availing itself of the 'Insurance Act,' Revised

Statutes of Canada 1906, ch. 34, as provided by sec. 4, sub-sec. 3?

"Is the said enactment, Revised Statutes of Canada, 1906, ch. 34, sec. 4, sub-sec. 3, *intra vires* of the Parliament of Canada?"

"(5) Can the powers of a company incorporated by a Provincial Legislature be enlarged, and to what extent, either as to locality or objects by

"(a) The Dominion Parliament?"

"(b) The Legislature of another Province?"

Then comes the question with which this particular case is involved:—

"(6) Has the Legislature of a Province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the Province, unless or until the companies obtain a licence so to do from the Government of the Province, or other Local Authority constituted by the Legislature, if fees are required to be paid upon the issue of such licences?"

"For examples of such Provincial legislation, see Ontario, 63 Vict., ch. 24; New Brunswick, Cons. Sts. 1903, ch. 18; British Columbia 5 Edw. VII, ch. 11"—and that would refer to the very legislation which is now in question.

Then the last question is:—

"(7) Is it competent to a Provincial Legislature to restrict a company incorporated by the Parliament of Canada for the *purpose of trading* throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the Province?"

"Is such a *Dominion trading company* subject to or governed by the Legislation of a Province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the Legislature of the Province may carry on, or the powers which they may exercise within the Province or imposing conditions which are to be observed or complied with by such corporations before they engage in business within the Province?"

"Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the

exercise of its corporate powers or capacity, and how, and in what respect, by Provincial Legislation?"

The LORD CHANCELLOR : Mr. Newcombe, these are the very worst forms of abstract questions—the very most objectionable that I think I have in the course of considerable experience seen, and I can only say that if I am sitting here when the application for leave to appeal comes, it will be very difficult to get us to sit down and write a treatise on the Company Law of Canada. That is not what the Judicial Committee exists for. We are a Court of Law, we are a Tribunal, and although, to a certain limited extent, we answer abstract questions, this is a treatise that we are asked to write.

Mr. NEWCOMBE : I heard that criticism from your Lordships when we were arguing the other case upon the jurisdiction to submit the questions. The answers, of course, were not in point at that time, and that is why I thought that as these cases are arising in concrete form, it might be more convenient for the present at all events to dispose of them as they come up.

The LORD CHANCELLOR : I think you have made a very pertinent observation ; now we realise what the abstract questions are.

Lord MOULTON : This does raise it in a case where it is important.

Sir ROBERT FINLAY : It raises neatly the question whether the power of the Dominion with regard to companies carries with it the right of dispensing with local requirements.

The LORD CHANCELLOR : It may dispose of a great deal that we have to answer. Of course it is not from any unwillingness of this Board to give any assistance that it can to the Government of Canada, but it is this : We are primarily a Tribunal of justice. We wish to give all assistance, but we know that however carefully we may proceed, observations made in a Judgment on abstract questions are apt to prejudice the consideration of the case when it arises in a concrete form with all the facts.

Mr. NEWCOMBE : At the same time, while we appreciate the difficulties of the Court in answering the questions, there are some of them that we think can

conveniently be answered, and what we proposed to do was to extend as broad an invitation to your Lordships as possible to give us as much assistance as you can, so that no information should be withheld through lack of enquiry.

The LORD CHANCELLOR : The invitation is certainly a very broad one. I may say that it does appear that this appeal will involve a question of very great importance between the Dominion and the Province, and that qualifies the general rule—Mr. Wegenast can open his own case, and we may hear two Counsel for the Dominion. I think in a case of this kind involving this question we should probably depart from our general rule and hear two Counsel for the Dominion fully on the point. We will hear you now, Mr. Wegenast : you are arguing the same question from the point of view of the Company. You, Sir Robert, appear for—

Sir ROBERT FINLAY : My friend, Mr. Lafleur, appears for the Respondent. I appear for the Intervenant, the Attorney-General of British Columbia.

The LORD CHANCELLOR : I think we had much better treat this case as raising the matter fully between the two Governments. You will arrange amongst yourselves what you will do, but we will not interpose any difficulty in the way of hearing Counsel fully merely because it is on the same point.

Mr. WEGENAST : I desire to say this, although it is just on the borders of bad taste, I assumed in view of the general reference that it was desired that the case should be fully argued, and while I appreciate the incongruity between the importance of the case and my own inexperience, I shall endeavour to place the case as fully as I possibly can before your Lordships.

Lord SUMNER : I have read your statement of the case, and I was very much struck by it.

Mr. WEGENAST : Thank you, my Lord.

I should like, then, to refer to the provisions of the Dominion Companies Act.

The LORD CHANCELLOR : I just wish to say that I did not for a moment intend you to suppose that any observations of mine referred to your argument : on the contrary, you must argue your case quite fully. What

I meant was that as this question is raised, we had better have the fullest argument upon it and dispose of it.

Mr. WEGENAST: Yes, my Lord. What I was thinking of is that the case is a peculiarly elusive and complicated one, and I am afraid I shall have to enter into arguments in which perhaps I have no right to expect——

Lord MOULTON: You have the great advantage that if you can establish that they have no right to interfere so as to give themselves a right to refuse, it may be that you will not have to go into detail at all; they claim the right to refuse.

Mr. WEGENAST: Yes, my Lord.

Lord MOULTON: It is not a question of the right to require you to pay, but a right to refuse.

Mr. WEGENAST: Yes, my Lord. I think my friend would say it was not a right to refuse, but to impose conditions and it is those conditions we object to as invading our rights.

Lord MOULTON: I do not see the difference between a right to refuse and a right to impose conditions.

The LORD CHANCELLOR: They refuse to register your Company?

Mr. WEGENAST: Yes, and it does not make any difference in one aspect.

The LORD CHANCELLOR: You say you have a Dominion right to proceed without registration?

Mr. WEGENAST: Yes. We say we have our corporate sanction without reference to any Provincial Authority.

I had copies prepared of the Dominion Companies Act for your Lordships—I had a dozen copies, but as nearly as I can calculate they must have gone down with the “Empress of Ireland.” I have only three which I have picked up here. I have also copies of the British Columbia Act, a sufficient number to give one to each of your Lordships.

Section 5 of the Dominion Companies Act, which is Chapter 79 of the Revised Statutes of Canada, is the section which empowers the Secretary of State to incorporate Companies, and may I call attention to this which may become of significance later in the

argument : that in the Dominion and in some of the Provinces the method of incorporation is by statutory Letters Patent rather than by registration as under the Imperial Act. The process, while different in theory, is in fact very similar, and it has been held in Canada that the Secretary of State in issuing charters is acting in a ministerial capacity as the Registrar of Companies is under the Imperial Act. I might have something to gain perhaps by putting the Letters Patent on a higher basis, but that is the accepted theory in Canada. "The Secretary of State may, by letters patent under his seal of office, grant a charter to any number of persons, not less than five, who apply therefor, constituting such persons"—then perhaps the rest may be omitted—"a body corporate and politic, for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends," with certain exceptions. The section which gives or purports to give the Company its substantive powers is section 29.

Lord MOULTON : I see it excepts banking and insurance, and one or two more : are Companies for that purpose incorporated under another Act ?

Mr. WEGENAST : Under separate Acts.

Lord MOULTON : They are incorporated just in the same way ?

Mr. WEGENAST : Yes. There is a Bank Act which supplies some of the Corporation Law for Banks, but each Bank is incorporated under private legislation.

Lord MOULTON : Does the Province claim that statutably incorporated Companies—by a Dominion Statute—must register ?

Mr. WEGENAST : No, my Lord, the distinction that is made, the distinction that I apprehend my friends will endeavour to establish, is this ; that Companies incorporated under the enumerated items of section 91 are not subject to interference by Provincial legislation of the character in question here, but that when a Company is incorporated under what is sometimes loosely called the residuary power, they are more vulnerable to Provincial interference.

The LORD CHANCELLOR : What do you mean by "residuary power" ?

Mr. WEGENAST : I am using that expression because it has been used by several of the judges.

The LORD CHANCELLOR : Something which is not prohibited by Provincial legislation : is that what you mean ?

Mr. WEGENAST : No, my Lord. What is meant is the "peace, order and good government power."

The LORD CHANCELLOR : That is the same thing. Under "peace, order and good government" the Parliament of Canada can *prima facie* do anything. Then section 92 says there are certain things which the Provincial Legislatures may do. Then you turn to section 91 and it says : These things the Dominion Parliament may not do, but excepting so far as these things are prohibitive in their terms, it remains.

Mr. WEGENAST : Yes, my Lord. That is where the battleground will lie—just on that point, I apprehend.

Lord MOULTON : May I ask is there any difference between the power of the Dominion under the "peace, order and good government" in relation to all matters not coming within the classes—is its power any less with regard to those than in section 91 ?

Mr. WEGENAST : That is the Provincial argument, that it is less : in fact, the Provincial argument, if I may anticipate, under my submission amounts to this : That the Dominion simply has the power to incorporate this Company, to give it certain subjective capacities, to give it certain metaphysical attributes, one might say, and that everything else in the shape of sanction comes under the Provincial item of "property and civil rights."

Now, section 29 of the Dominion Companies Act is the section with which the Provincial Legislation comes in conflict.

The LORD CHANCELLOR : Just before you pass to that, let us see where is "Incorporation of Companies" in section 91. Is there anything about it ?

Sir ROBERT FINLAY : No.

The LORD CHANCELLOR : In section 92 where is the item ?

Mr. WEGENAST : No. 11.

The LORD CHANCELLOR : "The incorporation of Companies with Provincial objects."

Mr. WEGENAST : Yes, my Lord.

The LORD CHANCELLOR : That is exclusively in the Province ?

Mr. WEGENAST : Yes.

The LORD CHANCELLOR : Unless you come within that, you are not prohibited from exercising the other unlimited powers which the Dominion of Canada possesses.

Mr. WEGENAST : I should be very glad to have that in the form of a Judgment, because that is just the question.

The LORD CHANCELLOR : You are quite right, and I must proceed guardedly, but let me see the point on the other side. Where is it suggested that the limitation comes in ?

Mr. WEGENAST : This is my understanding, it is read in in virtue of some observations of this Board in cases like *Parsons' case* in 7 Appeal Cases. I have the extract here, if your Lordships would like me to read it.

The LORD CHANCELLOR : I remember *Parsons' case* very well. That is the case in which it was said a thing in one aspect "Dominion" might be in another aspect "Provincial."

Mr. WEGENAST : Yes, my Lord, that is my solution. It is the question of finding the aspect in which this Provincial legislation is to be viewed. My whole case rests upon this, at least in one form, that the Province is endeavouring to legislate to make for this Company Company Law—that the Province is trying to make for this Company its Company Law.

The LORD CHANCELLOR : The Province may say : It is for the Dominion to incorporate this Company, but whether it can trade within British Columbia is a question of civil rights, and we do not recognise such a civil right.

Mr. WEGENAST : Then that brings my point at once : That it is a question whether your Lordships will regard this legislation as dealing with civil rights whatever the sense is in which it is used in section 92, or whether it deals with incorporation—whether it is Corporation Law.

The LORD CHANCELLOR : It could not affect the civil rights of a Bank. That is a case where you read

into "civil rights" a limitation. Civil rights of a Bank are not subject—

LORD MOULTON: Incorporation of Dominion Companies is also exclusively for the Dominion?

THE LORD CHANCELLOR: In the case of a Bank, section 91 gives express power to the Dominion to legislate about Banks, therefore any merely general terms in section 92 must be read subject to that. This Board has so held, but here there is no express power to deal with Dominion Companies, and it may be—the incorporation of Companies with Provincial objects may not touch the case—but it may be that civil rights are still left to control that. I suspect that that is the Provincial argument.

MR. WEGENAST: That is my friends' argument, and since that has been stated, perhaps I ought to say my way of meeting the point is threefold: first, this Company may rest for its power to trade on item 2 of section 91 "trade and commerce." Again, it may be that the limitation of item 11 of section 92 "with Provincial objects" has the effect of making an express exception to section 92 which by virtue of item 29 of section 91 would become an enumerated item of section 91. There is also this way of meeting it: the expression "with Provincial objects" has the effect of stamping the incorporation of Companies with ultra Provincial objects, as being a matter unquestionably of Dominion importance.

LORD MOULTON: Do they deny the power to incorporate Companies under Dominion Law?

MR. WEGENAST: No, my Lord.

LORD MOULTON: Very well. If they can incorporate Companies under Dominion Law, I suppose it is under "the regulation of trade and commerce."

MR. WEGENAST: Or by virtue of the exception.

THE LORD CHANCELLOR: Or the exception. I should like to be clear about the relation of "civil rights" to "trade and commerce." I should doubt very much whether a Province could say: You have no "civil right" to "trade."

LORD MOULTON: British Columbia could not say: No man in Alberta shall trade here? I suppose you say this is a legal person of the same type.

Mr. WEGENAST: The legislation is analogous to naturalisation legislation. A Province could not say that persons of Hindoo origin must take out a licence and pay so much or submit to certain conditions before they could trade in the Province, because the subject-matter would be identified at once as "naturalisation," and my argument will be to identify this legislation, Part VI of the Companies Act of British Columbia, as Company Legislation.

The LORD CHANCELLOR: But, on the other hand, could not the Province say: Nobody shall trade unless he wears decent clothes?

Mr. WEGENAST: But that would not be directed at Companies.

The LORD CHANCELLOR: No, but it may be an analogy. That would be a prohibition upon anybody selling in the street if he had not proper clothes on. It may be in the case of a Company they may say: We cannot interfere with your trading, but you must not take a name which will give rise to confusion in the minds of people. That does not arise here?

Mr. WEGENAST: Yes.

The LORD CHANCELLOR: They say: You cannot trade at all unless you register?

Mr. WEGENAST: They say, We will register you, although, as your Lordship suggests, that is not relevant strictly—this can be read in section 18 as a possibility; they say "We object to your name which the Dominion has given you"—

The LORD CHANCELLOR: All they say, surely, is this: You ask to be registered: we will register you, you must change your name. In that way you will get the status of a Provincial Company and be able to trade freely. You say "I do not desire to be registered." As these are terms, the question is whether you cannot trade freely without being registered. They say No, they will not give you a position in their Courts, and, in the other case, a shareholder is challenging the legality of your trading altogether as being *ultra vires*.

Lord MOULTON: Why do you trouble about their reason? It seems to me that that is a great concession to them. They claim the right—if they think proper, not for a limited set of reasons, but if they think proper

they have a right to say, "You cannot come to our Courts, you cannot trade in our area." Why do not you argue it in that way? Their particular reason does not make their act more, or less, legal.

Mr. WEGENAST: No, my Lord, I quite appreciate that, but I am anticipating certain arguments which I apprehend my friends will offer.

Lord MOULTON: Had not you better deal with your case, rather than with an imaginary point of your opponents?

The LORD CHANCELLOR: Your point is this: "I am a Dominion Incorporated Company with the right to trade under section 91"?

Mr. WEGENAST: Yes, my Lord, and I have become incorporated, empowered, and I do not need any further authority.

Lord MOULTON: You are in the same position as a citizen of Canada?

Mr. WEGENAST: Yes, and while the Province may legislate with regard to my land, may ask me to register deeds, may pass Laws with respect to nuisance and with respect to the contracts I make, they cannot pass legislation challenging or dealing with my corporate rights.

The LORD CHANCELLOR: No, they say this: "You shall not trade here in a name which would give rise to a wrong to other people"?

Mr. WEGENAST: Then my answer is that the name is an essential element of corporate status, or capacity, or position, and the Province cannot abstract that element from the Company.

Lord MOULTON: Could they say "that no John Smith from any other Province shall trade here as a restaurant-keeper because there is already a John Smith"?

The LORD CHANCELLOR: No, but I will put another case: suppose there was "The Bank of Montreal" trading in British Columbia, and somebody went to the Dominion and got himself registered as a Bank under the name of "The Bank of Montreal," could he come into British Columbia without British Columbia having any power to interfere with him?

Mr. WEGENAST: May I answer that broadly? My

submission is this, that, when it comes to the question under what name a Company or a person shall trade, it is not a matter for Provincial legislation.

The LORD CHANCELLOR : You say there is another remedy.

Mr. WEGENAST : Yes, my Lord.

Lord MOULTON : What you would do in that case would be to bring an action to prevent them trading without sufficiently distinguishing, I suppose ?

Mr. WEGENAST : There might still be an action in the Courts in which a constitutional question would arise.

Lord MOULTON : Unfair competition ?

Mr. WEGENAST : Yes, my Lord, there might still be an action in the Courts.

Lord SUMNER : It is enough for you to rest yourself on the broad principle that you are a trading company, and that this is an Act which purports to discriminate between traders and traders;—persons come into British Columbia and trade, and recover their debts without being told that they cannot have the benefit of the laws ; you who are an incorporated trader are told you must submit to a formality before you can trade and before you can recover judgment against your debtor ? It might be a question whether an Act passed to cover all traders corporate and incorporate was within the powers or not ; you start with the proposition : “ I am discriminated against ” ?

Mr. WEGENAST : Yes, my Lords. My friends will answer that by saying: “ We make our own Companies register.” We are already registered.

Lord SUMNER : A man who sells “ plows ” in his own name can get judgment for what is due to him ? You seem to have sold a “ plow ” and cannot get at your debtors.

Mr. WEGENAST : Yes, my Lord.

I was going to read extracts from the case of the *Citizens' Insurance Company of Canada v. Parsons*, and one or two other cases upon which the distinction which the Province I apprehend will endeavour to establish is based.

Lord MOULTON : Before you go on, I see that you

are in exactly the same position as if you were incorporated by a special Act of Parliament.

Mr. WEGENAST : Yes.

Lord MOULTON : And you have the power by the Statute to acquire, hold, mortgage, sell and convey any real estate requisite for the carrying on of the undertaking ?

Mr. WEGENAST : The extract from the *Citizens' Insurance Company of Canada v. Parsons* at once seizes on one of the features in question in that section. It is at page 117 of the report of that case.

Lord MOULTON : May I give you a piece of advice ? If you put forward your argument, instead of trying to answer an argument that is going to be put forward, you will do yourself more justice.

Mr. WEGENAST : My only apology is that I was endeavouring to answer your Lordship's question.

Lord MOULTON : That is a very good answer.

Mr. WEGENAST : Shall I go on with my main argument ?

Lord MOULTON : I want to see the basis of your argument ; then you will deal with those things of which you have notice.

Mr. WEGENAST : Then I desire to refer to section 29 of the Companies Act, sub-section 3 : " The Company shall forthwith upon incorporation under this Part, become and be vested with all property and rights, real and personal, theretofore held by it or for it under any trust created with a view to its incorporation,"—now here are the vital words : " and with all the powers, privileges and immunities, requisite or incidental to the carrying on of its undertaking, as if it was incorporated by a special Act of Parliament, embodying the provisions of this Part and of the letters patent and supplementary letters patent issued to such company."

I should like to refer your Lordships to the charter of the Company which is printed in the supplementary document. The charter recites the provisions of the Companies Act, and recites the application for incorporation under the name of John Deere Plow Company, and then in the name of the Secretary of State declares these persons who apply for incorporation and all others who may become shareholders in the said Company to

be "a Body Corporate and Politic, by the name of 'John Deere Plow Company' (Limited) with all the rights and powers given by the said Act and for the following purposes and objects, namely:—To carry on the business of dealers in agricultural implements, carriage and wagons and machinery and a general agency, commission and mercantile business, and to acquire, buy, sell, mortgage, exchange, improve and dispose of all kinds of real and personal property, rights and patents. The operations of the Company to be carried on throughout the Dominion of Canada and elsewhere." The words "throughout the Dominion of Canada" are perhaps vital as giving the Dominion jurisdiction to incorporate the Company, because if they had been more restricted, if the objects were restricted to one Province; then it might be said that the Company was one which should have been incorporated by the Province; but I think it is not questioned that this is a Company which only the Dominion could have incorporated. Then the head office of the Company is at Winnipeg.

Now, I should like to refer your Lordships to the British Columbia Act. This is an Office Consolidation of the Act, but I assume it is correct. The original Act is in the Revised Statutes of British Columbia, chapter 39, 1911, and this publication embodies the amendments.

LORD SUMNER: I see most of these sections are set out in the Case of the Attorney-General for Canada. Do you think you will want any more than there are set out there?

MR. WEGENAST: They are printed in the Respondent's Case, but it is probable it may be necessary to go further afield. That is the reason why I supplied the copies. I should like to refer your Lordships to the definition section for certain definitions.

THE LORD CHANCELLOR: 1911 is the last form?

MR. WEGENAST: It is an Office Consolidation of March, 1913.

LORD MOULTON: Consolidation for convenience only, but it does not give it the authority of having been passed as a Consolidation Act?

MR. WEGENAST: No, my Lord.

LORD MOULTON: It is correct, I suppose.

Mr. WEGENAST : On the first page section 2 is the definition : “ ‘Extra-provincial company’ means any duly incorporated company other than a company incorporated under the laws of the Province or the former Colonies of British Columbia and Vancouver Island.” I only cite that for the purpose of showing that this Company is within the terms of the Act. Then I should like to refer later to the definition of “Charter” and the definition of “Charter and regulations,” but I shall not read them now. Then I should like to refer to section 139, the first paragraph : “Every extra-provincial company having gain for its purpose and object within the scope of this Act is hereby required to be licensed or registered under this or some former Act, and no company, firm, broker, or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within the Province until such extra-provincial company shall have been licensed or registered as aforesaid.”

The LORD CHANCELLOR : This is very broad.

Mr. WEGENAST : And just to complete that logically and leave no doubt that it refers to a Company incorporated by the Dominion, I should like to refer your Lordships to section 152.

Lord MOULTON : The language covers it ?

Mr. WEGENAST : Yes, my Lord, if you refer to section 152 : “Any extra-provincial company duly incorporated under the laws of—(A) The United Kingdom ; (B) The Dominion ; (C) The former Province of Canada ; (D) Any of the Provinces of the Dominion,” and then it goes on to Insurance Companies. These companies mentioned there may be licensed, but if your Lordships will turn to section 157, you will find that other companies than those incorporated—

Lord MOULTON : “—may obtain a licence” (section 152)—does that mean have a right to obtain ?

Mr. WEGENAST : Subject to subsequent provisions.

Lord MOULTON : “—on compliance with the provisions of this Act” : what are the provisions of this Act ?

Mr. WEGENAST : I propose to refer to those, and they are rather lengthy and complicated. I just wanted

to point out at this stage that while companies incorporated in the United Kingdom or by the Dominion or by any of the Provinces of Canada are licensed, other companies, say companies from the United States, are registered, but there is no essential difference in the process and no essential difference in the results under my submission. I do not want to beg the point at all, but that is my submission. Now may I refer to section 153 which shows the character of the material which it is required a Company shall file? Your Lordships will notice that the Company must file a true copy of the charter and regulations of the Company. Will your Lordships now turn to the definition of "Charter and regulations," it may save some discussion later on, in section 2? You will find that the charter "means the Act, Statute, Ordinance, or other provision of law"——

Lord MOULTON : The formal document ?

Mr. WEGENAST : Yes, but I should like your Lordships to notice the width of the requirement; I think it is not too much to say it is preposterous.

Lord SUMNER : All contracts relating to the capital.

Mr. WEGENAST : Yes. " 'Charter and regulations' of a company means the charter of the company and the articles of association, and all by-laws, rules, and regulations of the Company, and all resolutions and contracts relating to or affecting the capital and assets of the company." No broader language I think could be employed to bring in literally even the books of the Company. Then, referring back to section 153, (c) may be omitted because it refers to an insurance company, (d) refers to a power of attorney giving an attorney in the Province powers which I may briefly say amount to the power to commit the Company absolutely in any legal proceedings.

Lord MOULTON : I think that is very important indeed, (d).

Mr. WEGENAST : They must have an agent in the Province who has absolute power to commit the Company in any legal action. Then (e) : "Notice of the place where the head office without the Province is situate." (f) : "Notice of the city, town, district, or county in the Province where the head office of the

company is proposed to be situate." That is, the Company must establish a head office in the Province. Then the amount of the capital of the Company, and the number of shares. Then I should like to refer your Lordships to section 166 which imposes certain disabilities and penalties.

Lord MOULTON : This man has power to issue and transfer shares or stock.

Mr. WEGENAST : The power is of the most far-reaching character one can imagine, but in the case of licensed companies at all events—and that is one of the small distinctions between licensed and registered companies—it must be in connection with legal proceedings. I think there cannot be read into the power of attorney which the Department requires a power to commit the Company to contracts, for instance, it is only when it has reached a stage of legal proceedings that the attorney's power becomes so broad.

Lord SUMNER : For example, an action for specific performance could lie within the Province, but if Judgment went against the Company the attorney would have power under his power of attorney to transfer shares in execution of the judgment—something of that kind ?

Mr. WEGENAST : Yes, I should think it would be something like that.

Lord SUMNER : This shows how very sweeping it is to attempt to regulate the Companies, but it may be that it is within the powers. The point is, the obligation to take out a license, which may be refused, after all imposes stringent liabilities upon the Company.

The LORD CHANCELLOR : To interfere with its capacity to trade ?

Lord MOULTON : Will you follow this : “—and generally, on behalf of such company and within the Province, to accept service of process and to receive all lawful notices, to issue and transfer shares or stock, and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney and of the company”—that is, I suppose, within the scope of the company—“to give to its attorney.” Does that mean it must give every power it can delegate to this attorney ?

Mr. WEGENAST : No, only such powers—I am paraphrasing this—as relate to legal actions.

Lord SUMNER : Suing and being sued ?

Mr. WEGENAST : Yes.

Lord MOULTON : Where do you get that, because it says “ to issue and transfer shares or stock ” ?

Mr. WEGENAST : I am afraid that must be a recent amendment, and I did not know about that until now.

Lord MOULTON : “—and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney.” Then come the words “and of the company.” I suppose that means within the power of the Company to give to its attorney.

Mr. WEGENAST : I should be very glad to argue that it is so broad, but is not it qualified by the words “ to act as its attorney and to sue and be sued, plead or be impleaded, in any Court, and generally, on behalf of such company and within the Province ”——

Lord MOULTON : “—to accept service of process and to receive all lawful notices, to issue and transfer shares or stock, and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney.” It seems to mean within the scope of the power of the Company to give to its attorney.

Mr. WEGENAST : I have drawn a great many of these Powers, but I had not apprehended that it was so broad.

Lord SUMNER : It may be stronger than you appreciate and carries your point on that a little bit further.

Mr. WEGENAST : Yes, my Lord.

(Adjourned for a short time.)

Mr. WEGENAST : My Lords, I omitted to refer to the latter portion of section 152, which is perhaps the most vital provision in the whole Statute. I referred to the first part of it, showing what Companies might become licensed, but I did not read the latter portion of it, and I should like to go on after beginning with any Company of the kind itemised “duly authorised by its charter and regulations to carry out or effect any of the

purposes or objects to which the legislative authority of the Legislature extends, may obtain a licence from the Registrar authorising it to carry on business within the Province on compliance with the provisions of this Act, and on payment to the Registrar in respect of the several matters mentioned in the Table B in the First Schedule hereto the several fees therein specified, and shall, subject to the provisions of the charter and regulations of the company, and to the terms of the licence"—

Lord MOULTON : I am not sure if they accepted the terms of the licence they were to give a licence.

Mr. WEGENAST : The section asserts the power to impose terms in the licence.

Lord MOULTON : It comes to the same thing, I think.

Mr. WEGENAST : Then the word on which I desire to lay particular emphasis is the next word "thereupon." They have in the former sections forbidden the Company to carry on business ; they have in other sections denied its capacity to appear in the Courts, and they now say in section 152 the Company after becoming licensed shall "thereupon have the same powers,"—and this is significant—"and privileges in the Province as if incorporated under this Act." What I desire to argue on that section is that there is an evident intention on the part of the Legislature to take this creature of the Dominion Parliament and to run it into the mould of their incorporation laws and to ask that Company to accept the sanction for its corporate status and activities at the hands of the Province.

The LORD CHANCELLOR : There may, of course, be reasons which render it right that the Province should take some security that this Company should be available as a defendant.

Mr. WEGENAST : Exactly, my Lord ; I propose to go into that. I would not for a moment deny that. In law it would fairly and reasonably come within the scope of the head, administration of justice or taxation—

Lord MOULTON : The registration of an address.

Mr. WEGENAST : Yes, my Lord, absolutely ; but what I desire to argue on that particular section and

everything else in the Act, I submit, goes to support this, is that the Province desires to mould this creature of the Dominion Government to its own uses and that the Province in attempting to legislate in this way is attempting to make company law for this Company; corporation law. It is invading the field of the law which is incidental to incorporation, if not incorporation itself.

Lord MOULTON: The question between you will be whether that is done; Sir Robert Finlay and Mr. Lafleur will, no doubt, argue that the provisions which are inserted are provisions which are necessary for the protection of the Province.

Mr. WEGENAST: Yes, my Lord, it will be for them to minimise the effect of these provisions.

Lord MOULTON: The proviso is your most important point that follows there.

Mr. WEGENAST: Yes, my Lord; I was going on in connection with that, and I will read it now: "Provided that the Registrar may refuse to issue a licence to any extra-provincial company which is authorised by its charter to exercise all or any of the powers of a 'trust company.'" That may be an assertion of another power which possibly might be brought under property and civil rights.

Lord MOULTON: Yes, but it is authorised to refuse a company duly authorised by its charter to exercise the powers of a trust company, to refuse to it the right to trade.

Mr. WEGENAST: In my case I need not, I submit, go so far as to challenge that.

Sir ROBERT FINLAY: There is an appeal to the Lieutenant-Governor.

Lord MOULTON: Yes, I know, but there is the power to refuse.

The LORD CHANCELLOR: The Company, according to this, *prima facie* may be authorised to carry on trade and commerce all through the Dominion of Canada, but if it tries to exercise the powers of carrying on trade and commerce as a trust company then British Columbia may say No. That is the way you put it.

Mr. WEGENAST: I should not concern myself about that section at all, because this is not a trust company

and I am willing to admit, for the purposes of this argument, the qualification that if the Province were dealing with trust companies and the execution of the trust they might be within their sphere. ✓

The LORD CHANCELLOR : We may hear more about this from Counsel for the Dominion than from you.

Mr. WEGENAST : Yes, my Lord. I was going on to refer to section 167 : "If any extra-provincial company, other than an insurance company, shall, without being licensed or registered pursuant to this or some former Act, carry on in the Province any part of its business, such extra-provincial company shall be liable to a penalty of fifty dollars for every day upon which it so carries on business." Then section 168 : "So long as any extra-provincial company remains unlicensed or unregistered under this or some former Act, it shall not be capable of maintaining any action, suit, or other proceeding in any Court in the Province in respect of any contract made in whole or in part within the Province in the course of or in connection with its business, contrary to the requirements of this Part of the Act." Then there is a proviso which restores the Company's capacity retroactively on its becoming licensed.

The LORD CHANCELLOR : You cannot sue in these Courts without being licensed.

Mr. WEGENAST : Yes, my Lord, you are not capable of suing, and something may turn on the use of the the word "capable."

Lord SUMNER : You mean it is not mere procedure?

Mr. WEGENAST : My submission is that it goes beyond procedure, beyond property and civil rights, and invades the capacity of the Company, and, apart from the use of the word "capable," which might be accidental, the whole genus of the legislation is to invade the capacity of the Company. Then section 169 : "No extra-provincial company required by this Act to be licensed or registered shall be capable of acquiring or holding lands or any interest therein in the Province, or registering any title thereto under the 'Land Registry Act,' unless duly licensed or registered under this or some former Act." Then there is a proviso for becoming licensed. I should not like to embarrass my argument

with an effort to carry that section with me. It is not inconsistent with my argument that that section may be good or would not be good standing by itself and perhaps standing in a Land Act, in an Act directed at the evil of holding land in mortmain, in the dead hand, but I am free to submit that in this connection in a Companies Act the use of the word "capable" does invade the domain of the Company's status. Then section 170 : "If any company, firm, broker, or other person acting as the agent or representative of or in any other capacity for an extra-provincial company not licensed or registered under this or some former Act shall carry on any of its business contrary to the requirements of this Part of this Act, such company, firm, broker, agent, or other person shall be liable to a penalty of twenty dollars for every day it, he, or they shall so carry on such business." Now I should like to turn back to section 18.

The LORD CHANCELLOR : You will, no doubt, refer to section 173 at some time.

Mr. WEGENAST : Yes, my Lord—in the proper aspect.

The LORD CHANCELLOR : It may be of some importance.

Mr. WEGENAST : Yes, my Lord, that amongst a great number of other sections which are brought into play.

The LORD CHANCELLOR : The importance of it is that it does not invalidate the proceeding merely because the Company or the directors have become liable to penalties.

Mr. WEGENAST : I do not think I am able at the moment to follow that out ; I have not examined the section in that aspect.

Lord SUMNER : It deals with Companies which were carrying on business before the Companies Act, 1897 ; it saves their proceedings even although the directors may subsequently become liable to penalties.

The LORD CHANCELLOR : It is only the old Companies.

Mr. WEGENAST : Yes, my Lord, but there are other sections which just as vitally affect the Company's corporate activities and I shall refer to them presently. I should like to read paragraphs 1 and 7 of section 18 :

“ A company or society may not be incorporated nor may an extra-provincial company be licensed or registered by a name identical with that by which a company or society or firm in existence is carrying on business or has been incorporated, licensed, or registered, or so nearly resembling that name as in the opinion of the Registrar to be calculated to deceive, or by a name of which the Registrar shall for any other reason disapprove, except where such company or society or firm in existence is in the course of being dissolved and signifies its consent by resolution duly passed and filed with the Registrar, or except where an extra-provincial company, licensed or registered, has ceased or is deemed to have ceased to carry on business in the Province”; and there are provisions where for infringement of some of the conditions of the Act a company is declared to have ceased carrying on business in the Province, and its name may then be given to another company.

LORD SUMNER: Is there an appeal against the Registrar's decision?

MR. WEGENAST: There is a case in the Court of Appeal in this country, the case of *ex parte Hall*, which your Lordships are probably familiar with, which is the only authority, so far as I know, on that point, and it holds in effect that the discretion of the Registrar of Companies in England is unrestrained.

LORD SUMNER: Then, if there is nothing in this Act which gives an express appeal, if the Registrar shall, for any reason, disapprove and he disapproves for some reason that is rather remote from the name being calculated to deceive, the Act does not provide any means for setting him right.

MR. WEGENAST: No, nor the law outside of the Act under that decision. Of course, I assume there must be an appeal for any flagrant abuse of that power, but it is not a ministerial but a discretionary power on the part of the Registrar. Now, paragraph 7 of section 18—

LORD MOULTON: That really cannot help you.

MR. WEGENAST: No, it does not vitally affect this question. The situation, of course, disclosed by the correspondence which I have read is of a Company duly authorised by the Parliament of Canada to trade

throughout Canada absolutely excluded from one Province of Canada or portion of Canada and without any recourse.

The LORD CHANCELLOR : Where are you reading from now ?

Mr. WEGENAST : I am submitting that that is the effect of the correspondence, and it is founded on the Act. There is a plain conflict between that state of things and the authority given by the Dominion Parliament in section 26 of the Dominion Companies Act. There is some embarrassment in arguing this appeal without a decision of the lower Court, without any reasoned judgment of the lower Court, upon which to base an argument, but the fact is, as shown by the statement in the Record, that the lower Court considered itself so bound by former decisions that it appeared not worth while going into the matter. The only reasoned Judgment of the British Columbia Court is the case of the *Waterous Engine Works Company v. Okanagan Lumber Company*, which your Lordships will find reported in 14 British Columbia Reports on page 238, and I should like to refer to that case. I may say that in the case of *John Deere Plow Company v. Agnew*, in which this same question was in issue in the lower Court, this case of *Waterous Engine Works Company v. Okanagan Lumber Company* was relied upon and is specifically referred to. The *Waterous Engine Works Company* case was an action on a contract executed in British Columbia under which the plaintiffs shipped to the defendants certain machinery, and the question was whether the plaintiffs, who were a Dominion Company, were competent to sue under that contract. The reasoning in the Judgment is somewhat important, because it covers the same ground as the Judgment of this Court in the case of *La Compagnie Hydraulique de St. Francois v. Continental Heat and Light Company*, which is reported in 1909 Appeal Cases. The reasoning covers the same ground, but reaches a different conclusion. I should like to contrast the two Judgments. On page 239 in the report of the *Waterous Engine Works Company* case the Judgment proceeds in this way : "The point was at once raised that the plaintiffs were then and

thus carrying on business in British Columbia in contravention of the Companies Act, Revised Statutes British Columbia, 1897, Chapter 44, Section 123. Subject to a further consideration and determination of this point, the merits of the case were investigated, and, after hearing a number of witnesses on both sides, I have come to the conclusion on the facts that the machinery in question arrived at a period later than stipulated"—the rest of that paragraph goes on to a question of fact. Then on page 240: "Counsel for the plaintiffs contend that the British Columbia Companies Act is *ultra vires*, inasmuch as it interferes with the status of a company created by the Dominion. From my understanding of the meaning of the word 'status' as used in this connection, I am strongly of opinion that that is exactly what the section in question does not do. In support of this contention, my attention has been directed to the existence of the word 'such' in the fifth line of section 123." Referring to the older Act. "It is contended that the Province thereby has the right to curtail the powers of a Federal company when issuing a licence. With due respect, the words of Vice-Chancellor Bacon in *Clere v. Financial Corporation* (1873) 43 Law Journal, Chapter 54 at page 61, occur to me, namely: 'that in a great many judgments, well considered and well expressed, a part of a sentence or a piece of a line may be extracted, so as to sustain anything that is desired to be founded upon it.'" The rest of that paragraph is perhaps not material. Then, going on in the next paragraph: "Section 123 cannot operate to repeal a Federal Act. It cannot be invoked to reconstitute or dissolve a company; it cannot enforce its amalgamation or liquidation," and so on. Then in the paragraph at the foot of page 240—this is the only argument, I submit, upon which the Respondents can expect to succeed, and will form the crux of the case—"The Dominion has given the plaintiff company the capacity, the status, to carry on certain business throughout Canada, consistently with the laws of that particular Province in which it seeks to extend its operations. In this case the pre-requisite is the securing of a licence"; and then a certain case is cited. Before passing from that it is just a little difficult to lay one's

finger on the precise defect in that argument, but is not it this, that the whole question at issue is whether this is not a Provincial law? Nobody denies that a Provincial Company must obey Provincial law, but his Lordship in arguing that this Dominion Company, whose status is conferred by the Dominion, is bound to obey Provincial law is begging the whole question.

That same argument was used in the case of *La Compagnie Hydraulique de St. Francois v. Continental Heat and Light Company* in 1909 Appeal Cases at page 194, and I should like to refer to the Judgment of Sir Arthur Wilson in that case. The facts of that case were very simple, and might form the subject of further discussion here. The Dominion had empowered the defendants by a private Act to buy, sell and deal in electrical energy, with certain ancillary powers.

LORD MOULTON: This seems to be a very important authority.

MR. WEGENAST: Of course, in my submission it is conclusive, and I submit that unless it can be effectively distinguished the Judgment is absolutely conclusive in our favour.

SIR CHARLES FITZPATRICK: In that case the Province went so far that the Dominion Company could not operate in certain areas in the Province.

MR. WEGENAST: Yes, my Lord.

SIR CHARLES FITZPATRICK: It excluded a portion of the Province from the jurisdiction of the Dominion Company.

MR. WEGENAST: Yes, my Lord; the Dominion Company had power under its private Act to carry on its business in several parts of Canada. The Provincial legislation was intended to carve out of the Dominion a certain small portion in the Province of Quebec and to give to the plaintiffs in the case an exclusive right to sell electrical energy in that district. In his Judgment Sir Arthur Wilson deals with the argument which prevailed in the *Waterous Company* case. On page 198: "The contention on behalf of the Appellant Company was that the only effect of the Canadian Act was to authorise the Respondent Company to carry out the contemplated operations in the sense that its doing so would not be *ultra vires* of the

Company, but that the legality of the Company's action in any Province must be dependent on the law of that Province." The same sophism there, the same begging the question as to what the law was. "This contention seems to their Lordships to be in conflict with several decisions of this Board. Those decisions have established that where, as here, a given field of legislation is within the competence both of the Parliament of Canada and of the Provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the Province if the two are in conflict, as they clearly are in the present case." We have here exactly the same effect, the carving up of a portion of the Dominion and the exclusion, or, at all events, the assertion of the right to exclude the Dominion Company from that portion.

Sir CHARLES FITZPATRICK : In this case the Province does not say that the Company may not come in, but the Company may come in subject to certain conditions which we think necessary for the protection of our own citizens. It does not say : You shall not come into the area, but : You shall come in subject to conditions.

Mr. WEGENAST : Subject to conditions which have the effect of excluding the Company, and, if not, subject to conditions which invade the Company's rights.

Sir CHARLES FITZPATRICK : I understand your argument is they are allowed to come in, but subject to conditions which change the character of the Company.

Mr. WEGENAST : Precisely, and, if that is so, the Company could not be compelled to adopt a new name in every Province in which it is to carry on business.

Lord MOULTON : It could not adopt a new name unless the Dominion permitted it.

Mr. WEGENAST : Of course, this is of no legal effect perhaps, but what the Attorney General advised the Company to do was to secure supplementary letters patent from the Dominion making some change in its name, but suppose in doing that it had come in conflict with another Company in another Province ; that is, the Province asserts the right to dictate under what name the Company shall trade, asserts the right to

meddle with an element of its corporate status, which is, of course, one of the vital elements.

Lord MOULTON : Of course, if the Companies' law of the Dominion is not *ultra vires*, it specifically gives you power to do this thing throughout the Dominion, does it not ?

Mr. WEGENAST : Yes, my Lord.

Lord MOULTON : Therefore, practically we are trying whether it is *ultra vires*.

Mr. WEGENAST : Yes.

The LORD CHANCELLOR : Yes, but there must be something on the part of the Province to regulate the carrying on of business within its own dominions which must interfere with the general right to conduct trade and commerce, you must interfere with the general right to incorporate for that purpose, and yet you may have to recognise some. We get nearer and nearer, and then the question is : What we have come to ?

Lord MOULTON : You can put them under the same obligations with regard to contracts that you put your citizens under. I suppose you could pass an Act, like our Statute of Frauds, saying that every contract above £10 should be in writing.

Mr. WEGENAST : Absolutely, my Lord.

The LORD CHANCELLOR : Or if you use barriers in the street you must have a licence to use and an immense number of things that can be done.

Mr. WEGENAST : Yes, absolutely ; if you wish to hold lands you must register your deeds ; if you have ditches you must clean them out.

Lord MOULTON : The question is whether they can refuse to recognise the corporate existence of the Company and give it rights to trade.

Mr. WEGENAST : That is the question, my Lord, and my learned friends will argue that the legislation does not affect their corporate status, but simply prescribes certain conditions.

Sir CHARLES FITZPATRICK : And that is the whole question.

Mr. WEGENAST : Yes, my Lord, that is the whole question. The whole question in another aspect is a question of identifying this legislation. If your Lord-

ships should hold, for instance, that this is legislation dealing with licensing, dealing with taxation, dealing with property and civil rights in the sense in which it is meant in section 92, although there there would be something more to be said for your Lordships identifying the legislation in that way, there is nothing more to be said, but my contention is that the legislation should not be identified in that way, but should be identified as legislation dealing with status and capacity and corporate rights, dealing with the Company, *qua* company, and not *qua* business that it carries on, or *qua* land that it holds.

The LORD CHANCELLOR: You say that the enactment is an enactment saying: You are not to carry on business at all unless you have a licence.

Mr. WEGENAST: Yes, my Lord, and that licence is the sanction under which the Company goes out instead of 26.

Sir CHARLES FITZPATRICK: The licence, if accepted, involves practically a re-organisation of your Company.

Mr. WEGENAST: It does. I would be prepared to submit that it does.

Sir CHARLES FITZPATRICK: Changing the name.

Mr. WEGENAST: Yes, my Lord. I do not want unduly to refine the ground on which I rest my case, but it is not necessary for me, I submit, to go so far. It is undoubtedly so, as your Lordship suggests.

The LORD CHANCELLOR: They will say that the licence is only required in order to give the conditions which would obtain in the case of a company properly incorporated within the Provincial Company law and within British Columbia.

Mr. WEGENAST: I presume so.

The LORD CHANCELLOR: They might say, for instance, that they will be a defendant and somebody is responsible.

Lord MOULTON: If they say that, I should leave them to make the point and then we will hear what the real point is. Have you given us all the materials on which you base your claim to have a corporate existence which must be recognised?

Mr. WEGENAST: I think so.

Lord MOULTON : It is entirely statutory. I think you have.

The LORD CHANCELLOR : And all the sections ?

Mr. WEGENAST : I think I have, my Lord. I do not think there is anything else that would add any particular strength. I think that I have in sections 25 and 26 of the Dominion Companies Act given everything.

The LORD CHANCELLOR : But what happened in this case ? There were two actions ?

Mr. WEGENAST : Yes, my Lord.

The LORD CHANCELLOR : Were they tried together ?

Mr. WEGENAST : They were argued together, and judgment was given two days apart.

The LORD CHANCELLOR : I think, if it does not interrupt your argument at all, it would be convenient that we should see what the judgments were.

Mr. WEGENAST : They are simply formal judgments.

The LORD CHANCELLOR : Purely formal ?

Mr. WEGENAST : Yes, purely formal judgments, but there is a statement which has, as it were, the effect——

Lord MOULTON : On page 11, is it not ?

Mr. WEGENAST : Yes, my Lord.

The LORD CHANCELLOR : I should like to see the pleadings.

Lord MOULTON : It was really treated as a demurrer. Everything that is contrary to a Statute is a pure matter of law and needs to be decided on a demurrer.

Mr. WEGENAST : Yes. As Mr. Justice Gregory says, it was argued purely on a question of law, and there is an interlocutory document at the foot of page 11 which is perhaps significant : “ On examining the pleadings herein, it seems to me that the only point of law distinctly raised is the one already disposed of by the *pro forma* judgment, and the motion is for judgment ‘ on the point of law raised by the pleadings.’ ” There is no admission that the transaction referred to is an isolated one, and paragraph 4 of the Defence sets up that Plaintiff has been carrying on business in various parts of the Province contrary to Part VI of the Company Act.

Aside from this there does not appear to be any agreement as to the nature of the payment of the sum of \$1,036.29. The liability to pay may easily depend upon whether the order was or was not subject to cancellation. In these circumstances I cannot make any further order than that already made." That Judgment, if it may be so called, is not understandable standing by itself, and the solicitors joined in making a statement as to what it meant, which is given below on page 12; they join in saying: "It having been brought to our notice that in the Reasons for Judgment, dated May 28th, 1913, the Honourable Mr. Justice Gregory makes reference to an 'Order' as already made, whereas in fact, no order in this action had yet been made. 'The one already' made and the '*pro forma* judgment' apply to the case of *Wharton v. John Deere Plow Company*, in which he on the argument shortly before this case decided that the provisions in the Companies Act, Part VI, were *intra vires* of the legislature of the Province of British Columbia, being bound as he said by the decisions of the Supreme Court of this Province. No Reasons for Judgment were filed nor put in writing in the case of *Wharton v. John Deere Plow Company*. In this case of *John Deere Plow Company v. Duck*, on the argument the judge expressed the opinion that as to the constitutional question, he, of course, would decide in favour of the defendant, and his judgment was reserved only for the purpose of considering the other points dealt with in the Reasons for Judgment."

LORD MOULTON: Have not you raised your question and shown that that was the ground on which Judgment was given, namely, that the provisions of the Provincial Statute refusing you to trade were *intra vires*?

MR. WEGENAST: Yes, my Lord.

LORD MOULTON: Are you adding anything to it by referring to anything else? It seems to me it is raised on the Statute as clearly as possible.

MR. WEGENAST: Yes, my Lord.

LORD MOULTON: It seems to me they have based this as a matter of Statute.

MR. WEGENAST: Yes, my Lord, the issue is quite

simple. While we have no Judgment to appeal from—

The LORD CHANCELLOR : You have two Judgments, one granted an Injunction and the other dismissed an action.

Mr. WEGENAST : Yes, my Lord, but what I am thinking of is reasons for Judgment. We have a great quantity of reasoning on the very point in question in the opinions of the judges in the Supreme Court in the Companies Reference. I presume it will be necessary for me to read those portions and deal with them ?

Lord MOULTON : Why ?

Mr. WEGENAST : They are absolutely germane and in point.

Lord MOULTON : Those are on the Reference.

Mr. WEGENAST : On the Companies Reference.

The LORD CHANCELLOR : Which may or may not come before us.

Mr. WEGENAST : It is not in this case, and yet the very point is discussed and decided.

Lord SUMNER : Were they unanimous ?

Mr. WEGENAST : No, my Lord.

Lord SUMNER : This is No. 6 of the questions put. Was the majority in your favour or against you ?

Mr. WEGENAST : My friends and I may not agree as to the reading of those Judgments, but I think they will agree that it is possible to disagree as to the effect.

The LORD CHANCELLOR : It seems to me these Judgments travel over a very wide field.

Sir CHARLES FITZPATRICK : This case never came before the Supreme Court.

Lord MOULTON : We have the material of the Statute here ; would not it be better to see what the arguments against you are ?

Mr. WEGENAST : I realise I cannot cite the case in the Supreme Court as authority, yet I assume your Lordships would like to hear what they said.

The LORD CHANCELLOR : Mr. Lafleur appears against you in this case, does not he ?

Mr. WEGENAST : Yes, my Lord.

The LORD CHANCELLOR : I think we should hear Mr. Lafleur on this particular case, and then we shall hear the Counsel for the Intervenants. We have the

points of Mr. Wegenast; he has made his case. We could get the arguments on the other side shortly and then we should have a full argument on each side.

Mr. WEGENAST: Yes, my Lord. I have a very full argument on the question of identity, and I should not like to lose the advantage of first stating that.

The LORD CHANCELLOR: What do you mean by "identity"?

Mr. WEGENAST: What kind of law this is. The Court has said that the very first thing in approaching a constitutional question under the British North America Act is to get at the pith and substance or the true intent, or the true nature and character, which was said in the Russell case.

Sir CHARLES FITZPATRICK: Of the legislation.

Mr. WEGENAST: Of the legislation, whether Company law or Licensing law, and so on.

Lord MOULTON: It is characterised by the feature that there is a properly constituted Company which claims its right to trade everywhere throughout Canada, and they refuse to allow it.

Mr. WEGENAST: Yes, my Lord.

Lord SUMNER: You want to show, I suppose, that Part VI of this Act is Company law and nothing else; it is not something for raising revenue or something for licensing auctioneers; it is not something dealing with property and civil rights of the Province, and it is not something dealing with administration of justice; it is Company law and nothing else. That is your proposition.

Mr. WEGENAST: Yes, my Lord; and in connection with that I should like to refer to some other sections of the British Columbia Companies Act.

Lord MOULTON: My difficulty about that is that one section might be *ultra vires* and not the other.

Mr. WEGENAST: I will try to show they so hang together and interlock that it would be impossible to separate them, that the total effect is to pass a Company law.

Sir CHARLES FITZPATRICK: That is, law affecting a Company organised under the laws of the Dominion?

Mr. WEGENAST: The Company law for Dominion Companies one would assume would be passed by the Dominion—Company law, and not merely dealing with

the subjective organisation of the Company, the interior mechanism, but also with its outward corporate acts.

The LORD CHANCELLOR: This is a Companies Act; it is dealing with Provincial Companies. You require a law, and here is the law in the Statute. There is no doubt that it is a Companies' Statute. When you come to the sections which affect extra-Provincial Companies, they speak for themselves.

Mr. WEGENAST: Yes, my Lord. Perhaps I should refer before leaving that—

Lord MOULTON: You will have plenty of opportunity in reply, perhaps on the full argument, to bring this forward if anything is raised.

The LORD CHANCELLOR: We shall have to take this case rather out of the ordinary course. I think the convenient course will be this: You have opened for the appeal on the particular case, and you have given us the general argument on the constitutional question. If Mr. Lafleur will give us in the same way the argument on the particular case with any general observations on the constitutional point which he wishes to add, then I think the most convenient plan is that we should stop there. We shall give you an opportunity of reply later on if it is required. I think then it will be convenient to hear the constitutional argument as if it was an interposed other case heard along with this, as if we had not consolidated the two appeals. In that case we would hear Mr. Newcombe and Mr. Asquith, and Sir Robert Finlay and Mr. Lawrence. You are not appearing for the Province?

Mr. LAFLEUR: No, not for the Province. I had arranged with Sir Robert that he should open the argument. Of course, I can make a statement if there is anything more to be added in the way of statement. I think my friend for the Appellant has stated the issue between us as fully as possible.

The LORD CHANCELLOR: So far as the particular case is concerned—

Mr. LAFLEUR: There is no special feature in this case, except I should like to point out the only question at issue between the parties is, not really the constitutionality of the whole Statute respecting Companies, but the question whether the provision which required

the Company to get a license, and refused to give a license unless the Company changed its name, is *intra vires*.

The LORD CHANCELLOR : It cannot be the constitutionality of the Statute, because the Statute is required to regulate Provincial Companies. It may well be particular provisions which affect extra-Provincial Companies are *ultra vires*—they may or may not be.

Mr. LAFLEUR : Some may be ; some may be *intra vires*.

The LORD CHANCELLOR : Some may be *intra vires* ; some may be *ultra vires*. Mr. Wegenast has defined the point in which he says that Statute is *ultra vires*.

Lord MOULTON : You think those are the points.

Mr. LAFLEUR : I think those are the points.

Lord MOULTON : You think we could at once go to Sir Robert Finlay's argument ?

Mr. LAFLEUR : I think so.

Lord MOULTON : You will have plenty of opportunity ; you will not be shut out.

The LORD CHANCELLOR : I think in this case Mr. Newcombe is *in pari materia* with Mr. Wegenast, and we should take first the Dominion case. Would that procedure suit your convenience, Mr. Newcombe ?

Mr. NEWCOMBE : Yes, my Lord. Would your Lordship propose to proceed with the argument now ?

The LORD CHANCELLOR : I think so ; we have still 20 minutes.

Lord MOULTON : Only for about 20 minutes ; you will have plenty of opportunity for consideration.

Sir ROBERT FINLAY : I should like to hear what the Attorney-General for Canada says ; he is in the same interest as Mr. Wegenast.

Lord MOULTON : That is what we are saying.

The LORD CHANCELLOR : That is what we are proposing to do.

Sir ROBERT FINLAY : I beg your Lordship's pardon. I thought my learned friend, Mr. Newcombe, was suggesting that he should not speak now.

The LORD CHANCELLOR : No, we are proposing that we should go on with this. If it is any convenience to you, Mr. Newcombe, we can stop a little before the

half-hour. We have, perhaps, called on you rather earlier than you expected to be called on.

Mr. NEWCOMBE : Thank you, my Lord.

The LORD CHANCELLOR : Then we will hear Mr. Asquith upon this—we are not treating the case as consolidated—and Sir Robert Finlay and Mr. Lawrence.

Sir ROBERT FINLAY : If your Lordships please. My friend Mr. Lawrence is with me for the Attorney-General of British Columbia.

The LORD CHANCELLOR : That I understand. We are hearing Counsel first for the Dominion ; then for the Attorney-General for British Columbia. Then if Mr. Lafleur and Mr. Wegenast desire to make any further observations on their particular case after that argument is concluded, they will have the opportunity.

Sir ROBERT FINLAY : And, of course, it will be open to my learned friend, Mr. Lafleur, to make, in the interests of his client, any further observations on the constitutional question ?

Lord MOULTON : Yes.

The LORD CHANCELLOR : Yes ; in this case we will not be fettered by the strict observance of procedure.

Mr. NEWCOMBE : My Lords, the question from the Dominion point of view involved in this case, and the reason on account of which we have intervened, is as to the enacting authority of British Columbia in the sections which my learned friend has referred to, section 18 and Part VI of the Companies Act, which provide in terms prohibition as against the exercise of corporate capacity by a Dominion Company in British Columbia, unless by license ; and I emphasize the word “license.” Registration has been spoken of ; it is not registration ; it is license which is required—license of the local authority.

Lord MOULTON : Can you, with regard to that, give me a reference to the Trust Regulation Act which is referred to ?

Mr. NEWCOMBE : The Trust Companies Regulation Act is in the Revised Statutes of British Columbia 1911 ; it will be indexed in that book, my Lord.

Now, the authority of the Parliament of Canada to incorporate Companies is not, and cannot be, denied. There are two classes of Companies which the

Parliament may incorporate, classified having regard to the subjects with which they deal and having regard to the area within which their operations are to be carried on. In the first place, there is the Company, such as the Bank or the Dominion Railway Company, which is incorporated by the Parliament in the execution of enumerated powers under section 91. No doubt the Dominion can incorporate such Companies as those. No doubt the Dominion legislation relating to such Companies, so long as it has strictly to do with banking or with railway business, or with the business which is a part of the enumerated subject, is exclusive and must prevail; there is no room for any local legislation upon that topic, consistent or inconsistent. But then there is also the other class of Companies which the Dominion may incorporate, because it has jurisdiction over the broad area of the whole Dominion, and is not limited, as the Provinces are, locally. That is, Companies which are to trade throughout the Dominion or in more than one Province. Now the Provincial powers of legislation are local; they are strictly private and local, as I think has been shewn in the case to which we referred yesterday, and in several cases, but especially made clear in the Prohibition case, where Lord Watson, who has contributed so much to the exposition of the British North America Act, shows that the concluding paragraph of section 91, referring to private and local matters, to the matters of a local or private nature comprised in the enumeration of subjects in section 92, is intended to refer to and correctly describes, not what is termed merely local or private for the purposes of article 16 of section 92, but all the enumerations of section 92.

The LORD CHANCELLOR: Lord Watson corrected the dictum in *Citizens' Company v. Parsons*.

Mr. NEWCOMBE: He corrected the dictum. Grammatically it was said in an earlier case to refer merely to article 16. It is extended to all the enumerations, so that every one of these enumerations is correctly denominated, is earmarked, passes under the caption of "private and local." Now, in the incorporation of a Company to do business throughout the Dominion, it makes no difference what the powers of the Company

are, what the subject-matter is ; the Dominion still has jurisdiction, because it is dealing with an extra-Provincial subject ; and, of course, it has been laid down over and over again by this Board that what does not fall within section 92 certainly falls within section 91. Here we have a Company incorporated, a trading Company. It is plain upon the construction of the Act, I submit, and it has been affirmed by the Committee, that the Dominion has exclusive authority to incorporate, not merely the Bank and the Dominion Railway Company and other Companies of that class, but Companies to trade, trading Companies, such Companies as, if their operations were to be limited to a Province, might competently be incorporated by a Province and carry on trade there for Provincial purposes. Locality is essential to the powers of the Provinces. They have the incorporation of Companies with Provincial objects. They may incorporate a Company with Provincial objects, with the object of trading in the Province, so long as the powers are exercised territorially within the Province, but they may not go beyond that.

The LORD CHANCELLOR : Subject always to the exception, supposing a Company wished to carry on the business of banking, say, in the Province of Manitoba, they would have to go to the Dominion to get their Charter.

Mr. NEWCOMBE : Certainly.

The LORD CHANCELLOR : And although it was a local Bank, although it was the Bank of Winnipeg, still it would have to be a Dominion Charter.

Mr. NEWCOMBE : Yes, although it was strictly limited to the City of Winnipeg.

The LORD CHANCELLOR : That is to say, local Companies may be incorporated by the Dominion in cases which fall under particular enumerated heads under section 91 ? That is your argument ?

Mr. NEWCOMBE : That must be so, but the Dominion may, nevertheless, incorporate a Company for a purpose which it could not meddle with at all if the area of the execution were limited to a Province, by extending the powers beyond the limits of a particular Province.

The LORD CHANCELLOR : Just let me ask you this : Could the Dominion incorporate a Company for some

purpose not within the specified heads to trade exclusively in Manitoba or in British Columbia or not? Would that be a Provincial Company.

Mr. NEWCOMBE: I would suppose that would be a Provincial Company.

The LORD CHANCELLOR: I think it would be a Provincial Company.

Mr. NEWCOMBE: There have always been Companies locally limited. We are familiar, in this country, and everywhere, with a Company incorporated to exercise powers, with no area mentioned within which those powers are to be carried out. Then it has the broadest area for the exercise of its powers which the Parliament or legislative enacting authority can give. There is also a Company incorporated to carry on business within a given locality, a Company incorporated to carry on business in Scotland, for instance. That Company may have possibly some incidental or ancillary powers which it may exercise out of Scotland, but its main functional purposes must be executed within the area committed to it by the legislature.

The LORD CHANCELLOR: You will have to consider this:—it may be that the incorporation of the Company to trade all over the Dominion is a matter exclusively for the Dominion, but it may also be that the Dominion under its reserved power may incorporate a Company, even though it may trade only locally, and the only effect of article 11 would be that the Province may also incorporate a Company if it is to act locally; it may be a dual power; if that is so, it may be an opportunity for seeing whether the British North America Act cannot be read so as to give, at any rate, some power of such control.

Mr. NEWCOMBE: I should be disposed to argue, answering offhand, that there cannot be that dual power. If you exclude the subject from the enumerations of section 91 and make the business merely local, then I would suppose it would probably fall within the exclusive powers of the Province as a matter of incorporation for Provincial objects.

The LORD CHANCELLOR: It raises rather a new case, whether a thing may fall within section 92 and

also within section 91 where the enumeration in section 92 is not exclusive.

Mr. NEWCOMBE : Properly speaking, and properly understood, a power cannot possibly, I should think, fall within the enumerations of section 91 and also within the enumerations of section 92; that is an essential power; there are ancillary or supplementary powers which may overlap.

✓ The LORD CHANCELLOR : I rather think you are right, because section 92 says in each Province the legislature may exclusively make laws in relation to matters within it,—the incorporation of Companies with Provincial objects,—it may exclusively make laws in relation to it. Unless the objects are non-Provincial, the Dominion Parliament cannot make laws?

Mr. NEWCOMBE : No; all Provincial powers are strictly local. They are strictly local as interpreted by the Court; they are strictly local——

Lord MOULTON : In their very nature.

Mr. NEWCOMBE : In their very nature. Your Lordship will observe that nearly every enumeration here in which the words could have any scope is qualified by such words as "Provincial," or "in the Province," "municipal institutions in the Province," "local works and undertakings," "incorporation of Companies with Provincial objects," "the solemnisation of marriage within the Province," "property and civil rights in the Province," and so on—matters of a merely private and local nature. Everything is local. So it is, in my submission, that, when they came to draft the British North America Act, they had in mind the Company with unlimited territorial area, with every power which Sovereign legislature could give as to area, and they had in mind the Company which was limited territorially, and so they said the local Company may go to the local Legislature, and that was properly expressed by the phrase "the incorporation of Companies with Provincial objects." That is my submission with regard to the interpretation of that clause.

Now, the Dominion incorporates a Company that has to do, perhaps, not with an enumerated subject, but which has to carry on its business generally throughout the Dominion. It is held that that is a

valid incorporation. Here we are concerned with a trading Company, with a Company incorporated to trade throughout the Dominion.

Lord MOULTON : You may assume that they will not deny that it is a valid incorporation of a trading Company entitled to trade everywhere.

Mr. NEWCOMBE : Yes, my Lord.

Lord MOULTON : I do not think that will be challenged.

Mr. NEWCOMBE : The first question is, to what authority are you going to attribute that power ? In the execution of which of the powers under section 91 is that Company which is to trade throughout the Dominion incorporated ?

Lord MOULTON : Is that necessary ? Section 91 is not exhaustive ? It is not in article 11 of section 92 ?

Mr. NEWCOMBE : It is not anywhere in section 92.

Lord MOULTON : The consequence is, since there is total power, it must be in section 91.

Mr. NEWCOMBE : Undoubtedly it is with the Dominion. I do not say that it does, and I am going to argue it does not necessarily affect my case, but it may effect my case to find out where this power rests in section 91. Of course it rests in the general terms. Everything is covered by the general terms; but does it also rest upon an enumerated subject ?

Lord MOULTON : Would it better you much if it did ?

Mr. NEWCOMBE : If it would not, then that is the end of this case, I submit. I should suppose that the position of the other side here is only arguable upon the assumption that they can succeed to exclude the power which the Dominion exercised in——

Lord MOULTON : We shall hear—it is not in section 92, and the residuary power is in the Dominion ? I do not think there will be any attack on this being a validly incorporated Company.

Mr. NEWCOMBE : They cannot attack that.

Lord MOULTON : For the purpose of trade everywhere.

The LORD CHANCELLOR : What I should say if I were they—I do not say it is a good argument—is that civil rights remain to the Province, and you can

incorporate a Company perfectly validly with power to trade, but there must be some capacity, under the head of civil rights, for the Province to regulate the conduct of business within its limits. It is the same point, that a case may fall, in one aspect, in one jurisdiction, and, in another, in another jurisdiction.

Mr. NEWCOMBE : They regulate to a certain extent the "civil rights" of Banks, but they cannot regulate the Bank out of the Province.

The LORD CHANCELLOR : I do not feel that there may not be something which they can do with regard to a Bank.

Mr. NEWCOMBE : They cannot prevent them from carrying on business.

The LORD CHANCELLOR : Can they make them build their houses in which they carry on business in a certain way—that they must have a proper doorplate?

Mr. NEWCOMBE : Not if they say the Bank should have a sign and nobody else. It may be that all business houses should carry signs—that may be a general law affecting Banks, but if they say every Bank shall put up a sign, and indicate what its capital, its reserve, and financial position is, so that everybody may know it, that they cannot do.

The LORD CHANCELLOR : It is pure banking business.

Mr. NEWCOMBE : Or even put up its name——

Lord MOULTON : Could they say that such and such a Bank should not draw a bill for a larger sum than 5,000 dollars?

Mr. NEWCOMBE : They would be in trouble if they said that.

(Adjourned till Friday next.)

COUNCIL CHAMBER, WHITEHALL, S.W.,
Friday, 17th July, 1914.

SECOND DAY.

The LORD CHANCELLOR: You were on the powers of the Dominion.

Mr. NEWCOMBE: Yes, my Lord. Before I proceed with the argument on that point, may I refer to two sections of the British Columbia Companies Act which throw some light upon the general purpose and character of the legislation? Section 149 provides: "The Lieutenant-Governor in Council may, by an order to be published in three consecutive issues of the Gazette, suspend or revoke and make null and void any licence granted or any registration effected under this or some former Act to any Company which refuses or fails to keep a duly appointed attorney within the Province, or to comply with any of the provisions of this Part of this Act, or for other good cause; and, notwithstanding such suspension or revocation, the rights of creditors of the Company shall remain as at the time of such suspension or revocation." The licence having been granted and revoked in the execution of that power the Dominion Company consistently with the intention of this Act could not exercise its corporate powers. Then section 150 provides: "Sections 102 to 110, both inclusive, of this Act shall apply to every extra-Provincial Company." Now, sections 102 to 110 are a pretty long group of sections, and I am not going to take up time by referring to them.

The LORD CHANCELLOR: The registration of mortgages, charges, and so on.

Mr. NEWCOMBE: Yes, my Lord, of mortgages and charges given by the Company, mortgages or charges upon any land wherever situate or any interest therein.

The LORD CHANCELLOR: There is no doubt that the sections you have referred to and other sections do impose restrictions upon a Dominion Company carrying on business and the question is whether it is not allowable to impose some restrictions and whether this comes within the category so allowed.

Mr. NEWCOMBE: Yes, my Lord, but not only does

it impose restrictions but it seems to be intended to liken a Dominion Company to a Provincial Company ; to impose the Provincial system upon a Dominion Corporation.

The LORD CHANCELLOR : They may or may not go too far, but I want to get at the substance of the case which we have to decide, and it seems to me to be this : Under section 91 the Company is incorporated by the Dominion, and I think it has been decided by this Board in the *Citizens' Insurance Company v. Parsons* and the *Temperance* case that that incorporation was made, not under sub-section 2 of section 91 in relation to the regulation of trade and commerce, but under a general power to make laws for the peace, order and good government. If the Dominion is proceeding under the general powers to make laws for the peace, order and good government, it is not as strong a proceeding as it would be if it were proceeding under sub-head 2 or one of the other sub-heads, the reason being that there is an express declaration that nothing that is within these sub-heads is to be done otherwise than exclusively by the Dominion. When the Dominion legislates under the power to make laws with regard to the peace, order and good government it does so subject to the exclusive right of the Provinces in matters coming under section 92. Therefore, it is important as regards this case that we should know at once, I think it is the first point we have to discuss, whether you contest that the only power of the Dominion to pass the Dominion Companies Act was under a power to make laws for the peace, order and good government of the Dominion.

Mr. NEWCOMBE : I am going to try and put it under enumerated powers, and that is what I am coming to, if your Lordships will bear with me for one moment, because, from my point of view, it is necessary to show the unconstitutionality of this sort of legislation and I would like to refer, as showing a mere extension of the intention of the Legislature, to an Act which they passed during the last Session. It is true that it does not apply to this case ; it is an amendment of the Companies Act, but it shows the intention and the extent to which they go.

The LORD CHANCELLOR : Yes, but in order to clear our minds and to focus the argument, is not it very important that we should know whether this Board has already decided whether the incorporation of Companies falls under the general power to make laws with regard to the peace, order and good government, whether the power to incorporate Companies for the Dominion is derived from the general power to make laws for the peace, order and good government of Canada as distinguished from the enumerated provisions. Where is the case of the *Citizens' Insurance Company v. Parsons* reported ?

Mr. NEWCOMBE : In 7 Appeal Cases.

The LORD CHANCELLOR : I may be wrong in my recollection, but let us look at that case first. I have a recollection that something was said about incorporation of Companies there.

Mr. NEWCOMBE : That is at pages 111 to 113.

The LORD CHANCELLOR : Look at the bottom of page 116 : " The learned judge assumes that the power of the Dominion Parliament to incorporate companies to carry on business in the Dominion is derived from one of the enumerated classes of subjects, namely : ' the regulation of trade and commerce,' and then argues that if the authority to incorporate companies is given by this clause, the exclusive power of regulating them must also be given by it, so that the denial of one power involves the denial of the other. But, in the first place, it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the Provinces, and the only subject on this head assigned to the provincial legislature being ' the incorporation of companies with provincial objects,' it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada. But it by no means follows (unless indeed the view of the learned judge is right as to the scope of the words ' the regulation of trade and commerce') that because the Dominion Parliament has alone the right to create

a corporation to carry on business throughout the Dominion that it alone has the right to regulate its contracts in each of the Provinces. Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a company were to carry on business in a Province where a law against holding land in mortmain prevailed (each Province having exclusive legislative power over 'property and civil rights in the Province') that it could hold land in that Province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion it might happen that it could do no business in any part of it, by reason of all the Provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body." There there is an expression of opinion that the power to incorporate is under the general power.

Mr. NEWCOMBE: No doubt it is under the general power.

The LORD CHANCELLOR: Is there any other decision of this Board?

Mr. NEWCOMBE: Yes, my Lord, there is the case of the *Colonial Building and Investment Association v. The Attorney General of Quebec*, which is reported in 9 Appeal Cases at page 157. On pages 164 and 165 Sir Montague Smith, who also gave the judgment in the *Parsons* case, says this—

The LORD CHANCELLOR: I want to understand the point. Does it touch the question we are now discussing, whether the power comes under the general words or whether the power comes from a special clause in section 91? It seems to me it does not.

Mr. NEWCOMBE: This case is important as affirming in terms that since the Company was incorporated with power to carry on its business consisting of various kinds throughout the Dominion, the Parliament of Canada could alone constitute the incorporation.

The LORD CHANCELLOR: That is quite true, but we are not discussing that at this moment. That is obvious.

Lord MOULTON : That is obvious. It will not be denied.

The LORD CHANCELLOR : The question is whether it has been decided by this Board that the power to incorporate those Companies is derived from the general power of the Parliament of Canada to make laws for the peace, order and good government of Canada in which case it is limited by section 92, or does it come under one of the sub-heads of section 91 by an exclusion of it by section 92 or otherwise ?

Mr. NEWCOMBE : We say it does that too, my Lord.

The LORD CHANCELLOR : What I want to know is : Is there a decision of this Board on this point, because it would be a great convenience if we could see it before we go into the general argument. Do your opponents rely upon any decisions ?

Sir ROBERT FINLAY : My Lords, there is no express case ; I think the case your Lordship has referred to, the *Citizens' Insurance Company v. Parsons*, comes nearest. ✓

Lord MOULTON : It might come under the special powers of section 91 in two ways—I only say that it may be argued—one is : “the regulation of trade and commerce” ; the other is, looking at No. 11 section 92, “The incorporation of companies with provincial objects” as being an express exception for the incorporation of Companies with wider powers.

Mr. NEWCOMBE : Yes, but your Lordship sees there is no express enactment on section 91 giving that power ; it would be covered and is covered by the general words.

Lord MOULTON : Then it would come under 29, not only the peace, order and good government. If we can take it as a class of subjects that is expressly enumerated. You see it says at the end of the section : “And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.”

Mr. NEWCOMBE : I think number 29 points to undertakings which are expressly excepted.

LORD MOULTON: For instance, those under 11 it applies to.

MR. NEWCOMBE: Yes, if there be an express exception.

LORD MOULTON: "The incorporation of companies with provincial objects" looks very much like an express exception of those with Dominion objects.

✓ MR. NEWCOMBE: My argument will be that Companies with Dominion objects are certainly excluded. Doubtless they fall to the Dominion by the general words at the beginning of section 91 as to peace, order and good government, but I contend also for a special enumeration.

THE LORD CHANCELLOR: It all turns on those words, which Lord Moulton has referred to.

(Their Lordships conferred.)

THE LORD CHANCELLOR: There seems to be no authority that goes beyond the case of the *Citizens' Insurance Company v. Parsons*.

MR. NEWCOMBE: No, my Lord.

SIR CHARLES FITZPATRICK (addressing Sir Robert Finlay): Do I understand you to say that when a Company is incorporated as to navigation and shipping under section 91 in order that that Company may get its Act of incorporation the Dominion must rely on the first part of the terms of section 91 under "peace, order and good government."

SIR ROBERT FINLAY: Your Lordship is speaking of a shipping company for inter-Provincial purposes taking any of the enumerated classes.

SIR CHARLES FITZPATRICK: How did the Dominion Parliament get authority to deal with the incorporation of a company organised for any of the purposes?

SIR ROBERT FINLAY: I submit under the general words.

SIR CHARLES FITZPATRICK: "Peace, order and good government of Canada?"

SIR ROBERT FINLAY: Yes, my Lord.

SIR CHARLES FITZPATRICK: That is to say, if you did not have that provision as to peace, order and good government of Canada in the first part of section 91,

the Dominion Parliament would not have power to incorporate ?

Sir ROBERT FINLAY : No, my Lord, or equivalent words giving a residuary power.

Sir CHARLES FITZPATRICK : Then if you take the section without those words the Dominion Parliament would have no power for any of the purposes enumerated in section 91 ?

Sir ROBERT FINLAY : Your Lordship has put the case of a navigation and shipping company.

Sir CHARLES FITZPATRICK : Let me put it in broader terms. Take a Company incorporated for any of the purposes enumerated in section 91. Would the Dominion Parliament have power to incorporate a Company for any one of those purposes were it not for these general words, "The peace, order and good government of Canada," in the first part of the section ?

Sir ROBERT FINLAY : I think not.

The LORD CHANCELLOR : What do you say to Lord Moulton's suggestion as to head 29 of section 91, "Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," that it might be said that the incorporation of Companies with Provincial objects expressly included the incorporation of Companies with Dominion objects ?

Sir ROBERT FINLAY : I submit not, my Lord. What that means is this : Head 10 of section 92——

The LORD CHANCELLOR : I am bound to say that my present impression is to think that those words are satisfied which we are talking of, by head 10.

Sir ROBERT FINLAY : Yes, my Lord.

Lord MOULTON : They are satisfied, but I cannot help thinking that head 29 meant that the things which the enumeration in section 92 clearly excludes from Provinces are intended to go in 29, and it is quite clear that the incorporation of Dominion Companies is clearly excluded by 11.

The LORD CHANCELLOR : I should have said these were by implication.

Sir ROBERT FINLAY : Yes, my Lord, and I submit that the words expressly excepted really point to the very express exception in head 10 of section 92.

The LORD CHANCELLOR: You say it is not excepted; it is not expressly excepted.

Sir ROBERT FINLAY: Yes, my Lord.

The LORD CHANCELLOR: By an affirmative expression.

Sir ROBERT FINLAY: Yes, my Lord, and there you have got in head 10 an enumeration of cases to which the power of the Dominion would apply.

Lord MOULTON: Even supposing it came under "peace, order and good government," the only respect in which that is weaker than the enumerated one is when it clashes with section 92.

Sir ROBERT FINLAY: Yes, my Lord.

Lord MOULTON: What does it clash with in section 92?

Sir ROBERT FINLAY: What I am going to say, my Lord, is this, that there is no clashing of jurisdiction at all; that if the two sections are correctly read, while the Dominion may incorporate a Company which is to carry on operations throughout Canada generally, yet its operation in each Province must be subject to the laws of that Province. For instance, the contracts it is to enter into must be entered into according to the laws of that Province.

The LORD CHANCELLOR: Contracts is a different matter.

Sir ROBERT FINLAY: Yes, my Lord. That is my submission, and I put it to your Lordships that it cannot go further than authorising the Dominion to confer power upon a Company, a power with which the Province cannot interfere; but the Province certainly may prescribe the conditions under which the trade is to be carried on within the particular Province.

The LORD CHANCELLOR: Suppose a man had a right to acquire property, the Dominion cannot prevent him from acquiring property within the Province on the ground that it was a civil right.

Sir ROBERT FINLAY: Yes, my Lord.

The LORD CHANCELLOR: Supposing it was carrying on business, say, as an ice-cream vendor, or whatever it might be, why should not that apply to an incorporation. It may be a delicate question where you come to draw the line, but why should not the Province have a power to say: You shall not have a civil right to carry

on this business? It is always a question whether they have interfered with its status as a corporation or whether, recognising its status as a corporation, they have imposed a restriction on the civil right. That is the point, is it not?

SIR ROBERT FINLAY: Your Lordship mentioned one topic which is a very good illustration indeed; your Lordship is aware that very much attention has been directed, I think particularly in Scotland, to ice-cream shops, which are supposed to be very demoralising, I do not quite know why—

THE LORD CHANCELLOR: I think I know why, and I am surprised that you do not.

SIR ROBERT FINLAY: The strongest possible language has been used with regard to them. Now suppose that the law of a Province forbade all ice-cream shops, could it be contended that the Dominion Parliament by incorporating a company for the opening and conducting of ice-cream shops throughout the Dominion overrode a local prohibition.

THE LORD CHANCELLOR: That may be, but Mr. Newcombe has been reading sections which go a little further. A company has to be registered and, according to Mr. Newcombe's argument, the restrictions which are imposed on the unregistered company prevent it from performing its functions as a corporation under conditions which alter its status.

LORD MOULTON: Practically they say: unless we incorporate you, you are not a corporate body.

SIR ROBERT FINLAY: I submit not. It will not serve my friend's purpose to say that there are here and there some things which he might contend are *ultra vires* of the Provincial Legislature; the broad point is whether it is within the competence of the Provincial Legislature to require that such an extra-provincial company should take out a licence before carrying on business.

SIR CHARLES FITZPATRICK: More than that; change its corporate name.

SIR ROBERT FINLAY: Your Lordship will forgive me. What they say is: We cannot issue a licence because there is another Company of the same name, and I put it to your Lordships that that is a perfectly

right and reasonable condition. Surely if it be the law of the Province that two companies of the same name should not be trading there on account of the confusion and mistakes that would result, it cannot be contended that the Dominion Parliament could override that any more than it could in the matter of ice-cream shops.

LORD MOULTON: Then that is negating the incorporation.

SIR ROBERT FINLAY: No, my Lord.

THE LORD CHANCELLOR: It might be a deprivation of civil rights.

SIR ROBERT FINLAY: They have the right to regulate, and I shall most strenuously contend—

THE LORD CHANCELLOR: Speaking for myself, I am not expressing the slightest opinion on any of these points, but I think we have had a useful conversation now; we have defined the point. It is a question whether you can incorporate a company under some other words than the words "peace, order and good government"? It is not an absolutely concluded question anyhow although we know what the argument about it is. Secondly, it may be that it is quite unimportant whether it is under the general words or whether it is under the specific powers of section 91, having regard to the particular controversy before us. Thirdly, the particular controversy turns apparently upon whether this is an interference with the civil rights or whether it is an interference with the status of incorporation.

MR. NEWCOMBE: Upon that last observation may I refer your Lordships to the Companies Act Amendment Act of British Columbia, Chapter 12 of 1914, and this shall be my last reference to the legislation, as showing the provision which they have interposed pending this suit in order to enforce the view of the Provincial advisers as to the extent of their powers under section 92. It is an amendment of section 18 of the Companies Act which is the section requiring a licence. Section 4 says: "Section 18 of said Chapter 39 is hereby amended by adding the following as subsections (8) and (9):—"(8) Notwithstanding anything contained in any other Act of the Legislature, subsection (1) of this section shall be construed to form

part of any Act by or under which a company, society, or association may be incorporated or registered, or a company, society, or association incorporated or registered outside the Province may be licensed or registered; and no such company, society, or association may change its name without the approval of the Registrar, signified in writing. (9) No company, society, or association incorporated outside the Province which is or shall be licensed or registered under this or any other Act of the Legislature shall use any name or title in this Province, except that under which it is or shall be so licensed or registered without the approval of the Registrar, signified in writing.'” That is a legislative declaration of British Columbia that section 18 of their Companies Act shall form a part of the charter of a Dominion Company which goes into British Columbia.

LORD MOULTON: Altering the incorporation, the actual constitutional document, you say, of a Dominion Company.

MR. NEWCOMBE: Yes, my Lord. They have attempted to give that clause the sanction of the Dominion Parliament by declaring that their clause shall be read as part of the Dominion Act, and that is a mere extension of the principle upon which they have been legislating, and it has been put there as another ground for supporting the provincial policy in case your Lordships would hold that this legislation so far is *ultra vires*.

Now, my Lord, with regard to the power upon which this right of the Dominion rests, it is quite true, as the Lord Chancellor has observed, that it is referred by the decision of the Board in the case of the *Citizens' Insurance Company v. Parsons* to the peace, order and good government of Canada, but, of course, all powers under section 91, enumerated or not enumerated, are powers for the peace, order and good government of Canada. They are all included in the general terms, but special effect is given to legislation enacted under the enumerations, and there is nothing in the decision to show that the incorporation of companies may not aptly be referred to the regulation of trade and commerce. The Court below had put it under trade and commerce;

this Board said it was not necessary to refer the statute to that power because it would belong to the Dominion any way under the "peace, order and good government of Canada," and for the purposes of that case it was not necessary to go any further.

The LORD CHANCELLOR: Have not there been some decisions on that point which have given a meaning to "trade and commerce"?

✓ Mr. NEWCOMBE: I am going to refer to those now, my Lord. We have to go to the case of the *Citizens' Insurance Company v. Parsons* for that at the beginning.

The LORD CHANCELLOR: Before you part from this argument, there was a case of *Dobie v. The Temporalities Board*, which is reported in 7 Appeal Cases at page 136, which has some bearing on this.

Mr. NEWCOMBE: Yes, my Lord. That was a case of a Church Corporation created by the Old Province of Canada before the Union. The point decided there was that that corporation could not be broken up by the Provincial Legislation of Ontario or Quebec or by both jointly. It is really the converse of the case of the *Colonial Building and Investment Association v. The Attorney-General of Quebec*.

The LORD CHANCELLOR: If you will look at page 148 and the top of page 149 you will find something that has a bearing on the point we are now discussing. Lord Watson says: "The Ontario Act merely prescribed that certain conditions should attach to every policy entered into or in force for insuring property situate within the Province against the risk of fire. It dealt with all corporations, companies, and individuals alike who might choose to insure property in Ontario—it did not interfere with their constitution or status, but required that certain reasonable conditions should be held as inserted in every contract made by them." Then you see: "The Quebec Act, 38 Victoria, Chapter 64, on the contrary deals with a single statutory trust and interferes directly with the constitution and privileges of a corporation created by an Act of the Province of Canada and having its corporate existence and corporate rights in the Province of Ontario as well as in the Province of Quebec. The professed object of the Act and the

effect of its provisions is not to impose conditions on the dealings of the corporation with its funds within the Province of Quebec, but to destroy, in the first place, the old corporation and create a new one, and, in the second place, to alter materially the class of persons interested in the funds of the corporation." That is rather material for the purpose of your argument.

Mr. NEWCOMBE: Yes, my Lord. There is an observation at the foot of page 113 in the case of the *Citizens' Insurance Company v. Parsons*, which is very much in line with what your Lordship has read from *Dobie v. The Temporalities Board*: "It was contended in the case of the Citizens' Insurance Company of Canada, that the Company having been originally incorporated by the Parliament of the late Province of Canada, and having had its incorporation and corporate rights confirmed by the Dominion Parliament, could not be affected by an Act of the Ontario Legislature. But the latter Act does not assume to interfere with the constitution or status of corporations. It deals with all insurers alike, including corporations and companies, whatever may be their origin, whether incorporated by British authority, as in the case of the Queen Insurance Company, or by foreign or colonial authority, and, without touching their status, requires that if they choose to make contracts of insurance in Ontario, relating to property in that Province, such contracts shall be subject to certain conditions."

Lord MOULTON: That is as I said. Supposing they were to say that all contracts should be sealed with the seal of the company, or supposing they were to pass a Statute of Frauds, then, of course, that would affect them.

Mr. NEWCOMBE: Or bills of sale must be registered; these are general laws; doubtless they must conform to them.

Lord MOULTON: Your distinction is the affecting of the status of incorporation.

Mr. NEWCOMBE: Yes, my Lord, the power to do business.

The LORD CHANCELLOR: I have some recollection of another case on this doctrine which is more recent, that is the case of *La Compagnie Hydraulique de*

St. Francois v. Continental Heat and Light Company, which is reported in 1909 Appeal Cases at page 194. Has that anything to do with it? Mr. Wegenast referred to it, although I had not seen it lately. Does that touch this point?

Mr. NEWCOMBE: It is conclusive of the point in our submission.

The LORD CHANCELLOR: If you have the case before you, will you tell us exactly what it decided? Let us see what the facts were. The Appellants were a Quebec Company, and they had a certain privilege of producing and selling electricity for power, heat and light within a certain area.

Mr. NEWCOMBE: Yes, a monopoly.

The LORD CHANCELLOR: I suppose it was a monopoly; it seems to me to be treated as such. The Respondents were incorporated under a Dominion Act which gave them general powers to sell electricity with the consent of the municipal authorities, it could do almost anything. The Appellants brought an action for damages and an injunction in respect of the monopoly of which you speak, and the Appellate Court of Quebec held that there was no error in the judgment of the Court below and in substance "that a federal charter confers not only legal existence on the company it incorporates, but it gives inherent rights and powers of a general kind which cannot subsequently be affected, limited, or changed by provincial legislation, and the federal charter being *intra vires* the Parliament of Canada, it was not possible to say that it could be affected by the Appellants' charter afterwards obtained." That was a distinct decision.

Mr. NEWCOMBE: Yes, my Lord.

The LORD CHANCELLOR: Then this Board appears to have affirmed that Judgment. In a very short Judgment Sir Arthur Wilson says: "The contention on behalf of the Appellant Company was that the only effect of the Canadian Act was to authorise the Respondent Company to carry out the contemplated operations in the sense that its doing so would not be *ultra vires* of the company, but that the legality of the company's action in any Province must be dependent on the law of that Province." Now that comes

very near your point. "This contention seems to their Lordships to be in conflict with several decisions of this Board. Those decisions have established that where, as here, a given field of legislation is within the competence both of the Parliament of Canada and of the Provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the Province if the two are in conflict, as they clearly are in the present case." Here there was a conflict; a monopoly had been given there by the Quebec Parliament, and the Dominion Company was in possession of the field.

Sir CHARLES FITZPATRICK: This was a monopoly which the Provincial Legislature attempted to create.

The LORD CHANCELLOR: It is a question whether the monopoly of Quebec could have prevailed. I think this was a Judgment which dealt with the particular case; I doubt whether Sir Arthur Wilson intended to lay down the principle broadly.

Lord MOULTON: For instance, take this case: Supposing there was a Dominion Gas Company with powers to supply gas anywhere, and the Legislature of the Province gave a special concession with regard to it to the town of Vancouver, which is in British Columbia. I do not see that that clashes with the incorporation of the gas company. If it had got the concession it would have been entitled to do it. This seems to me to go very far, and I should like to consider it very carefully.

The LORD CHANCELLOR: If the words were taken literally they would mean this, that although it was within the power of the Province to give the monopoly, if it were within the power of the Dominion, the Dominion must prevail.

Lord MOULTON: I do not think the incorporation of the Company gives it any civil rights excepting that it is a person. It gives it power, but it does not give it any further rights than that it makes it an individual.

Sir CHARLES FITZPATRICK: That is saying this, that the Dominion Government having created a federal corporation it is not within the scope of the authority of the Dominion Legislature to limit its legislation within any part of the territory of Canada.

Mr. NEWCOMBE : The Dominion has declared that this Company may trade throughout Canada, and the Province interposes a Statute which says that they cannot trade in a particular portion of Canada.

Sir CHARLES FITZPATRICK : If they can say it for a portion of the Province they can say it for the whole Province.

Mr. NEWCOMBE : Quite so, my Lord.

Lord MOULTON : I think there is a confusion between this if one reads it very carefully. As I say, if there is a gas company which is entitled to put gas in all over the Dominion it does not give them a right to do it, because, for instance, there might be a village entirely on a land-owner's property, and he would say : I shall not let you come in. That would be quite right. It does not come within the civil rights which would entitle them to put gas everywhere, but it gives them a corporate power to put gas wherever they have the right to put it.

Mr. NEWCOMBE : If the Dominion Act said that this Company may expropriate private properties for its gas, it would not do for the Province to come in and say that it must be restricted.

Lord MOULTON : That is a question of its power.

Mr. NEWCOMBE : That is what I am coming to. What I submit the Dominion did in this case was to authorise the Company to trade throughout the Dominion in power, and when the Company came to trade in this particular portion of the Province they found opposed to them a Provincial Statute which said : here they shall not trade ; here nobody shall trade except AB. No doubt that was interfering with the exercise of the power granted by Parliament.

Lord MOULTON : Supposing the Company says : I want to be incorporated to carry on the manufacture of pottery at any kilns in Hanley. Well, it is incorporated. That does not give it a right to take any kilns in England.

The LORD CHANCELLOR : Take a decision which was given by this Board by Sir Montague Smith. A Dominion Company is incorporated for the purpose of holding land anywhere in the Province, but I think it

was Sir Montague Smith who laid it down in one of these cases that it did not exempt it from mortmain.

Mr. NEWCOMBE: Yes, certainly, my Lord. That is in the case of the *Citizens' Insurance Company v. Parsons* too. I was going to read to your Lordships what was said in this and several other cases with regard to the regulation of trade and commerce, because my submission is that the incorporation of trading companies is regulation of trade and commerce, and that power, of course, which is very broad indeed in its terms, has undoubtedly been expounded and limited by judicial construction. There are decisions touching that very point, and with your Lordships' permission I would refer to them.

The LORD CHANCELLOR: On this same point that we are talking about?

Mr. NEWCOMBE: The regulation of trade and commerce. Now what is that? When the Dominion incorporated the John Deere Plow Company, it did so in the execution of the second enumeration, "Regulation of trade and commerce."

The LORD CHANCELLOR: You have got dicta of Sir Montague Smith against you.

Mr. NEWCOMBE: No, not quite that. I do not think it is against me. He only says that it is not necessary to put it on trade and commerce because it comes under the general terms.

The LORD CHANCELLOR: I think that is the way he put it. That seems to imply that he considered it came under the general words. There have been cases as to the regulation of trade and commerce, I am sure, which I remember which have given it a very general interpretation. Was it not in the prohibition case?

Mr. NEWCOMBE: Yes, my Lord. The prohibition case is reported in 1896 Appeal Cases, and this is what Lord Watson says on pages 362 and 363: "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 were discussed by this Board at some length in *Citizens' Insurance Company v. Parsons*, where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the Legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade. Their Lordships do not find it necessary to reopen that discussion in the present case." Thus it was merely in the absence of inconsistent Dominion legislation, and so long as the conditions affect only provincial trade, that the power was affirmed as existing in the Legislature of Ontario. It was said in the *Citizens' Insurance Company v. Parsons* 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. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place, the collocation of No. 2 with classes of subjects with national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the Legislature when conferring this power on the Dominion Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in section 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency." I shall refer to that passage later in another aspect of this case, but I direct attention to it now. "'Regulation of trade and commerce' may have been used in some such sense as the words 'regulations of trade' in the Act of Union between England and Scotland, and as these words have been used in Acts of

State relating to trade and commerce. Article V of the Act of Union enacted that all the subjects of the United Kingdom should have 'Full freedom and intercourse of trade and navigation' to and from all places in the United Kingdom and the Colonies; and Article VI enacted that all parts of the United Kingdom from and after the Union should be under the same 'prohibitions, restrictions and regulations of trade.' Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the Articles of Union. Thus, the Acts for regulating the sale of intoxicating liquors notoriously vary in the two Kingdoms. So with regard to Acts relating to Bankruptcy and various other matters. Construing, therefore, the words 'regulation of trade and commerce' by the various aids of their interpretation above suggested, they would 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 that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single Province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the Legislature of Ontario by No. 13 of section 92. Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the Dominion Parliament, might legally modify or affect property and civil rights in the Provinces, or the legislative power of the Provincial Legislatures in relation

to those subjects; questions of this kind, it may be observed, arose" in two cases which are referred to.

The LORD CHANCELLOR: "It was contended, in the case of the Citizens Insurance Company"—that is what we want, which is at the bottom of page 113.

Mr. NEWCOMBE: "It was contended, in the case of the Citizens' Insurance Company of Canada, that the Company having been originally incorporated by the Parliament of the late Province of Canada, and having had its incorporation and corporate rights confirmed by the Dominion Parliament, could not be affected by an Act of the Ontario Legislature. But the latter Act does not assume to interfere with the constitution or status of corporations." I have read that before in connection with what your Lordship read from *Dobie v. The Temporalities Board*. Then there were some further observations upon the subject in the case of the *Bank of Toronto v. Lambe*, which is reported in 12 Appeal Cases at page 585.

The LORD CHANCELLOR: Was not that a case where the taxes were imposed, not by the Dominion Legislature, but by the Provincial Legislature?

Mr. NEWCOMBE: Yes, my Lord. Lord Hobhouse in giving judgment says: "It has been earnestly contended that the taxation of banks would unduly cut down the powers of the parliament in relation to matters falling within class 2, namely, the regulation of trade and commerce; and within class 15, namely, banking, and the incorporation of banks. Their Lordships think that this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the Provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks. The words 'regulation of trade and commerce' are indeed very wide, and in *Severn's* case it was the view of the Supreme Court that they operated to invalidate the licence duty which was there in question. But since that case was decided the question has been more completely sifted before the Committee in *Parsons' case*, and it was found absolutely necessary that the literal meaning of the words should

be restricted, in order to afford scope for powers which are given exclusively to the provincial legislatures."

LORD MOULTON: Of course, if you get a case of that then it will be a guide.

MR. NEWCOMBE: It was restricted in order to make room for the special enumerations of section 92. That is the interpretation of *Citizens' Insurance Company v. Parsons*. "It was there thrown out that the power of regulation given to the parliament meant some general or inter-provincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parsons'* case, they would be straining them to their widest conceivable extent."

LORD MOULTON: That does not seem to me to interfere with the incorporation. For instance, supposing they were to say that any contract with regard to fire insurance by a Dominion company should be unenforceable. I think that that does affect its incorporation, it treats it as an *ultra vires* contract, but if it is only a question of the regulation of its contracts or the taxation, that does not seem to me to clash at all with the power to incorporate a Dominion company.

MR. NEWCOMBE: No, my Lord.

THE LORD CHANCELLOR: What do you say is the effect of this decision, that the regulation of trade and commerce, at any rate, does not interfere with the power to tax?

MR. NEWCOMBE: It does not interfere with the power to tax; and it shows, of course, that it was not intended to decide anything in the way of limitation of that power in the *Citizens' Insurance Company v. Parsons*.

THE LORD CHANCELLOR: I do not think it is an authority for the proposition that the power to incorporate comes under that; I do not see why it should. The incorporation of the Company would be merely for the purpose of trade and commerce.

MR. NEWCOMBE: It is for the purpose of trade and commerce; to place commerce in responsible hands.

The LORD CHANCELLOR : Power to incorporate a Company may be for many other purposes besides trade and commerce.

Mr. NEWCOMBE : A trading Company.

The LORD CHANCELLOR : I did not say a trading Company. Power to incorporate a Company for Dominion purposes.

Mr. NEWCOMBE : It may be that there are cases——

The LORD CHANCELLOR : It may be for charitable purposes ; it may be for public purposes ; it may be what is called a public utility company.

Mr. NEWCOMBE : Certainly, my Lord.

The LORD CHANCELLOR : It need not be a trading Company.

Mr. NEWCOMBE : No, my Lord.

The LORD CHANCELLOR : Therefore, why should you invoke the words “ regulation of trade and commerce ” to enable companies which are trading companies to be incorporated when you could incorporate them like all the others under the general powers.

Sir ROBERT FINLAY : May I call my friend's attention to the fact that when they deal with banking in section 91 they add in express terms “ including the incorporation ” ?

Mr. NEWCOMBE : I am aware of that. On the other hand, is it that the Dominion shall not incorporate a railway company because the incorporation of railways is not mentioned ? That brings me to the other point which perhaps is combined with this, because it is a question whether the incorporation falls under an enumerated power, and, if it fall under an enumerated power, it matters not whether it is trade and commerce or another enumerated power. Now, head 10 of section 92 describes : “ Local works and undertakings other than such as are of the following classes : (A) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province ; (B) Lines of steamships between the Province and any British or foreign country ; (c) Such works as, although wholly situate within the Province, are before

or after their execution declared by the Parliament of Canada to be for the general advantage of Canada." Now, an undertaking extending beyond the limits of the Province is a very apt description of this very company which is now before your Lordships.

LORD MOULTON: I do not quite agree with that. I think "local works and undertakings" does not mean companies. You see, it is "undertakings connecting the Province with any other or others of the Provinces."

MR. NEWCOMBE: I would say that those words should be read distributively. You see, when you come down to (c), the word "undertaking" is not there. "Such works as, although wholly situate within the Province" are declared to be for the general advantage. It is a work, that is, something existing on the ground, that is declared for the general advantage of Canada. An undertaking cannot be declared for the general advantage of Canada.

THE LORD CHANCELLOR: You cannot say that a Dominion Company is an undertaking connecting.

MR. NEWCOMBE: No, certainly not connecting, but extending beyond the limits of the Province. There are lines of steamships connecting, or lines of railway connecting.

THE LORD CHANCELLOR: Surely "extending beyond the limits of the Province" does not mean simply that it is *ultra vires* to deal beyond the limits of the Province.

MR. NEWCOMBE: My learned friend has suggested that our powers of incorporation are limited by implication inasmuch as in the banking clause, head 15 of section 91, it says: "Banking, incorporation of banks, and the issue of paper money"; incorporation of banks is mentioned there. Now, there is no doubt that the Dominion incorporates a railway company if the work extends beyond the limits of the Province.

THE LORD CHANCELLOR: A railway company does come under head 10.

MR. NEWCOMBE: Yes, in respect of its incorporation it comes under Head 10 as an undertaking extending beyond the limits of the Province although there is no work laid down making any actual connection, but they have the power to extend their

operations beyond the limits of the Province; and just so a trading company has power to extend beyond the limits of the Province. It is the regulation of trade in matters of inter-provincial concern. According to any limitation that has been suggested for those words, "regulation of trade and commerce"——

Lord MOULTON: I think that the words "regulation of trade and commerce" would probably cover any attempt to make difficulties with trade and commerce as it passes over the frontier of a Province.

Mr. NEWCOMBE: Yes, my Lord, I should suppose so.

The LORD CHANCELLOR: But you see it covers half a dozen things in section 91.

Mr. NEWCOMBE: But when it is held to cover inter-provincial trade and trade affecting matters of inter-provincial interest, what I humbly submit is that it must cover the power to set up agencies which carry on that particular sort of trade. What, for instance, were the sovereigns doing in the fifteenth and sixteenth centuries when those great corporations were constituted upon which the whole trade of Great Britain depended? Those charters generally proceeded upon the narrative that it was expedient to regulate and order trade.

Lord MOULTON: That is a wiping-up phrase there is no doubt.

The LORD CHANCELLOR: I think the prohibition case is very much on this point, because there, you know, it was argued strenuously that under trade and commerce the Dominion occupied the field and had occupied it since the Ontario Act.

Mr. NEWCOMBE: Pursuing my endeavour to find the proper home of this power which is exercised by the Dominion under section 91, I say it is trade and commerce; I say it is an undertaking extending beyond the limits of the Province; and then I say that it is the sort of undertaking which they described in the Prohibition case, namely, too big an undertaking for the Provinces to meddle with. There it is affirmed that the Canada Temperance Act rests upon the general clause for the peace, order and good government of Canada, and it is also affirmed that the Canada Temperance Act will supersede, in any locality where it is adopted, the local Prohibition Act of Ontario which is enacted, as

affirmed by that case, under the specially enumerated provisions of property and civil rights or private and local matters, because the liquor traffic is of dimensions too large for the Provinces.

Lord MOULTON : Which case is that ?

Mr. NEWCOMBE : That is the prohibition case which is reported in 1896 Appeal Cases. It was put thus on page 361 : "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interests of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada."

(Adjourned for a short time.)

Mr. NEWCOMBE : My Lords, I have submitted that this Company is incorporated by the Dominion under exclusive powers to regulate trade and commerce ; as an extra-Provincial undertaking ; or as a subject so large as to be beyond the field of Provincial control, applying the rule as laid down in the Prohibition case. In any case, it is incontestably established that the Dominion has the exclusive authority to incorporate this Company ; that is affirmed in terms in the case of the *Colonial Building Society* in 9 Appeal Cases ; the power to incorporate is affirmed, and that it is an exclusive power. Now the power being exclusive in the Dominion if it fall under the enumerated powers, that I submit is the end of the question ; or if it be with relation to a subject of sufficient magnitude ; and I would humbly submit that this question of the constituting and sending forth the agencies of trade—

Lord MOULTON : What was the case which brought in the phrase of "sufficient magnitude" ?

Mr. NEWCOMBE : The Prohibition case, 1896 Appeal Cases at page 361. I was submitting that this power,

in the execution of which those great agencies of trade, upon which practically the whole trade and commerce of the country depends inter-provincially, are constituted and sent forth, must be a subject of greater magnitude than the mere liquor traffic, a single branch of trade, which is a subject in respect of which, by the general terms, the Dominion may over-ride specially limited local powers.

Then, moreover, there is at least an implication involved in the construction of section 92 which is favourable to as great a power on the part of the Dominion to incorporate Dominion Companies, as the locals have with regard to the incorporation of Companies for Provincial objects. The incorporation of Companies for Provincial objects might very likely have fallen within "property and civil rights" if it had not been specially mentioned; but it is specially mentioned; therefore it does not fall within "property and civil rights." The incorporation of Companies for Provincial objects is a specifically enumerated subject of section 92. Therefore, when a Provincial Company goes out into the field of its own Province to carry on the operations which are enumerated and defined by its act of incorporation, it may actively carry out those powers, subject, no doubt, to the general law of the Province. "The incorporation of Companies for Provincial objects"; that very expression implies that there must be a power resident somewhere not within the Province to incorporate Companies for objects not Provincial; that is, a power resting with the Dominion. The Dominion Company, incorporated in the execution of that power must, I submit, by the implication of section 92, independently of words in section 91, have the same sort of active powers, the same power to go out and transact the business mentioned in its charter throughout the Dominion, that the local Company has within the ambit of the Province of its incorporation. In any case as I have said, wherever you rest the power, it is exclusive in the Dominion, and, being an exclusive power in the Dominion where is the power, I ask, granted to the Province to interfere with the execution of the powers so competently granted by the Dominion to its own creature? Where is the Provincial power? Now, I

submit that it does not exist; but it is not necessary to go through the whole range of section 92, because here we find that the power is asserted and attempted to be exercised by way of requiring a Provincial license from the Dominion Company as a condition to its exercising the powers which have been conferred by the Dominion Parliament; it is to be done by way of license. Therefore, the question is, and I submit it is the real question in this case, whether the locals have power to impose the sort of license upon a Dominion Company which is defined by this local Act and the various clauses of it bearing upon the subject to which reference has been made. If so, it must come under item 9 of section 92: "Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes."

LORD MOULTON: Nobody suggests that this license is a mode of taxation.

THE LORD CHANCELLOR: Nobody has said that, I think.

MR. NEWCOMBE: No. Well, I say it is not taxation—it does not come within that.

LORD MOULTON: I think not.

LORD SUMNER: It is relied on in the case of the Respondents.

LORD MOULTON: Do you rely on it, Sir Robert Finlay?

SIR ROBERT FINLAY: I do; it is not the main contention, but it is insisted upon in some of the Judgments on the Reference bearing on this point, to which I shall refer.

THE LORD CHANCELLOR: It is really difficult to say that it is in order for raising revenue that this is done.

SIR ROBERT FINLAY: That is one purpose; there may be also much more important purposes—the protection of those engaged in trade with such Companies in the Province.

LORD MOULTON: But, Sir Robert, just consider what would be the punishment. Supposing they did not take a license, no doubt they could be sued and be made to pay, but, if you fine them because they have not paid a license duty, it does not appear to me that that was really for the purpose of revenue,

Sir ROBERT FINLAY : The most effective mode of securing that the license fee is paid is to say that any contract you make for carrying on trade without a license is not enforceable.

Lord MOULTON : I do not know whether you have gravity enough to suggest this ?

Sir ROBERT FINLAY : Well, my Lord, I will consider it by the light of what your Lordship has said.

Mr. NEWCOMBE : The point is, this sort of license is imposed on the Dominion Company. If it be a license in the nature of "Shop, Saloon, Tavern, Auctioneer, and other Licenses in order to the raising of a Revenue for Provincial . . . Purposes," perhaps the legislation is good ; if it be not that, they have no power to interfere by imposing a license, because the whole authority of the Province with regard to licenses is defined by item 9 of section 92.

Lord MOULTON : I should not trouble about that till your opponent comes, for this reason : it is not only paying the money ; no paying the money would do it at all ; you have to consent to alter your name.

Mr. NEWCOMBE : Yes, my Lord, that is just what I am coming to ; it is not that kind of a license. In *Brewers & Maltsters' Association of Ontario v. Attorney-General for Ontario* it was argued that this kind of a wholesale license was incompetent to the Province, because it was not of the genus : shop, saloon, tavern or auction licenses.

The LORD CHANCELLOR : Which case is that ?

Mr. NEWCOMBE : *Brewers & Maltsters' Association of Ontario v. Attorney-General for Ontario* in 1897 Appeal Cases. At page 237 Lord Herschell said this : "But their Lordships were not satisfied by the argument of the learned counsel for the appellants that the licence which the enactment renders necessary is not a licence within the meaning of subsection 9 of section 92. They do not doubt that general words may be restrained to things of the same kind as those particularised, but they are unable to see what is the genus which would include 'shop, saloon, tavern' and 'auctioneer' licences and which would exclude brewers' and distillers' licences." That is perfectly so, but is it not plain to perceive the genus which would exclude the sort of

license which says that every Corporation, before it can do any sort of business in the Province, must take out a license? It is competent to the Province to license and require licenses for certain classes of business, such as those described in item 9, and it may be, possibly, that there is no genus to limit the general terms there, but it is perfectly plain, in my submission, that that section was never intended to authorise a Province to say, no person, domiciled in, or citizen of another Province, shall trade in this Province without a license; no Company incorporated by the Dominion, or another country, shall trade here without a license, irrespective of what sort of trade it is going to carry on; a license for the exercise of status or corporate capacity is not within the ambit of that enumeration. I submit, for that reason, as well as because it is not a taxing license, that the licensing power does not support the legislation in question; and, inasmuch as it is licensing legislation and is not supported by the only licensing power which the Province has, it cannot be supported at all.

Now, the other consideration is, what is the sort of legislation which has been interposed here by the Province against the Dominion Company? How is that to be earmarked and described? And what I submit, my Lords, is that these provisions are "regulations of trade and commerce," that what the Province has done in requiring this license is to "regulate trade and commerce." I took down from my learned friend's observation in reply to one of your Lordship's, this: that "the Province may prescribe the conditions under which the trade is to be carried on in the particular Province"; those are my learned friend's words in reply to your Lordship: "may prescribe the conditions." That is what they are doing, prescribing the conditions under which trade is to be carried on in the Province; they are prescribing that as against an agency constituted by the Dominion to carry on trade inter-provincially and in all the Provinces; therefore, if the Province of British Columbia can prescribe the conditions under which the trade is to be carried on there, so may every other of the nine Provinces prescribe the conditions under which the trade is to be carried on there. Each one of those

Provinces may have a different code of conditions ; and when the Company goes out to do business in those Provinces its directors and managers must say, surely : What are the regulations of our trade in those Provinces ? Are not they considering regulations of trade when they look at these various Companies Acts to ascertain what they have to do ? And what, I ask, are those regulations, except regulations of trade and commerce in respect of the big agencies, constituted by the Dominion to carry out trade inter-provincially—trade in matters of inter-provincial concern—as has been variously denominated by your Lordships in the different cases in which that clause “ regulation of trade and commerce ” has been considered ? The legislation is intended to limit the competition for trade. Think of the sort of recital upon which these Acts might be based. They want to exclude the foreign Company, the Company incorporated in the United States, the Company incorporated by the Imperial Parliament, the Company incorporated by the Dominion Parliament ; the legislation is aimed at all of those : Whereas Companies with insufficient capital, with too few shareholders, with directors in whom we have no confidence, are coming into the country and competing for trade : Whereas various considerations exist which influence the Legislature in its judgment to take control over these Companies in relation to their trade within the Province ; therefore it is enacted that an officer shall be appointed whose business it shall be to supervise the conditions under which these Companies shall engage in trade, and, therefore, these various clauses are expanded on the Statute book with respect to these extra-provincial Companies : “ regulations of trade.” I submit, and nothing else.

The LORD CHANCELLOR : Mr. Asquith, you are with Mr. Newcombe, and if you desire to add some observations, as their Lordships consider that the broad question is before them, they will hear you as representing the Dominion.

Mr. RAYMOND ASQUITH : If your Lordship pleases.

I feel that, after the full and almost exhaustive argument which your Lordships have listened to, there is not very much that I can usefully add ; I shall, there-

fore, not attempt to put before your Lordships any general argument, and I propose to confine myself very shortly to one particular point.

Of course, this case is obviously very much simplified, and, from the point of view of the Dominion, is very much strengthened, if we can succeed in persuading your Lordships that the power to legislate with regard to a Company with capacity to do business throughout the Dominion can be brought under one of the enumerated heads of section 91; and, therefore, it is very important, from the point of view of the Dominion, that we should try and convince your Lordships that that is the case. Now, my learned friend, Mr. Newcombe, has suggested two of the enumerated heads of section 91 under which he has argued that this subject-matter falls. The first of them is sub-section 2: "The regulation of trade and commerce," and upon that I have nothing to add to what my learned friend has already argued. But I would like to add one or two observations with regard to the second heading upon which he relied for that purpose, and that is sub-section 29 of section 91, taken in conjunction with subsection 10 of section 92. My learned friend has urged that the exception referred to in the first sub-heading of subsection 10, namely, "lines of steam or other ships . . . extending beyond the limits of the province," is a description which applies to the subject-matter which your Lordships have to consider in this case: namely, to any Company incorporated by the Dominion for the purpose of doing business in every Province in Canada. Now, a criticism which was passed upon that argument of my learned friend, I think by Lord Moulton and also by your Lordship, was that that subsection (A) must be read as referring only to physical things of some sort. The subsection refers in terms to "works" and to "undertakings," and I should respectfully agree, if the subsection ended with the words "connecting the Province with any other or others of the Provinces" that that construction would be a very persuasive one and difficult to disturb.

The LORD CHANCELLOR: You say "extending" shows that it is not necessarily physical?

Mr. RAYMOND ASQUITH : Yes, my Lord.

The LORD CHANCELLOR : That is your point ?

Mr. RAYMOND ASQUITH : That is my point.

Lord MOULTON : Do not you think that the *ejusdem generis* would qualify the word "undertakings" ?

Mr. RAYMOND ASQUITH : I do, my Lord.

Lord MOULTON : "Steam or other ships, railways, canals, telegraphs and other works and undertakings." Do not you think that "undertakings" must be something of a physical character ?

Mr. RAYMOND ASQUITH : I quite agree, my Lord, that, if you could stop at the point which I have indicated, and before the words upon which I rely, the *ejusdem generis* rule would entirely rule out my argument.

Lord MOULTON : I miss those words. "And other works and undertakings . . . extending beyond the limits of the Province." Still, that would not prevent the *ejusdem generis* qualifying the interpretation.

Mr. RAYMOND ASQUITH : Possibly not, but one must consider both expressions, "connecting" on the one hand and "extending" on the other. All the works and undertakings which are enumerated *nominatim* in that subsection are works which "connect," they do not "extend" "beyond the Province," but they are works and undertakings which connect one Province with another. Then, I say, if you are to give any sense to the words "extending beyond the limits of the Province," you get into another genus altogether ; if your Lordship will see : "ships," "railways," "canals," "telegraphs," are all classes of "undertakings or works" which do physically connect one Province with another Province, or one Province with some other part of the world.

Lord MOULTON : I can give you an example : Supposing that it was a trans-continental line of telegraphy which did not touch the Provinces but was entirely for submarine telegraphy ; it would "extend beyond the limits" of a Province, but it would not "connect" two Provinces—through lines of telegraph, as we probably shall have ; that would be an example, would not it ?

Mr. RAYMOND ASQUITH : That depends what is to be

understood by the word "connecting." If "connecting" means connecting as a means of communication, of course the illustration that your Lordship has given would be an exception to the rule which I was trying to lay down.

LORD SUMNER: This goes very far, Mr. Asquith; your proposition is that local undertakings which extend beyond the limits of the Province are exclusively under the control and legislation of the Dominion; so much so, that the Province cannot legislate for them at all?

MR. RAYMOND ASQUITH: Yes, my Lord.

LORD SUMNER: You are reading "undertaking" and "extending" in the widest possible sense?

MR. RAYMOND ASQUITH: Yes.

LORD SUMNER: It seems to me, therefore, it would be *ultra vires* for British Columbia to pass a law forbidding assemblies with brass bands in the streets on certain days, whereby the Salvation Army was touched; because that would clearly be an "undertaking" "extending beyond the limits of the Province," on your view, and it could not be subjected to a local law requiring it not to make sacred music of a particular kind outside a particular place of worship.

MR. RAYMOND ASQUITH: If your Lordship would call that an "undertaking"; I should have thought that could hardly be brought within it.

LORD SUMNER: You can only say that it is less than that by reading it *ejusdem generis* with something else in the section. I know that a *reductio ad absurdum* is often absurd; but still you have to face it, I think.

MR. RAYMOND ASQUITH: With submission, I should say it is not necessary to bring in the *ejusdem generis* rule in order to give to the word "undertaking" the normal meaning which such a word has. The rule in construing an Act of Parliament is to give to each word, in default of any reason for doing otherwise, the normal meaning of the word in the English language. I submit that nobody would think of describing a Salvation Army band as an "undertaking."

LORD MOULTON: When I saw "undertaking" in such company, "lines of steam or other ships, railways,

canals, telegraphs and other works and undertakings"——

The LORD CHANCELLOR : There is no doubt "undertaking" is used in this country as meaning a physical enterprise, very constantly.

Mr. RAYMOND ASQUITH : Yes, my Lord.

The LORD CHANCELLOR : Some of these physical enterprises "connect"; others "extend." For instance, a canal, you might say, "extended" beyond the Province, naturally, whereas a line of steamships might "connect" the Provinces when they were separated by water. I do not think the use of the word "extend," as an alternative to "connect," by any means shuts out the notion that there is a physical genus you are dealing with.

Mr. RAYMOND ASQUITH : My submission was, for what it was worth, that all the other matters enumerated, including, I should have said, canals, were more correctly described as "connecting" than "extending beyond."

Lord MOULTON : A railway goes across the corner of a Province but has no station there——?

Mr. RAYMOND ASQUITH : I should say that physically connected one Province with another; it is a connection; whereas there are other things which can merely be said to "extend" beyond the Province though they do not actually "connect" one Province with another. Supposing it be that it is necessary to import some notion of a physical extension from one Province into another, then I should still say a Company of this nature would come within that description, because, as your Lordships will remember, because I think you have already had before you the patent of incorporation of this Company, the Company is empowered, amongst other things, to acquire, buy, sell, mortgage, exchange, improve and dispose of all kinds of real and personal property; and, therefore, you may have a state of affairs in which this John Deere Company becomes the owner of property in land, part of which is in British Columbia and part of which may extend into one of the adjacent Provinces. In that case I submit you would have a state of affairs which would, I should have thought, have satisfied the description which you find in this subsection 10, of an "undertaking" which physically extends from one

Province to the other ; and, if that be so, then legislation with regard to such a Company must be within the exclusive jurisdiction of the Dominion Parliament.

There is a case to which I might, perhaps, refer your Lordships on that point, though I am far from saying that it is conclusive, but I think, as far as it goes, it is slightly in my favour—*The Corporation of the City of Toronto v. The Bell Telephone Company*, reported in 1905 Appeal Cases, page 52. That was a case in which there was a Telephone Company incorporated by an Act of the Dominion Parliament which proceeded, without obtaining the consent of the Local Authorities, to break up the streets of the City of Toronto for the purpose of laying its cables, and the City of Toronto said that that was *ultra vires* the Corporation ; your Lordships' Board said that the Telephone Company, being incorporated by a Dominion Act, was entitled to do that. The Judgment, delivered by Lord Macnaghten, begins on page 56, and in the 3rd paragraph Lord Macnaghten says : " The Company had been incorporated by a Dominion Statute of April 29th, 1880 (43 Victoria, chapter 67), for the purpose of carrying on the business of a telephone company. The scope of its business was not confined within the limits of any one Province." I call attention to the expression "the scope of its business."

LORD MOULTON : This was incorporated by legislation ; one of its powers was to maintain its line or lines of telephone along the sides of and across or under any public highways.

MR. RAYMOND ASQUITH : Yes, my Lord.

LORD MOULTON : It was an undertaking " extending beyond the limits " or " connecting," whichever way you like to use it ; therefore, just as if it had been a railway, there was a power to legislate.

MR. RAYMOND ASQUITH : With submission, " extending beyond the limits of the Province " merely, because it had power, just as the Company in question has power, to carry on its business in different Provinces, and, possibly, to lay lines which connected physically one Province with another, just as this Company has power to buy land which runs from one Province into another.

Lord MOULTON: But this Company had rights given—not only powers to buy land, a pure question of giving powers to the Company—but it had rights of interference with streets and everything of the kind.

Mr. RAYMOND ASQUITH: Yes, my Lord, but rights which, surely, unless the Dominion legislation which created those rights had power to override the Provincial legislation, could not have been competently exercised in any Province.

Lord MOULTON: Certainly not, but, just like the railway, Dominion legislation with regard to a Dominion railway, it can give the right to expropriate in the Provinces; there is no doubt about that.

Mr. RAYMOND ASQUITH: Yes, my Lord.

Lord MOULTON: This contemplated “undertaking” goes into many Provinces—with regard to that undertaking, it has to have rights of fixing up its poles and putting the lines under the streets, and that is given by Dominion Act.

Mr. RAYMOND ASQUITH: And it is given them by Dominion Act, by reason of the fact that railway and telephone companies and things of that sort come under the express enumerations of section 91. I am endeavouring to show your Lordships that the Company now in question is a Company of an exactly similar kind, that it also comes under the express enumerations of section 91. I may be wrong, but, if I am right, this Company presents a parallel case to the railway companies and telephone companies which the Dominion Parliament can empower to deal with Provincial lands and to carry on their operations in the Provinces without respect to Provincial legislation.

The LORD CHANCELLOR: Should you say a telephone company was a physical undertaking? I ask, because Lord Moulton said it was just as much within the exception as a telegraph company would have been. Is not that like a railway company who set up physical connections? It is really an “undertaking” in the sense in which that word has been used in this country—“a telephone undertaking,” meaning by that to include all the poles and wires and so on.

Mr. RAYMOND ASQUITH: Yes, my Lord, I quite

agree the telephone company does "extend beyond the Province" and does "connect" one Province with another by physical means of connection, but, as I pointed out to your Lordship, this Company could equally establish physical connections between one Province and another under the powers given.

Lord MOULTON : It is only a trading Company.

Mr. RAYMOND ASQUITH : A trading Company, with power to buy and deal with land.

Lord MOULTON : Its own powers. That does not give it any more power with regard to the outside.

The LORD CHANCELLOR : It was no physical undertaking unless it had manufactories in different places, but then these would not be essential to its constitution, whereas the physical configuration is essential in the case of a telegraph or telephone company.

Lord MOULTON : All that the Legislature gave to this Company was a good memorandum of association ; but to the telephone company it gave a great deal more ; it was like a statutory company with statutory powers ; I mean powers over the outside.

Mr. RAYMOND ASQUITH : I will not labour the point ; I think I have made the point, such as it is.

Lord MOULTON : We have got the point.

Sir ROBERT FINLAY : My Lords, I desire during the few minutes that remain for argument to-day, to say a word or two on the two points with which my friends, Mr. Newcombe and Mr. Asquith, have been dealing on sections 91 and 92 of the British North America Act. The point which my friend, Mr. Asquith, more particularly devoted himself to is one that I submit has really been decided by your Lordships' Board in the case of *The Montreal Street Railway* in the Appeal Cases for 1912. The case begins at page 333 ; the passage is at page 342. Lord Atkinson, in delivering the Judgment of the Board, says this ; he is referring to subsection 10 : " Now the effect of subsection 10 of section 92 of the British North America Act is, their Lordships think, to transfer the excepted works mentioned in subheads (A), (B), and (C) of it into section 91, and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament. These two sections must then be read and construed as if these

transferred subjects were specially enumerated in section 91, and local railway as distinct from federal railway were specifically enumerated in section 92. The matters thus transferred are :”—then his Lordship reads (A), (B), and (C), and then he goes on thus : “These works are physical things, not services. The appropriate number of the group would probably be 29 or 29 (A). It has accordingly been strongly urged”—I need not read further. I submit that is manifestly right when one reads the enactment itself : “Local Works and Undertakings other than such as are of the following Classes :—a. Lines of Steam or other Ships connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.” Other “works and undertakings” would comprise such things as waterworks or sewage works extending beyond the limits of one Province into another.

LORD MOULTON : Waterworks is rather a good example ; you might have, and very likely would have, your collecting area in one Province, and then you would take the water down to another ; there would be no real connection ; that is to say, you would not serve the other Province at all.

SIR ROBERT FINLAY : Yes, my Lord ; and one reason for the introduction of this was that “connecting” is obviously applicable only to means of transit or means of communication, whereas with waterworks or sewage works you have works extending over parts of two Provinces, and it was necessary to include such works, although they could not be said to connect the one Province with the other. And another reason for the introduction of these words probably was this, that you might have such a case as Lord Moulton referred to, of an international cable, a submarine cable crossing over the territories. There, there is no connection ; messages are not sent by that cable, but it goes through the land, or a portion of the land, of the State.

LORD MOULTON : Not “tapped.”

SIR ROBERT FINLAY : No ; and, again, there is this reason, that, if you had works extending over the border of the Province into the United States, you want the words to cover that.

LORD MOULTON : Yes, I thought of that.

SIR ROBERT FINLAY : All these things show that the words are required.

MR. NEWCOMBE : What about a wireless service ?

SIR ROBERT FINLAY : My friend says : What about a wireless service ?

LORD MOULTON : The Constitution was made before people thought about wireless.

SIR ROBERT FINLAY : Yes, but I will face the question about wireless. If you have wireless works in one Province for sending and in another for receiving, and *vice versa*, then I suppose they might fairly be talked of as works connecting one Province with another.

LORD SUMNER : There is physical connection, is not there—electricity is physical, is not it ?

SIR ROBERT FINLAY : I suppose it is, and the wireless is the operation through the ether which—I speak with deference in Lord Moulton's presence—allows the "local" electric current to operate.

THE LORD CHANCELLOR : I think we will interrupt you here.

SIR ROBERT FINLAY : If your Lordship pleases.

(Adjourned till Monday next, not before 12 o'clock.)

COUNCIL CHAMBER, WHITEHALL, S.W.

Monday, 20th July, 1914.

THIRD DAY.

SIR ROBERT FINLAY : My Lords, I was dealing with the provisions of the British North America Act, and I had pointed out the reason for the conclusion which I submit is the correct one, that the reference at the end of section 91 would not apply in the present case, the case of incorporation of Companies. Your Lordships recollect that section 91, head 29, assigns to the Dominion such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The LORD CHANCELLOR : You have argued that.

Sir ROBERT FINLAY : Yes, my Lord, and I do not propose to repeat what I said on that point. I also submitted to your Lordships some observations on the construction of section 92, head 10 a, "extending beyond the limits of the Province."

The LORD CHANCELLOR : We know the argument on that point too.

Sir ROBERT FINLAY : I leave that head, my Lord. Then I submit that the argument to which the Attorney-General for the Dominion chiefly devoted himself, that it falls within the head of trade and commerce, is not sound for this reason : Trade and commerce is one thing, the incorporation of companies for carrying on trade and commerce is another.

The LORD CHANCELLOR : You had just begun on that point. Have we got the charter of incorporation printed anywhere ?

Sir ROBERT FINLAY : It is in the separate document.

The LORD CHANCELLOR : Let us see what it says : "To carry on the business of dealers in agricultural implements, carriage and wagons and machinery and a general agency, commission and mercantile business, and to acquire, buy, sell, mortgage, exchange, improve and dispose of all kinds of real and personal property, rights and patents. The operations of the Company to be carried on throughout the Dominion of Canada and elsewhere." Just consider this. Section 92, head 11, is limited to the incorporation of companies with provincial objects. This is not a Company with only provincial objects ; at all events, it is a Company with general objects. It is shut out, therefore, from section 92. It may or may not be that there is some head in section 91, in the specifically enumerated heads, which covers it, but, if not, it falls within the general words at the beginning of section 91, "peace, order and good government," which except matters coming within the classes of subjects assigned by section 92 to the Province. Therefore, it may be that the incorporation of a Company for general objects, for objects which extend all over Canada, is within these general words of section 91, and if you come to the further question,

whether these objects may not conflict with the objects of section 92, then may not Mr. Newcombe be right in praying in aid head 2, "the regulation of trade and commerce," not for the incorporation of companies, because we do not want to resort to that for these words, you have them under the general words at the beginning, but as regards regulation of trade and commerce here it is said in the charter that this Company is to be at liberty, being a Dominion Company, to carry on its trade and commerce all over the Dominion.

Sir ROBERT FINLAY : My Lord, may I in that connection call your Lordship's attention to the language of the Companies Act of Canada, which was passed for the purpose of using the power conferred on the Dominion Government. It is at page 9 of the Respondents' Case, the same Case in which the sections of the British North America Act are set out : "The Companies Act of Canada (Revised Statutes of Canada (1906), Volume 2, Chapter 79) contains sections 5 and 29." Section 5 is this : "The Secretary of State may, by letters patent under his seal of office, grant a charter to any number of persons, not less than five, who apply therefor, constituting such persons," and others who become subscribers, "a body corporate and politic, for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, except the construction and working of railways or of telegraph or telephone lines, the business of insurance, the business of a loan company and the business of banking and the issue of paper money." What I submit to your Lordship is this : Section 92, head 11, gives to the Provincial Government the power of incorporation of companies with provincial objects, and 13 "Property and civil rights in the Province," 16 "Generally all matters of a merely local or private nature in the Province." Now, my Lords, the view that this Company seems to take of this power is that it is not incorporated for any purpose with regard to which the Dominion Parliament has power to legislate, but that it has power under its Dominion charter to set up a local business in any or every Province of the Dominion. I submit that that is not the intention of the British North America Act,

and it is not the intention of this Act conferring power on the Secretary of State for the purpose of carrying out the British North America Act. It would obviously be *ultra vires* for the Dominion Parliament to pass an Act incorporating a company to trade in the Province of British Columbia; another Act for carrying on a local business in the Province of Alberta, the Province of Ontario, the Province of Quebec, and so on. They could not do that.

LORD MOULTON: Do you mean to say that they cannot pass an Act relating to trade and commerce in any one Province?

SIR ROBERT FINLAY: To trade and commerce so far as those words have been defined, they can, of course, but it has been defined, I think, particularly in the case of the *Citizens' Insurance Company v. Parsons*, as not applying to local trade, but to the general aspects of trade in the same sort of sense in which we talk about trade regulations.

THE LORD CHANCELLOR: You say "provincial objects" surely mean some object specific to the Province.

SIR ROBERT FINLAY: Yes, my Lord.

THE LORD CHANCELLOR: Suppose, for instance, the Dominion of Canada had incorporated a shipping company to do coasting shipping, the coming to the ports and going up the rivers and so on. Under the words "navigation and shipping" in head 10 of section 91 they could do that, and that would enable trade to be carried on within the Province.

SIR ROBERT FINLAY: Coasting, because that is specifically assigned to the Dominion.

THE LORD CHANCELLOR: By which word?

SIR ROBERT FINLAY: Under "navigation and shipping."

THE LORD CHANCELLOR: Yes. Navigation and shipping you see there is a trade to be carried on within the Province. That seems to point to this, that a company incorporated with the provincial object, the object being to trade in British Columbia among other places, is not the provincial object within head 11. Surely head 11 means an object limited to British Columbia.

Sir ROBERT FINLAY : I think it does, undoubtedly.

The LORD CHANCELLOR : And admits of trade in British Columbia, an object which is not specific to British Columbia but extends to the whole of Canada.

Sir ROBERT FINLAY : My Lord, may I add to the answer I gave just now a reference to head 10 of section 92 which is extremely germane to be taken into account in connection with the suggestion your Lordship made : " Local works and undertakings other than such as are of the following classes " those that connect several Provinces and so on ; those that " are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada." If it were a power to regulate, navigation and shipping is a perfectly general power to establish regulations for navigation and shipping ; in a general sense I apprehend that that would not carry with it any power to create a company which was to carry on a purely local business between points A and B in the case, say, of British Columbia.

Lord MOULTON : Just test it in this way : Suppose the Province were to pass a law that no one was to carry on trade in the Province but persons born in the Province. Would not that be a regulation of trade and commerce in the Province ?

Sir ROBERT FINLAY : That no one was to carry on a local trade ?

Lord MOULTON : No one was to carry on any business in the Province except a native-born person. Would not that be the regulation of trade and commerce ?

Sir ROBERT FINLAY : That may fall under the principle which has been laid down by authority that the Dominion Parliament can trench—

Lord MOULTON : You see the exclusive right to legislate for the regulation of trade and commerce is given to the Dominion.

Sir ROBERT FINLAY : Yes, my Lord.

Lord MOULTON : I was testing what you are saying in this way : Suppose that they were to say : No joint stock company shall trade within the Province. You would surely say that that was the regulation of trade and commerce.

SIR ROBERT FINLAY : I think that that might fall under the principle which has been laid down in the case of *The Attorney-General for the Dominion v. The Attorney-General for Ontario*, that the Dominion can encroach on the subjects assigned to the local Legislature only in cases where they are of such importance that they affect the body politic of the Dominion, and a regulation of that kind would.

LORD MOULTON : I do not think you are quite following me. I was thinking of this : The exclusive right to legislate under section 91, head 2, is in the Dominion, that is the exclusive right in the regulation of trade and commerce.

SIR ROBERT FINLAY : I agree, my Lord.

LORD MOULTON : Very well. Now, supposing that a Province was to say : No joint stock company shall do business within the Province. You would say that that regulated the trade and commerce in the Province, would you not ?

SIR ROBERT FINLAY : Yes, my Lord.

LORD MOULTON : But if that is the regulation of trade and commerce, then that is a thing which is exclusively in the hands of the Dominion.

THE LORD CHANCELLOR : I think Sir Robert Finlay would say that is civil rights.

SIR ROBERT FINLAY : I do say that, my Lord.

THE LORD CHANCELLOR : But surely you would have to admit that there must be some construction put upon it.

SIR ROBERT FINLAY : Yes, my Lord, but also trade and commerce and both these matters have been dealt with by authority.

LORD MOULTON : Yes, but I was testing it. If you were to take a Provincial Statute of that kind, I do not think you could deny that it regulated trade and commerce.

SIR ROBERT FINLAY : In a sense it would undoubtedly, my Lord.

LORD MOULTON : Supposing you were to forbid partnership, would not that be regulating trade and commerce ?

SIR ROBERT FINLAY : Yes, my Lord, that I submit the local Legislature clearly could do. That would be

property and civil rights and a matter of purely local concern.

LORD MOULTON : All trade and commerce is civil rights.

SIR ROBERT FINLAY : May I refer to two authorities which are of capital importance, I think, in this connection. The first is with reference to the extent of the expression "trade and commerce." That is dealt with at considerable length in the case of the *Citizens' Insurance Company v. Parsons*.

THE LORD CHANCELLOR : We have had that passage read in which they say that it must refer to something of a general character—the general condition of trade.

SIR ROBERT FINLAY : Yes, my Lord, and it would not apply to any regulation of trade which was of a purely local character. At page 113 it is summed up thus : "Construing therefore the words 'regulation of trade and commerce' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single Province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the Legislature of Ontario by No. 13 of Section 92." Now suppose, for the sake of illustration, a particular Province was of opinion that it was very undesirable that a particular class of business should be carried on by companies. Surely it is open to that Province to say : Businesses of a particular kind are not to be carried on by a company.

LORD MOULTON : I should have thought that was,

as clearly as possible, regulation of trade and commerce.

Sir ROBERT FINLAY : With great deference, my Lord, it is purely local arrangements.

Lord MOULTON : Yes, but including political arrangements with regard to trade.

Sir ROBERT FINLAY : That is arrangements with regard to other countries. Political arrangements with regard to that I submit point to that. And, surely, if anything is to be left to the Provinces at all, they must be at liberty to legislate as to whether joint stock companies should be allowed to carry on particular branches of business.

The LORD CHANCELLOR : The passage you are referring to is explained on page 148 of the same volume, in the case of *Dobie v. The Temporalities Board* in Lord Watson's Judgment. If you will look at the bottom of page 148, in explaining the case of the *Citizens' Insurance Company v. Parsons*, he says : "The Ontario Act merely prescribed that certain conditions should attach to every policy entered into or in force for insuring property situate within the Province against the risk of fire. It dealt with all corporations, companies, and individuals alike who might choose to insure property in Ontario—it did not interfere with their constitution or status, but required that certain reasonable conditions should be held as inserted in every contract made by them. The Quebec Act, 38 Victoria, Chapter 64, on the contrary deals with a single statutory trust and interferes directly with the constitution and privileges of a corporation created by an Act of the Province of Canada and having its corporate existence and corporate rights in the Province of Ontario as well as in the Province of Quebec."

Sir ROBERT FINLAY : Yes, my Lord. There the corporation which had been formed by the old Provincial Legislature, which comprised Quebec and Ontario, and related to both Provinces, this Act professes to deal with, and to put it on an individual basis, and what Lord Watson points out is, that is clearly going far beyond your local legislation. It is not like the case of the *Citizens' Insurance Company v. Parsons*, where all that was done was to regulate a particular business, the incidence of a particular business, in the

Province. That is the distinction which Lord Watson is drawing, and I had marked the case of *Dobie v. The Temporalities Board* on the point.

Sir CHARLES FITZPATRICK : Regulating business within the Province, or regulating the contracts.

Sir ROBERT FINLAY : Yes, of course, in regulating contracts to be entered into by insurance companies it was regulating the business.

Sir CHARLES FITZPATRICK : Not regulating the business, but regulating the contract entered into by an insurance company ; not the general business of insurance.

Sir ROBERT FINLAY : No, my Lord, but they had power to say in what way the contract should be entered into.

Sir CHARLES FITZPATRICK : Did they have power to say in what way the business should be carried on in the Province ?

Sir ROBERT FINLAY : I submit so, certainly, my Lord.

Sir CHARLES FITZPATRICK : And also the business of insurance carried on by a company ?

Sir ROBERT FINLAY : I submit they could. However, all these points are a good way off the present point, which is a very much smaller point.

The LORD CHANCELLOR : The last point is very near, because if the Dominion Legislature had incorporated an insurance company and said it might carry on business all over, although it may have incorporated it under the general words giving it residuary jurisdiction, it would still leave the Province the power to object if it trenched on section 92 ; but then comes the power to regulate trade and commerce.

Sir ROBERT FINLAY : Take the illustration that was mentioned the other day, a company incorporated by the Dominion for carrying on local trade in any Province it pleases, a business to which the Legislatures of these Provinces might highly object. The illustration mentioned was that of ice-cream shops, which created some stir in Scotland.

Lord MOULTON : I quite understand by legislation, for instance, legislation applying to everyone, that there might be legislation which they would have to bear, like

the Statute of Frauds, but you could not affect its having the corporate rights which were given to it.

SIR ROBERT FINLAY : The corporate rights, but their execution in a purely local way within the Province is another matter, and I do desire to call your Lordships' attention to the fact that all local affairs are expressly reserved for the Province, and is it to be contended that under this general power to incorporate companies the Dominion could incorporate a company to carry on a purely local business in each of the Provinces which together form the Dominion ?

THE LORD CHANCELLOR : I do not think it could. It could not set up a provincial company, a company with provincial objects, but supposing it incorporates a great insurance company to do business all through Canada, or suppose that the Prudential Company, or some great company here, under the powers of the Canadian Act is to be at liberty to carry on business all through Canada, is not that regulation of trade and commerce ? Are not there two things : The status of a company and then the regulation of trade and commerce ?

SIR ROBERT FINLAY : Yes, my Lord, and I am going to invite your Lordships' attention to this, that the incorporation is a distinct thing altogether from the regulation of the business.

THE LORD CHANCELLOR : Quite ; I think it is.

SIR ROBERT FINLAY : That is very well brought out under the head "Banking." Your Lordship recollects that in section 91, head 15, you have : "Banking, incorporation of banks, and the issue of paper money." I submit to your Lordships that that head alone is enough to show that my friend, Mr. Newcombe, cannot be right when he says that the power to regulate trade and commerce, head 2 of section 91, would carry with it the power of incorporating companies for that purpose.

THE LORD CHANCELLOR : I am at this moment, without at all shutting my mind to Mr. Newcombe's argument, rather inclined to agree with you, but if you once get incorporation under the general powers at the beginning of section 91, then it may be that you get the rest under "Regulation of trade and commerce."

Sir ROBERT FINLAY : Surely not, my Lord, if it is purely local trade, as this is here. We are dealing with a purely local trade.

The LORD CHANCELLOR : It is carrying on a general trade, but part of it is carrying on trade in the Province of British Columbia.

Sir ROBERT FINLAY : Not part of a general trade. It is a local business which it has established in British Columbia. It may get these things elsewhere, just as any British Columbia Company would get these things, but, for all that, although a British Columbia Company formed for local trade by its articles elsewhere, it would still be a company formed for purely local purposes.

The LORD CHANCELLOR : But, you see, there again when you get to head 11 of section 92 it is : "Incorporation of Companies with provincial objects."

Sir ROBERT FINLAY : Yes, my Lord.

The LORD CHANCELLOR : Now, this certainly is not a company incorporated exclusively for provincial objects. It is a company incorporated for trade all over Canada, and you could not incorporate it under that, and it seems to me not to be under that section that the question really arises.

Sir ROBERT FINLAY : I agree, my Lord, but what I say is this, that the protection of this company by charter of the Dominion can only be justified on the ground that it relates to some subject that the Dominion had power to legislate about.

The LORD CHANCELLOR : Not quite that. Once you get outside this category of a company incorporated with a provincial object, these general words of section 91 at the beginning enable you to incorporate it. Is not that so ?

Sir ROBERT FINLAY : Yes, my Lord. I was referring to the Canada Act for the purpose of carrying out the British North America Act, which is on page 9 of the Respondents' Case. Your Lordship sees what section 5 confers.

The LORD CHANCELLOR : "The Secretary of State may, by letters patent under his seal of office, grant a charter to any number of persons, not less than five, who apply therefor, constituting such persons, and others who have become subscribers to the memorandum

of agreement hereinafter mentioned and who thereafter become shareholders in the Company thereby created, a body corporate and politic, for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends." You say that is restrictive?

Sir ROBERT FINLAY: Yes, my Lord. They have read the Act as I read it. The Secretary of State is only given power to incorporate for some purpose for which the Dominion Parliament has power to legislate.

Lord MOULTON: No, is not it this: Not coming within the classes of subjects assigned exclusively to the Legislatures?

Sir ROBERT FINLAY: "For any of the purposes or objects to which the legislative authority of the Parliament of Canada extends."

Lord MOULTON: I did not know; I thought this was a constitutional question. If you are going to say that the incorporation of this particular company was not in due accordance with the Dominion Act, that does not seem to me to be the point here.

Sir ROBERT FINLAY: I was only citing the Dominion Act as showing that they read the Statute of the British North America Act in the same sense as I do.

Lord MOULTON: That does not make much difference, does it? We have to construe how it should be read.

Sir ROBERT FINLAY: Your Lordships have to construe how it should be read, but the fact that the Act is worded in a way inconsistent with the argument on the other side goes some way, I submit.

The LORD CHANCELLOR: Is not it *primâ facie* within the legislative authority of the Parliament of Canada to incorporate for any purpose until you find that section 92 has taken away the power?

Sir ROBERT FINLAY: No, my Lord, I submit not. I submit that it is manifest that the purpose for which the Dominion Act incorporates must be a purpose not falling within the scope of head 11 of section 92, "The incorporation of companies with provincial objects."

The LORD CHANCELLOR: I feel the difficulty about that. You may incorporate a company for an exclusively

provincial object that is quite clear; the Dominion could not. But it does not say that you are not to incorporate a company for the general object, non-local object, and it seems to me if that is not prohibited, then it falls within the scope of the general words of section 91 to enable the Dominion to do it.

Sir ROBERT FINLAY: May I put it in this way: My point is a double one on this. I say, in the first place, that the power of the Dominion Parliament does not extend to creating one company, or nine companies, with power to carry on purely local businesses in the different Provinces of the Dominion, because that is reserved to the Legislature of each Province. That is my first point. Secondly, and what we are concerned with here, is purely local business in the Province of British Columbia, that if your Lordships should hold that it has power to do that then the operations of such a company are clearly subject to the regulations of the local Legislature with regard to local matters and property and civil rights.

The LORD CHANCELLOR: Those are your two points.

Sir ROBERT FINLAY: Yes, my Lord; those are my two points on this head of the case.

(Adjourned for a short time.)

Sir ROBERT FINLAY: My Lords, with reference to the propositions I have laid before your Lordships, there is one case that I desire to call attention to, because it bears upon both points that I have mentioned. It is the case of the *Colonial Building and Investment Association v. Attorney General of Quebec*, which is reported in 9 Appeal Cases at page 157.

The LORD CHANCELLOR: On which of your propositions are you quoting this case?

Sir ROBERT FINLAY: It bears on both.

The LORD CHANCELLOR: Will you just state your propositions again?

Sir ROBERT FINLAY: My first proposition was this: that it would be *ultra vires* for the Dominion to create a Company to carry on a purely local business in one Province; and so it would be *ultra vires* of the Dominion to create a Company to carry on nine local

businesses, in each of the nine Provinces of the Dominion.

LORD MOULTON : Yes, but you are not going to say that it is impossible that a Company can be created which can carry on both local and inter-State trade ?

SIR ROBERT FINLAY : No, my Lord, I am not going to say that ; in fact, this case which I am going to cite shews that that is so. It shews the limitations of my first proposition. Everything that relates to purely local trade is *intra vires* only of the Legislature of the Province. This case deals with that, and also with the second proposition : that if the Dominion incorporates a Company with power to carry on business in Provinces it must be subject to the regulation of the Provinces in all matters which can be held to fall within Property and Civil Rights, or local matters, as defined in section 92. If your Lordships will look at this case, I think the head-note states the point very clearly, and then I will refer to some passages on page 164 and the following pages : “ Held, that Canadian Act 37, Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. The fact that the Corporation chose to confine the exercise of its powers to one Province, and to local and provincial objects, did not affect its status as a corporation, or operate to render its original incorporation illegal as *ultra vires* of the said Parliament. Held, further, that the corporation could not be prohibited generally from acting as such within the Province, nor could it be restrained from doing specified acts in violation of the Provincial law upon a Petition not directed and adapted to that purpose.” In the Court below, the corporation had been prohibited from carrying on business as a corporation within the Province of Quebec for the purposes of the incorporation. That Judgment was reversed by this Board in a Judgment delivered by Sir Montague Smith ; and if your Lordships will turn to page 164, I think you will see the principle very clearly stated : “ Their Lordships cannot doubt that the majority of the Court was right in refusing to hold that the Association was not lawfully incorporated. Although the observations of this Board

in the *Citizens' Insurance Company of Canada v. Parsons*, referred to by the Chief Justice, put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and Provincial Legislatures in regard to the incorporation of Companies. It is asserted in the Petition, and was argued in the Courts below, and at this Bar, that inasmuch as the Association had confined its operations to the Province of Quebec, and its business had been of a local and private nature, it followed that its objects were local and provincial, and consequently that its incorporation belonged exclusively to the Provincial Legislature. But surely the fact that the Association has hitherto thought fit to confine the exercise of its powers to one Province cannot affect its status or capacity as a Corporation, if the Act incorporating the Association was originally within the legislative power of the Dominion Parliament. The Company was incorporated with powers to carry on its business, consisting of various kinds, throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of incorporation, nor warrant the Judgment prayed for, viz., that the Company be declared to be illegally constituted. It is unnecessary to consider what remedy, if any, could be resorted to if the incorporation had been obtained from Parliament with a fraudulent object, for the only evidence given in the case discloses no ground for suggesting fraud in obtaining the Act." Then they go on to consider the second point, as to how far it was competent in these proceedings to restrain the Company from infringing local regulations in Quebec. "There remains the question, which was mainly argued at the Bar, whether the Judgment of the Court of Queen's Bench, which, shortly stated, declares that the Association has no right to act as a Corporation in respect of its most important operations within the Province of Quebec, and prohibiting it from so acting within the Province, can be sustained.

It was not disputed by the Counsel for the Attorney-General that, on the assumption that the Corporation was duly constituted, the prohibition was too wide, and embraced some matters which might be lawfully done in the Province, but it was urged that the operations of the Company contravened the Provincial Law, at the least, in two respects, viz., in dealing in land, and in acting in contravention of the Building Acts of the Province. It may be granted that by the Law of Quebec, corporations cannot acquire or hold lands without the consent of the Crown. This law was recognised by this Board, and held to apply to foreign corporations, in the case of the *Chaudière Gold Mining Company v. Desbarats*. It may also be assumed for the purpose of this Appeal that the power to repeal or modify this law falls within No. 13 of section 92 of the British North America Act, viz., 'Property and Civil Rights within the Province,' and belongs exclusively to the Provincial Legislature; so that the Dominion Parliament could not confer powers on the Company to override it. But the powers found in the Act of Incorporation are not necessarily inconsistent with the Provincial Law of Mortmain, which does not absolutely prohibit corporations from acquiring or holding lands, but only requires, as a condition of their so doing, that they should have the consent of the Crown. If that consent be obtained, a corporation does not infringe the Provincial Law of Mortmain by acquiring and holding lands. What the Act of Incorporation has done, is to create a legal and artificial person with capacity to carry on certain kinds of business which are defined, within a defined area, viz. throughout the Dominion. Among other things, it has given to the Association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any Province consistently with the laws of that Province relating to the acquisition and tenure of land."

Lord MOULTON: Is not that exactly what was said a little while ago: an incorporation creates powers, but not rights?

Sir ROBERT FINLAY: Exactly. Your Lordship, I think, said that in dealing with that recent case of *La Compagnie Hydraulique de St. Francois v. Continental*

Heat and Light Company and another. Your Lordship will recollect that there is a very short Judgment delivered by Sir Arthur Wilson, and I shall have something to say about that case. "It is said, however, that the Company has, in fact, violated the Law of the Province by acquiring and holding land without having obtained the consent of the Crown. It may be so, but this is not the case made by the Petition." Then I need not read the details of the Judgment bearing on that point. On page 167, Sir Montague Smith goes on: "So with respect to the objections founded on the Acts of the Province with regard to Building Societies. Chief Justice Dorion appears to be of opinion that, inasmuch as the Legislature of the Province had passed Acts relating to such Societies, and defined and limited their operations, the Dominion Parliament was incompetent to incorporate the present Association, having for one of its objects the erection of buildings throughout the Dominion. Their Lordships at present fail to see how the existence of these Provincial Acts, if competently passed for local objects, can interfere with the power of the Dominion Parliament to incorporate the Association in question." Then on page 168, after examining the allegations of the Petition, Sir Montague Smith goes on, near the bottom of the page:—"If the Company is really holding property in Quebec without having complied with the law of that Province, or is otherwise violating the Provincial Law, there may be found proceedings applicable to such violations, though it is not for their Lordships to anticipate them, or to indicate their form." I, therefore, submit to your Lordships that while that case shews in the first instance that a Company may be incorporated to carry on business anywhere within the Dominion, and does not lose its rights by for a time carrying on business only in one Province, yet it does not say that it would be competent to the Dominion Parliament to incorporate a Company to carry on business only in one Province, nor to incorporate a Company to carry on nine local businesses in the nine Provinces of the Dominion.

LORD MOULTON: I do not understand nine local Provinces. The business of the Company is not local if it has business in different Provinces.

Sir ROBERT FINLAY : That depends, my Lord. There may be a local business in British Columbia, and another local business in Ontario.

Lord MOULTON : The business of the Company is not local ; it is not provincial.

Sir ROBERT FINLAY : It is doubly local ; it is local in British Columbia and it is local in Quebec.

Lord MOULTON : And, therefore, it is not local.

Sir ROBERT FINLAY : There are two businesses which have nothing to do with one another, the one carried on in British Columbia and the other carried on in Quebec. I only refer to that first part for the purpose of showing the limitations of my first proposition, and I submit that what I put before your Lordships on that head is sound. But the real importance of this case is with reference to the second branch, which so clearly indicates that if the local law is in any way contravened the Company may be restrained from going on with operations contrary to the local law.

Lord MOULTON : Those were, of course, laws which applied generally to all individuals.

Sir ROBERT FINLAY : So to Companies. It is not a case of undue preference, there is nothing of that kind here ; it is perfectly competent to the local Legislature to enact laws applying to the Companies only.

Lord MOULTON : To Dominion Companies only ; to prohibit Dominion Companies from trading.

Sir ROBERT FINLAY : It is perfectly competent to say that no Company shall trade without being registered, and including Dominion Companies in that. It is perfectly competent, I submit, to the Provincial Legislature to say that particular kinds of trade shall not be carried on by Companies at all.

The LORD CHANCELLOR : It must be so, that jurisdiction over property and civil rights gives power to interfere with every kind of person, even over Dominion Companies. But then the question in each case is, what is the question, and we are dealing with the concrete question.

Sir ROBERT FINLAY : Exactly, my Lord.

The LORD CHANCELLOR : And that has to be borne in mind here, where there is a section which says that the

very constitution of the Company is to contain provisions which the Dominion is not to put there.

Sir ROBERT FINLAY : Yes, my Lord, and I put it to your Lordships that a provision that no Company shall carry on business in British Columbia, without registering or being licensed by the Government of British Columbia, is thoroughly *intra vires*, and that it is impossible——

Lord MOULTON : Put the two together as they really exist here. No Dominion Company shall carry on business in British Columbia unless it is registered; no Dominion Company shall be registered under the name which it bears.

The LORD CHANCELLOR : The first proposition is very difficult to reconcile with the case of the *Colonial Building and Investment Association v. The Attorney-General for Quebec*.

Sir ROBERT FINLAY : I submit that there is nothing inconsistent in the Judgment there with what I am submitting, because surely it falls under the head of property and civil rights as to whether you should have two companies carrying on business under the same name in the same Province. It must be competent to the local Legislature, which, as regards all local trade, is supreme, to have the right to say : we are not to have the confusion which several companies under the same name would create. Suppose that there is a company incorporated for local purposes by the legislature of British Columbia, which carries on trade there, and enjoys a large trade. Is it to be said that it is competent to the Dominion Parliament to create another company with exactly the same name and to authorise it to carry on a rival business in British Columbia ?

The LORD CHANCELLOR : It might be in that case not the Province, but the other company itself which would have cause to complain.

Sir ROBERT FINLAY : The Province, of course, would have the power to prevent such grievances arising by saying : "Oh no, we are not to have a second company where there is already a company carrying on business in British Columbia under the same name."

Lord SUMNER : May I test it ? John Smith, born in British Columbia, has carried on business in

Vancouver for years. The Dominion naturalises a person whose name is John Smith. Is it part of your claim that as part of the jurisdiction of the Province over civil rights to say, John Smith No. 2 shall not trade in Vancouver because John Smith No. 1 is there already?

Sir ROBERT FINLAY : My Lord, as regards all consequences resulting from naturalisation, the Province is supreme. That was decided in the case of *Cunningham and Attorney-General for British Columbia v. Tomey Homma and Attorney General for the Dominion of Canada*.

Lord MOULTON : Naturalisation is not essential to the proposition that is put by Lord Sumner. Take it that a man of the name of John Smith comes from Ottawa ; do you mean to say that he shall not carry on business in British Columbia ?

Sir ROBERT FINLAY : The local Legislature would be perfectly competent, surely, to pass an Act that a second firm should not be created with the same name as the one already carrying on business.

Lord SUMNER : That is your answer to my question, that it is part of the jurisdiction to legislate for civil rights to say : There shall only be one person of the same name trading under that name in our Province, or at any rate if there are two they must both have been born in our Province ?

Sir ROBERT FINLAY : Yes, my Lord.

Lord SUMNER : Will you give me the reference to the case you have just referred to ?

Sir ROBERT FINLAY : It is reported in 1903 Appeal Cases, at page 151.

Lord MOULTON : Would you say that that was an interference with trade and commerce ?

Sir ROBERT FINLAY : No, my Lord ; that is a purely local matter.

Lord MOULTON : It may or may not be a local matter, I do not know ; but surely you would say that that was an interference with trade and commerce ?

Sir ROBERT FINLAY : It relates to trade, of course, but not to trade and commerce within the meaning of section 91, head 2.

Lord MOULTON : I should have thought it was, absolutely.

SIR ROBERT FINLAY: I submit not, my Lord. May I put the proposition generally: It must be within the competence of the local Legislature to pass laws or regulations to prevent confusion between different firms, between different businesses. Of course, as regards the general proposition to prohibit a certain John Smith from carrying on business, that is not very likely to arise, but I accept it as a good illustration of the general principle. They are not likely to enact it in that form, but what I do say is that it certainly is competent to them to pass any law they like to prevent confusion between different firms carrying on the same business; and so, my Lord, *a fortiori* where a company takes a name, where it is the act of the company itself, at the moment it comes into being for business purposes, of the name it gets. I say that that is quite different from an individual who, of course, receives his name at a period when it is not yet settled what business he is going to undertake, but I say that to restrain things of that kind must be within the competence of the local Legislature.

May I refer, in answer to the question put to me by Lord Sumner, to the case of *Cunningham*. The head-note is this: "Section 91, sub-section 25, of the British North America Act, 1867, reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalisation—that is, the right to determine how it shall be constituted. The provincial Legislature has the right to determine under section 92, sub-section 1, what privileges, as distinguished from necessary consequences, shall be attached to it. Accordingly, the British Columbia Provincial Elections Act (1897 c. 67), section 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not *ultra vires*." It was in connection with that question that it arose. But still the principles laid down go far beyond that.

LORD MOULTON: Was not that a provincial vote?

SIR ROBERT FINLAY: Yes, my Lord, certainly; of course, the Dominion vote would have been a different matter.

LORD MOULTON: Exactly, it was a provincial vote.

SIR ROBERT FINLAY: Yes, my Lord.

LORD MOULTON: You remember the case of the *Union Colliery Company of British Columbia v. Bryden*, which decided that an Act, the Coal Mines Regulation Act, which prohibited the employment of Chinamen in underground coal workings, was *ultra vires* because it was directed against preventing Chinamen from earning their living.

THE LORD CHANCELLOR: That was the regulation of trade and commerce.

SIR ROBERT FINLAY: That was directed against Chinamen as such, and trenched on a matter with which the Dominion was concerned. May I read what the Lord Chancellor, Lord Halsbury, said on page 156: "The first observation which arises is that the enactment, supposed to be *ultra vires* and to be impeached upon the ground of its dealing with alienage and naturalisation, has not necessarily anything to do with either. A child of Japanese parentage born in Vancouver City is a natural-born subject of the King, and would be equally excluded from the possession of the franchise. The extent to which naturalization will confer privileges has varied both in this country and elsewhere. From the time of William III down to Queen Victoria no naturalization was permitted which did not exclude the alien naturalized from sitting in Parliament or in the Privy Council. In Lawrence's Wheaton, page 903 (2nd annotated ed. 1863), it is said that 'though (in the United States) the power of naturalization be nominally exclusive in the Federal Government, its operation in the most important particulars, especially as to the right of suffrage, is made to depend on the local constitution and laws.' The term 'political rights' used in the Canadian Naturalization Act is, as Walkem J. very justly says, a very wide phrase, and their Lordships concur in his observation that, whatever it means, it cannot be held to give necessarily a right to the suffrage in all or any of the Provinces. In the history of this country the right to the franchise has been granted and withheld on a great number of grounds, conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign. Could it be suggested

that the Province of British Columbia could not exclude an alien from the franchise in that Province? Yet, if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of section 91, sub-section 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.”

LORD MOULTON: That is only that the power to regulate voting is a purely provincial matter as to a provincial vote. As soon as it came to a question of interfering with the rights of the man to work, the decision was the other way.

SIR ROBERT FINLAY: My Lord, surely with regard to any purely local matter in the Province the local Legislature could say that naturalization should not confer the right.

The case to which your Lordship referred is *Union Colliery Company of British Columbia v. Bryden*, which is reported in 1899 Appeal Cases, at page 580. There it was held that a section of the British Columbia Act, the Coal Mines Regulation Act, which prohibits Chinamen of full age from employment in underground coal workings, is, in that respect, *ultra vires* of the provincial Legislature. “Regarded merely as a coal working regulation, it would come within section 92, sub-section 10, or section 92, sub-section 13, of the British North America Act. But its exclusive application to Chinamen who are aliens or naturalized subjects establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament conferred by section 91, sub-section 25, in regard to ‘naturalization of aliens’.” Lord Watson delivered

the Judgment, and says on page 584: "The case was tried in the Superior Court before Mr. Justice Drake without a jury. In the course of the trial the Respondent, the Attorney-General for the Province of British Columbia, who appears to have suspected that this suit was collusive, appeared by Counsel, and he has since, in the character of Intervenant, been a party to the litigation. It appeared from the evidence that the Appellant Company, in working some of their underground seams of coal, employed no workmen except Chinamen who were of full age, and that, in those parts of their workings where miners other than Chinamen were employed, no Chinamen occupied a position of trust or responsibility, such as were alleged in the Statement of Claim. The consequence was that, in the subsequent conduct of the litigation, the Courts below, and their Lordships in this appeal, have only been invited to consider the conclusions of the action in so far as these bear upon the legality of employing Chinese labour in violation of the express enactments of section 4 of the Revised Statute No. 138 of 1897"—that is the section in question. "In other words, the controversy has been limited to the single question—whether the enactments of section 4, in regard to which the appellant company has stated the plea of *ultra vires*, were within the competency of the British Columbian Legislature. In considering the issue to which the case has thus been narrowed, the evidence led by the parties appears to their Lordships to be of no relevancy." Then reasons are given for that. Then, on page 585: "In assigning legislative power to the one or the other of these Parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the Parliaments, whether of the Dominion or of the Provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but when that point has been settled, courts of law have no right whatever to enquire whether their jurisdiction has been exercised wisely or not." Then lower down: "There can be no doubt that, if section 92

of the Act of 1867 had stood alone and had not been qualified by the provisions of the clause which precedes it, the provincial Legislature of British Columbia would have had ample jurisdiction to enact section 4 of the Coal Mines Regulation Act. The subject matter of that enactment would clearly have been included in section 92, sub-section 10, which extends to provincial undertakings such as the coal mines of the appellant company. It would also have been included in section 92, sub-section 13, which embraces 'Property and civil rights in the Province.' But section 91, sub-section 25, extends the exclusive legislative authority of the Parliament of Canada to 'naturalization and aliens.'" Then he reads the proviso at the conclusion of section 91. Then he says: "Section 4 of the Provincial Act prohibits Chinamen who are of full age from employment in underground coal workings. Every alien when naturalized in Canada becomes, *ipso facto*, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalised, but are natural born Canadians. It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada; but section 91, sub-section 25, might possibly be construed as conferring that power in the case of naturalized aliens after naturalization. The subject of 'naturalization' seems *prima facie* to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term 'naturalization' was intended to bear, as it occurs in section 91, sub-section 25. But it seems clear that the expression 'aliens' occurring in that clause refers to, and at least includes, all aliens who have not yet been naturalized; and the words 'no Chinamen,' as they are used in section 4 of the Provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not been naturalized." Then his Lordship states what was held below, and at page 587 goes on thus: "The provision of which the validity

has been thus affirmed by the Courts below are capable of being viewed in two different aspects, according to one of which they appear to fall within the subjects assigned to the Provincial Parliament by section 92 of the British North America Act, 1867, whilst, according to the other, they clearly belong to the class of subjects exclusively assigned to the Legislature of the Dominion by section 91, sub-section 25. They may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and, if that were an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial Legislature, by virtue either of section 92, sub-section 10, or section 92, sub-section 13. But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia. Their Lordships see no reason to doubt that, by virtue of section 91, sub-section 25, the Legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the Provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada. The learned judges who delivered opinions in the Full Court noticed the fact that the Dominion Legislature had passed a ‘Naturalization Act, No. 113 of the Revised Statutes of Canada, 1886,’ by which a partial control was exercised over the rights of aliens. Mr. Justice Walkem appears to regard that fact as favourable to the right of the provincial Parliament to legislate for the exclusion of aliens being Chinamen from underground coal mines. The abstinence of the Dominion Parliament from legis-

lating to the full limit of its powers, could not have the effect of transferring to any provincial Legislature the legislative power which had been assigned to the Dominion by section 91 of the Act of 1867." That, my Lords, I submit, establishes this, that they regarded that as being *ultra vires* on the ground that it was not a genuine coal mines regulation.

LORD MOULTON: Much more than that; they had no right to pass an Act. I mean the question of the rights, privileges and disabilities of the Chinese was a matter they had no right to interfere with.

SIR ROBERT FINLAY: Yes, my Lord.

LORD MOULTON: Is not this the case here: That the rights, privileges and disabilities of a Dominion Company the Province has got no right to interfere with?

SIR ROBERT FINLAY: It goes a great deal further. It was perfectly plain that that was legislation directed against Chinese as such; it was not a genuine coal mines regulation section at all.

LORD MOULTON: This is directed against two companies.

SIR ROBERT FINLAY: With great deference, my Lord, I submit the two things stand in a different category. Every general regulation with regard to coal mines was within the competence of the local Legislature, but this was really an enactment directed against Chinese. It had no reference to the efficiency of the conduct of the mine—not the slightest.

LORD MOULTON: Nor has this to do with the behaviour of the Company.

SIR ROBERT FINLAY: I beg your Lordship's pardon. I most respectfully protest against that assumption. It is directed, in the view of the British Columbia Legislature, to the proper conduct of the business in the Province, and I submit to your Lordships that when that Judgment is read it shows that the legislation was directed against them as Chinamen; it was not genuine coal mines regulation at all. That is the *ratio decidendi*; and that is, of course, an enumerated subject.

SIR CHARLES FITZPATRICK: Is not the effect of this legislation, that the Dominion Parliament cannot give a

name to a company without the consent of the provincial Legislature ?

Sir ROBERT FINLAY : That the Company to carry on business in the Province must be registered or licensed.

Sir CHARLES FITZPATRICK : A Dominion company may not carry on its business within any Province of the Dominion except in so far as the Legislature of that Province is satisfied that it has a proper name.

Sir ROBERT FINLAY : In other words, it is the same thing ; that they have a right to require that they have a licence.

||| Sir CHARLES FITZPATRICK : Not only the right to require a licence, which I think is a very proper thing, but to have the right to say : You have come into this Province having an Act of Incorporation given to you by a competent Parliament, but you shall not have a right to carry on your business in this Province under that name.

Sir ROBERT FINLAY : Surely if it is conceded— I am much obliged to your Lordship, it defines the issue—it cannot be objected that they have the right to require a licence.

||| Lord MOULTON : The real point is this : Have they the right to say : We will not licence you if there is already a company carrying on business in British Columbia ?

Sir CHARLES FITZPATRICK : We shall not licence you unless you shall take such and such a name as the Registrar of Licences shall choose to give you. That is the Statute.

Sir ROBERT FINLAY : That is the same thing put in another way.

Sir CHARLES FITZPATRICK : That is the case we have been arguing.

Sir ROBERT FINLAY : That is the same thing put in another way, my Lord. Surely, if the right to licence is conceded, as I submit it must be conceded, then they have a right to say : We shall not licence a company bearing the same name as another company already established here until some distinctive mark is affixed to the name.

Lord MOULTON : It is a good argument for saying

that they have not an unlimited right to impose conditions for licence.

SIR CHARLES FITZPATRICK : The right to licence is a perfectly well-known thing in Canada. A Company comes into a Province and the Province requires that it should be registered for the purpose of procedure in law.

SIR ROBERT FINLAY : Yes, my Lord.

SIR CHARLES FITZPATRICK : Or for any other purpose, that is to say, that in contracting with that Company people may know where to go to find out its corporate name for the purpose of bringing an action and so forth. But taking the terms of your Statute, you say that this company shall not come into this Province without obtaining a licence, which licence shall be granted by the Registrar, and he is to be the judge as to the legitimacy of the name they select.

SIR ROBERT FINLAY : There is an appeal to the Lieutenant-Governor in Council.

LORD MOULTON : Provided that we are satisfied that the legislation appealed to was *ultra vires*, have we to dissect exactly and how far it was *ultra vires*?

SIR ROBERT FINLAY : I submit to your Lordship that the only question which comes up is whether it is *ultra vires* for them to require a licence.

LORD MOULTON : No.

THE LORD CHANCELLOR : It is much more than that.

SIR ROBERT FINLAY : It cannot go further than the question whether they can impose such a condition on the granting of a licence that it is not to be a company with the same name.

LORD MOULTON : No, it is not with the same name.

THE LORD CHANCELLOR : Look at the British Columbia Amending Act. I am far from saying that that is the only question we have to consider here, but that is one we have to consider.

LORD MOULTON : Look at section 4 of the Amending Act ; it is the amendment of section 18 of the first Act.

SIR ROBERT FINLAY : " Notwithstanding anything contained in any other Act of the Legislature, subsection (1) of this section shall be construed to form part of any Act by or under which a company, society,

or association may be incorporated or registered, or a company, society, or association incorporated or registered outside the Province may be licensed or registered; and no such company, society, or association may change its name without the approval of the Registrar, signified in writing." That Act, of course, was not in force at the time when this question arose.

Sir CHARLES FITZPATRICK : Read section 18.

Sir ROBERT FINLAY : Of the first Act ?

Sir CHARLES FITZPATRICK : Yes.

Sir ROBERT FINLAY : It really depends on section 18 of the first Act.

Lord MOULTON : "—or by a name of which the Registrar shall for any other reason disapprove."

Sir CHARLES FITZPATRICK : Exactly ; he is the sole judge.

Lord MOULTON : The sole judge.

Sir ROBERT FINLAY : That is, I suppose, a power to regulate names. There must be some controlling power over names. A Company might take a name of a scandalous character.

Sir CHARLES FITZPATRICK : In the interests of public morality !

Sir ROBERT FINLAY : Yes, my Lord, that is one thing for which you want such a regulation.

Sir CHARLES FITZPATRICK : The Dominion may make an error in that respect, and some Province should have the power to correct it !

Sir ROBERT FINLAY : I do not suppose it is very likely to happen, that there should be a Dominion Company incorporated, open to objection.

Sir CHARLES FITZPATRICK : In that respect.

Lord MOULTON : That is a denial of corporate rights, because it is only incorporated under a name ; and the consequence is that is a denial of corporate rights.

Sir ROBERT FINLAY : But I say if it is pushed so far as that, it is a manifest interference with property and civil rights in the Province. You have a British Columbia Company carrying on business there under a particular name, and it is said against me that it is not competent to the British Columbia Legislature to say : We will impose no obstacles in the way of other Companies coming here ; but we do say this, they are

not to come here so as to create confusion with Companies already established.

Sir CHARLES FITZPATRICK : That is the concrete case ; but that is not the abstract question we are called on to deal with.

Sir ROBERT FINLAY : The concrete case is the case of this Company.

Lord MOULTON : The other is not the same name ; it differs ; one is, such and such a Company of Illinois, and the other is not.

Sir ROBERT FINLAY : With great deference, in fact, I am not at all sure that that correspondence which has been read forms any part of the case at all. I did not object to it being read, but it is not in the Case.

Lord SUMNER : We are deciding upon two actions. In one, a claim is made for an injunction, and the injunction is granted. The question is whether it should have been granted. The ground alleged is general contravention of the provisions of Part VI upon the ground that they are valid provisions. The other turns upon a defence to an action upon a dishonoured cheque—which, I think, it is not denied was given and dishonoured. Defence : That the Plaintiff by section 168 cannot sue ; for non-compliance with Part VI. If Part VI is upset in any one material particular, does not the claim for the injunction, in the one case, and the defence in the other, go, because you cannot prop it up again, on the ground that “ some parts of the egg ” were good ?

Sir ROBERT FINLAY : I submit not, for this reason. If your Lordship would look at the Statement of Claim in the first action by Wharton to restrain the Company : “ The Defendant is a Company incorporated under the Companies’ Act of Canada,” &c. “ The Plaintiff is a shareholder,” &c. Then : “ 4 ”—I am reading at page 2 of the Record—“ The Defendant Company is not licensed to carry on business in British Columbia as required by Part VI of the Companies Act of British Columbia. 5. The Defendant has been and is carrying on a part of its business in the Province of British Columbia, that is to say, the Defendant has been selling agricultural machinery in the Province of British Columbia through persons residing and carrying on business in the Province

of British Columbia and acting as the agents of the Defendant, the said carrying on of business being illegal and contrary to the provisions of the said Part VI," &c.

LORD MOULTON: Take that, and compare it with the Chinese case—a Company incorporated by the Dominion cannot change its name. You appeal to legislation which says it shall not carry on business unless it does change its name. That is just as in the Chinese case. You forbid such a Company to carry on.

SIR ROBERT FINLAY: I submit that analogy does not hold to legislation directed against Chinese as such. One gets into a different range of thought altogether. What I point out is, that the matter in Part VI relied on is they are carrying on business without a license.

LORD SUMNER: As you are on the Statement of Claim, paragraph 8 is the important paragraph.

SIR ROBERT FINLAY: Yes.

LORD SUMNER: "The Defendant . . . intends, unless restrained from so doing, to continue carrying on business contrary to the provisions of the said Part VI," &c. Therefore the Plaintiff claims an injunction. It is threatening and intending to violate Part VI, which is alleged to be valid. That is the ground for the injunction. Supposing it turns out that Part VI is in some material respect invalid, would any Court grant an injunction to restrain the Company from disregarding an enactment which contains invalid provisions?

SIR ROBERT FINLAY: The portion of Part VI relied on, and the only portion, is that which requires a licence. Paragraph 4 shows clearly what paragraph 8 means: "The Defendant Company is not licensed to carry on business in British Columbia as required by Part VI." Then it has been carrying on business though not licensed. Then: "8. The Defendant, though notified by the Plaintiff to refrain from so doing, intends, unless restrained from so doing, to continue carrying on business contrary to the provisions," and so on.

LORD MOULTON: Precisely the same as the Chinese—they have been working in spite of not being allowed; and the reason why it has not been licensed is because you, by an *ultra vires* statute, I will assume for this

purpose, put a condition which they cannot comply with for a licence ; it is a prohibition.

Sir ROBERT FINLAY : The whole gist of the action, I submit to your Lordships, is whether they had power to require a licence. I will deal with the question of whether they had power to say : We shall not grant a licence if the Company coming in bears a name the same as that of a Company already in the field. X

Lord MOULTON : It is whether they had the right to require a licence on those terms. It is not "require a licence" ; it is, require a licence on those terms. That is the legislation. Supposing a licence had to be obtained at £5 a year, that might be perfectly right ; it might have been pure taxation or for taxation. So you cannot say "a licence" ; you must say a licence in those terms.

Sir ROBERT FINLAY : Surely if there is power to require licences, there are powers to impose conditions on the grant of the licence.

Lord MOULTON : There may be conditions which it is lawful to impose, but because there are conditions which it is lawful to impose, it does not follow that you may impose any unlawful conditions.

Sir ROBERT FINLAY : I should not argue for that, my Lord, so stated.

Lord MOULTON : If you say, "You must get a licence," and impose unlawful conditions, it would be *ultra vires* altogether.

Sir ROBERT FINLAY : Yes, my Lord, but I do put it to your Lordship that this case raises a neat question, whether it was unlawful to require a licence as a condition of carrying on business there. Secondly, my Lord, if your Lordships go into that correspondence which has been read——

Lord MOULTON : No correspondence can touch *ultra vires*.

Sir ROBERT FINLAY : The correspondence is that which my friend relied upon as showing that the Registrar refused registration or licence on the ground that there was another Company of the same name already in possession of the field.

Lord SUMNER : Is not it an equal objection to the validity of this legislation that that ground might have

been taken, whether it was in fact ;—is not the Company entitled to say : We have not taken out a licence ; we have not sought to do it, because it is one of the conditions in your licence that the Registrar may say he does not like our name ?

Sir ROBERT FINLAY : I hope to show later it is quite *intra vires* the Legislature to impose that condition.

Mr. WEGENAST : May I remind my learned friend that the correspondence was filed by the Attorney-General for British Columbia, and not by us.

Sir ROBERT FINLAY : I did not object to the admissibility, and the letters have been referred to without any word of protest, and I am now going, I hope, to satisfy your Lordships that the Legislature of British Columbia had perfect power to require that the Company should not be of a name the same as that of a Company already carrying on business there.

Lord MOULTON : Even that would not save the legislation. *Ultra vires* cannot be decided by that ; you have to examine the Statute and see.

Sir ROBERT FINLAY : The question of licence or no licence would be a question of *ultra vires*. Then it is said : That is not the question ; the question is whether you impose an unreasonable condition. I say, my Lord, that the condition so far from being unreasonable is eminently reasonable. Now the case that I wish to refer to is that of *The Attorney-General for Ontario v. The Attorney-General for the Dominion* in 1896 Appeal Cases, 348.

The LORD CHANCELLOR : That is the *Liquor* Case.

Sir ROBERT FINLAY : The *Liquor* Case ; and I submit to your Lordships that it will be found there laid down that you cannot encroach by Dominion legislation on section 92, which gives certain things to the Provinces, unless it is quite clear that the matter has assumed proportions, or a shape, which renders it one of national concern as distinguished from provincial. At pages 359 and 360, Lord Watson deals with this point : “ It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by s. 91 might, occasionally and incidentally, involve legislation upon matters which are *prima facie*

committed exclusively to the provincial Legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 91 enacts that 'any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.' It was observed by this Board in *Citizens' Insurance Co. of Canada v. Parsons* that the paragraph just quoted 'applies in its grammatical construction only to No. 16 of s. 92.'" Then I need not read that observation which corrects that dictum. Then at page 360 : "The general authority given to the Canadian Parliament by the introductory enactments of s. 91 is 'to make laws for the peace, order, and good government of Canada.'" Then it is declared that it extends to certain things. Then : "There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application ; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial Legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92."

Lord MOULTON : I think those two leave a gap between them : "not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92," I have no doubt about ; I do not suppose anybody has ; but, without doing that, I do not see that they "ought to be strictly confined to such

matters as are unquestionably of Canadian interest and importance." There is an intermediate zone which I should have thought belonged to the Dominion.

The LORD CHANCELLOR: I am not sure that Lord Watson is stating anything more than an old construction. There is hardly a head of residuary legislation that would not be brought up against "civil rights." He says you must construe both; you must construe Dominion legislation as not to mean a power to interfere with specific things.

Sir ROBERT FINLAY: I agree, but it goes rather in this way. What Lord Watson is dealing with is these powers which the Dominion Parliament has not got under any specific enumeration. That is the case we are dealing with here.

The LORD CHANCELLOR: Yes. It is plain that Lord Watson did not believe in the Judgment of this Board in *Russell v. The Queen*, and you will see right through this case, and you will see it earlier in other cases, he was endeavouring to find a foundation for the decision on the Canada Temperance Act of another kind, and he takes the initial words of section 91, and he will not treat regulation of trade and commerce as in itself sufficient to justify *Russell v. The Queen*.

Sir ROBERT FINLAY: No, my Lord.

The LORD CHANCELLOR: And he is always coming back to that and putting a construction on it.

Sir ROBERT FINLAY: But Lord Watson, as was his habit, lays down a principle and works it out with that principle always in his eye, and the principle is this. He says, if you find a subject enumerated in section 91 that is perfectly different from any power which the Parliament of the Dominion may have merely under the general initial words.

Lord MOULTON: It is not different if it is not assigned to the exclusive legislation of the Provinces.

Sir ROBERT FINLAY: The difference is very obvious. He says, if you have a subject enumerated in section 91, then that may, and must, trench upon the rights of the Provinces enumerated in section 92.

The LORD CHANCELLOR: If you get within section 91, it is all over.

Sir ROBERT FINLAY: Within the enumerated subjects.

The LORD CHANCELLOR: If you are within "peace, order, and good government," the question still remains whether it is not within section 92, and then you are outside.

Sir ROBERT FINLAY: Exactly, that is the very principle that I was trying to state.

The LORD CHANCELLOR: I am with you on that.

Sir ROBERT FINLAY: Then he says this, that the power that the Dominion Parliament takes under these general words at the beginning must be read subject to the specific powers conferred on the Province.

The LORD CHANCELLOR: The section says so in terms.

Sir ROBERT FINLAY: You have in the section here the words "property and civil rights in the Province."

The LORD CHANCELLOR: Now, wait a moment, Sir Robert. First of all, you have the power of incorporating Companies limited under section 92 to Companies with provincial objects. Therefore, Companies with objects other than provincial remain for the initial words of section 91. That only carries you as far as *status*. When you come to *power*, you may run up against "property and civil rights." Then the question is whether there section 91 in its detailed heads does not come in, whether regulation of trade and commerce does not assist the matter. That is the point.

Sir ROBERT FINLAY: I submit it cannot, for this reason, that the Company in its local dealings is subject to the local Legislature doubly; firstly, with regard to property and civil rights; secondly, with regard to local laws. These are both mentioned as falling within the jurisdiction.

The LORD CHANCELLOR: If this Board were disposed to extend the application of the doctrine of *Russell v. The Queen*, you would be out of court here.

Sir ROBERT FINLAY: But your Lordships will not. So far from extending *Russell v. The Queen*, it has been narrowed. I do submit that what Lord Watson goes on to say is of very great importance. He says this: "To attach any other construction to the general

power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the Provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each Province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial Legislatures."

The LORD CHANCELLOR: About that, there is no doubt. The whole question is its application.

Sir ROBERT FINLAY: No, my Lord; I submit the whole power of the Legislature under these general words at the commencement of section 91 is the incorporation of the Company; there is no power conferred on the Dominion as to Company law except insofar as, when you provide for the incorporation of a company you attach certain incidents.

The LORD CHANCELLOR: Pause there. You incorporate a Company, and thereby you give it a status of a natural person. Then comes "property and civil rights," and it may be restrictions can be applied not to the Company as such, but to all natural individuals including the Company.

Lord MOULTON: Take it, that it was said that no action should be brought on a cheque on a certain bank. That relates to property and civil rights in one sense. Do you say they could do that? Would not that be interfering with banking—"no action shall be brought on a cheque drawn on an unregistered bank"? Would not that interfere with banking?

Sir ROBERT FINLAY: Banking is specifically referred.

Lord MOULTON: If you are going to include "property and civil rights," I do not know what it cannot do.

Sir ROBERT FINLAY: May I suggest, my Lord, with great deference, you are transgressing the limitation of Lord Watson in the passage I have read. He says,

where you have the thing specifically handed over to the Dominion in section 91, that is very different indeed from a general power under the initial words.

SIR CHARLES FITZPATRICK : Would you make a distinction between a Company incorporated under the enumerated provisions of section 91, and under "peace, order, and good government." You say in one you can interfere ; in the other you cannot. That is qualified by the Manitoba case ?

SIR ROBERT FINLAY : There is no specific power except with regard to banking.

SIR CHARLES FITZPATRICK : The general rule you lay down, it seems to me, as the result of the Judgment you are now dealing with is, if a Company is incorporated under any of the enumerated provisions of section 91, the Dominion Parliament has power to interfere with any of the enumerated provisions of section 92, but if incorporated under the general powers of peace, order, and good government, it cannot interfere.

SIR ROBERT FINLAY : It cannot interfere.

SIR CHARLES FITZPATRICK : Do not you think the Manitoba case qualified that to some extent ?

SIR ROBERT FINLAY : I will take the Manitoba case. If the Company is incorporated for one of the purposes specified in section 91, the Dominion has the exclusive right to legislate on that subject, so that that affords the distinction at once.

SIR CHARLES FITZPATRICK : The best case on that is *Tennant v. The Union Bank*.

SIR ROBERT FINLAY : Yes, that case I was going to refer to, but I submit that is the essential point, if the Company is incorporated with regard to one of the objects in section 91, then the Dominion Parliament has, by that section, the exclusive right to make laws about it.

LORD MOULTON : With all due respect, I think you are making a gloss on the early words of section 91. It says : "To make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." If it does not come under one of those exclusively assigned, then the Dominion has power ?

Sir ROBERT FINLAY : Yes, my Lord.

Lord MOULTON : Then it says : "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared," and so on.

Sir ROBERT FINLAY : I agree, but then, as Lord Watson points out, if it is under these general words, it must be subject to the power specifically conferred on the Provincial Legislature. You cannot, by virtue of these general words at the beginning of section 91, trench upon the exclusive power of the Province with regard to property and civil rights in the Province.

The LORD CHANCELLOR : No, but I am putting this. First of all, it is clear from the *Colonial Building Society's* case in 9 Appeal Cases, the Dominion can incorporate a Company for general trading purposes.

Sir ROBERT FINLAY : Yes, my Lord.

The LORD CHANCELLOR : That being so, it is not competent to the Province to derogate from what the Dominion has done. That goes only to status, I agree ; that goes only to incorporation. Now, when you come to powers, it is no doubt true under "property and civil rights" you may pass laws restricting all individuals, whether natural or artificial, from doing things excepting under certain restrictions which are imposed in the general interest. That, again, is recognised by one of the cases which we have here, but in each case you come back to what it is that is the issue raised. And here, the issue raised is a claim on the part of the Province to the power to insist on a licence for this very sort of Company.

Sir ROBERT FINLAY : Certainly, and my submission to your Lordships is that they have that right, because it is incident to the regulation of "property and civil rights in the Province," and, with regard to the same name as another Company, that it unquestionably falls within the jurisdiction of the local Legislature to prevent people being misled by identity of names in firms or companies carrying on the same business.

The LORD CHANCELLOR : I doubt whether that is a good answer. No doubt it is within "civil rights" to do that, but then the incorporation of the Company

itself is a matter of "civil rights," and there is no doubt that such an incorporation is within the law.

Sir ROBERT FINLAY: Yes, my Lord, I agree.

The LORD CHANCELLOR: That only shows that "civil rights" must have some construction put on it, some limitation of its meaning; otherwise it would cover not only everything in section 91, but almost every power you could give to the Dominion of Canada under the residuary words.

Sir ROBERT FINLAY: The two must be read together. There must be found some way of reconciling the two enactments, and I submit that the local Legislature must have the power of preventing confusion between Companies carrying on the same business, between firms carrying on the same business, between persons carrying on the same business, and that for the purpose of preventing that, it is a perfectly reasonable thing, and one within their unquestioned jurisdiction, to say, in the first place, we require a licence; and, in the second place, we will not grant a licence to an extra-provincial company which carries on business under a name the same as that of a company already occupying the field. Now, there was a case mentioned by the Lord Chief Justice, of *Tennant v. The Union Bank*.

The LORD CHANCELLOR: Where is that reported?

Sir ROBERT FINLAY: That is reported in the Appeal Cases for 1894, p. 31.

Lord SUMNER: Before we pass to that, put shortly, your proposition about the name is that it is a mere police regulation?

Sir ROBERT FINLAY: Yes, my Lord.

Lord SUMNER: It is for the purpose of preventing confusion and fraud.

Sir ROBERT FINLAY: Yes, my Lord.

Lord SUMNER: Well, even if that would justify legislation, and it said: (A) All extra-provincial companies must register themselves and take out a licence; (B) They must have a distinctive name so as to prevent fraud and confusion; how would that justify section 152, which limits the extra-provincial company to carrying on business and enjoying the same powers and privileges as if incorporated in the Province, provided it acts subject to the terms of the licence; because the terms

of the licence may go much beyond the prevention of confusion ?

Sir ROBERT FINLAY : Of course, if a case were made out of unreasonable terms being imposed, it would be another matter.

Lord SUMNER : But this is a legislation which, on the face of it, in section 152, says the Registrar is the sole judge, he may impose terms, and he, subject to an appeal to the Lieutenant-Governor, shall be the sole judge of what is reasonable or not, and, section 149, when you get to the Lieutenant-Governor, he can annul a licence for any good cause of which he alone is the judge.

The LORD CHANCELLOR : You can only succeed if you maintain the validity of that Statute.

Lord SUMNER : Yes.

Sir ROBERT FINLAY : With great deference, this is a concrete case on the Reference ; if the Reference ever comes before your Lordships, your Lordships will have the whole Statute before you.

The LORD CHANCELLOR : Your defence is based, is not it, on that Statute ?

Sir ROBERT FINLAY : On the necessity of a licence, certainly.

Lord SUMNER : A licence of that character. The shareholder says, they threaten and intend to trade without a licence which will comply with Part VI. Among other things, it must be a licence under which the Registrar will see what terms are to be inserted, and, on appeal to the Lieutenant-Governor or otherwise, it is a licence that he may revoke for any other good cause, that is, any good cause in the world. Then the shareholder says, they threaten and intend to disregard the requirements of that section. You have to justify the whole part of the Act.

Sir ROBERT FINLAY : I submit not.

Lord SUMNER : If he had said, they threaten and intend to trade in the name of another company already here, and thereby to cause confusion and subject themselves to penalties, actions for fraud, and holding out, and so forth, it might be a different thing, but he says baldly : They propose to disregard Part VI ; therefore, enjoin them.

Sir ROBERT FINLAY : I have already made the submission, I do put it that the Statement of Claim merely alleges that they disregard Part VI in insisting on trading without a licence.

Lord MOULTON : I agree it may be, that, for one of the reasons put by Lord Sumner, they did not apply for a licence, because of that.

Sir ROBERT FINLAY : They did apply, and then the Registrar said : I cannot register a company which bears the same name with another company already there.

Lord SUMNER : You must stand on one foot or the other. If the ground on which the licence was refused was : You will not take another name, the answer appears to be, We are incorporated under this name : it is an integral part of incorporation to have a name : your legislation which requires us to take another name than that which we are incorporated under derogates from our status as a Dominion incorporated company. Conversely, if it is said : I do not rely on the specific facts—because you did not take out a licence within Part VI—the answer may be : No, we did not, because, among other things, the attempt to get the licence submitted us absolutely to the discretion of the Registrar, and the taking out of the licence, if we had got it, would have limited us and our trading to compliance with the terms that he might insert, and only on those terms could we stand in line with the provincial companies trading in competition with us. On the second ground, it seems to me, you have to justify the whole of Part VI, so far as it relates to licences.

Sir ROBERT FINLAY : It is not an arbitrary power conferred on the Registrar. I must take your Lordships through the provisions of the Act presently, I must come to that, but it is not an arbitrary power conferred.

Lord SUMNER : Of course, it is intended that he should exercise his power as a conscientious official, and no doubt he will do so.

Sir ROBERT FINLAY : And in reference to the provisions of the Act, I submit there is nothing in that section which goes beyond the power of the Legislature, and I do most strongly put it to your Lordships that the Provinces would have the greatest possible reason

to complain if it were laid down that the Dominion Parliament, by creating a company with the same name as a company already in possession of the field in the Province, could compel the Province to admit that company to trade without some addition which enabled people to distinguish the one from the other. I do put it that that is a matter of local concern; it affects "property and civil rights."

LORD SUMNER: I could understand a regulation which says, you can take out your licence, but as there is already a certain "Plow Company" you must always put on your advertisements "No connection with a Plow Company already incorporated"—I could understand that.

SIR ROBERT FINLAY: That would not do, for this reason——

LORD SUMNER: But this seems to imply a "new birth."

SIR ROBERT FINLAY: No, it is merely getting some distinctive addition. "No connection with the Company of the same name which carries on business" at such and such an address, is too long; you want something in the name.

LORD MOULTON: If that is so, it is a prohibition to trade, clearly, because they have no power to alter their name at all.

SIR ROBERT FINLAY: I submit, in conferring such an incorporation, the Dominion is trenching upon the rights of the Province. The Province has a perfect right to authorise a Company to carry on business in British Columbia under a particular name; and if the Province has done that, how can the Dominion come and say: "We shall create a Company which has power to carry on business in British Columbia under the same name, and we have the right to say: It is beyond your power to require any addition"?

THE LORD CHANCELLOR: You might very easily get into the "regulation of trade and commerce" there.

SIR ROBERT FINLAY: I mean, in a purely local matter, as to what is to be done in British Columbia; I say it must rest with the Legislature of British Columbia.

LORD MOULTON: Surely the trade of a Dominion

Company, which is carrying on trade all over British Columbia, is not a purely local matter—surely not?

Sir ROBERT FINLAY : So far as British Columbia is concerned, it has an effect on civil rights which already have been created there and exist there.

The LORD CHANCELLOR : I am afraid we must interrupt you here, and we will go on with this to-morrow morning.

(Adjourned till to-morrow.)

COUNCIL CHAMBER, WHITEHALL,
21st July, 1914.

FOURTH DAY.

Sir ROBERT FINLAY : My Lords, before saying a few words on one or two cases on which I have not yet commented, I desire very shortly to go through section 92 for the purpose of calling your Lordships' attention to the relevant heads there. Now, section 92 gives exclusive jurisdiction to the matters enumerated. The second is "Direct taxation within the Province in order to the raising of a revenue for Provincial purposes." I apprehend that it cannot be denied that there is power in the Province to impose taxation in the way of fees for licences,—that they may insist on licences, in any case, and it could not be disputed, if this were a case of raising revenue by means of licences, that would be within the jurisdiction of the Provinces.

Lord MOULTON : He would have the right to pay.

Sir ROBERT FINLAY : Yes, my Lord; and, if he refused, he might be prevented from trading.

Lord MOULTON : I do not know that.

Sir ROBERT FINLAY : But that is vital to my case.

Lord MOULTON : A debt?

Sir ROBERT FINLAY : Yes, and he might be forbidden from carrying on trade.

The LORD CHANCELLOR : Possibly.

Sir ROBERT FINLAY : That, from my point of view, is vital; unless I establish that point, I have not fulfilled the purpose for which I referred to this.

The LORD CHANCELLOR : Assume that nobody has

said that this is a provision introduced for the purpose of raising taxation.

Sir ROBERT FINLAY : Not merely ; it was one of the objects.

Lord MOULTON : I know no case of taxation that is enforced by anything like that ; I should suspect a provision which purported to be taxation and made a man an outlaw unless he paid.

Sir ROBERT FINLAY : It is the commonest thing in the world to say that a man shall not carry on a certain trade without a licence, and, if he does, he is liable to a penalty.

Lord MOULTON : I agree.

Lord SUMNER : There is one instance I may give ; the stamp on a marine policy is a Revenue stamp, but you cannot sue at all on any document which is a contract of marine insurance unless it is a stamped policy, and you cannot get round it by proving marine insurance by a slip.

Lord MOULTON : Has it ever been decided that taxation of that kind is within the Provincial powers ?

Sir ROBERT FINLAY : Imposing a stamp. That arose, I think, in one of the cases. I forget the name.

Sir CHARLES FITZPATRICK : *The Bank of Toronto and Lambe*. I think that is the case.

Mr. NEWCOMBE : The Quebec case.

Sir ROBERT FINLAY : *The Bank of Toronto and Lambe* is reported in 12 Appeal Cases, 575 : "Held, that Quebec Act 45 Vict., c. 22, which imposes certain direct taxes on certain commercial corporations carrying on business in the Province, is *intra vires* of the provincial legislature. A tax imposed upon banks which carry on business within the Province, varying in amount with the paid-up capital and with the number of its offices, whether or not their principal place of business is within the Province, is direct taxation within clause 2 of section 92," &c.

Lord MOULTON : That was a question of direct taxation. A stamp on affidavits was held not to be.

Sir ROBERT FINLAY : There have been a good many cases, and, if the whole matter were *res integra*, some of these cases might require consideration, because it is very unsatisfactory, to determine whether

it is "direct taxation," by considering whether it will fall on somebody else. The object of saying "direct taxation" was, probably, to exclude Customs and Excise from the taxing powers of the Province.

Lord MOULTON : This was a tax, and levied like all taxes.

Sir ROBERT FINLAY : Yes, my Lord, and it was a very strong case, because it was on a Bank, and banking and the incorporation of banks are specially reserved to the Dominion Parliament. Then there is a long discussion in this Judgment as to whether this is a direct tax or not. At the bottom of page 585, there is a passage which I think is material: "It has been earnestly contended that the taxation of banks would unduly cut down the powers of the Parliament in relation to matters falling within class 2, viz., the regulation of trade and commerce; and within class 15, viz., banking, and the incorporation of banks. Their Lordships think that this contention gives far too wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the Provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks. The words 'regulation of trade and commerce' are indeed very wide, and in *Severn's Case* it was the view of the Supreme Court that they operated to invalidate the licence duty which was there in question. But since that case was decided, the question has been more completely sifted before the Committee in *Parson's Case*, and it was found absolutely necessary that the literal meaning of the words should be restricted, in order to afford scope for powers which are given exclusively to the provincial Legislatures. It was there thrown out that the power of regulation given to the Parliament meant some general or inter-provincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parson's Case*, they would be straining them to their widest conceivable

extent. Then it is suggested that the Legislature may lay on taxes so heavy as to crush a bank out of existence," &c. Then, at page 587, reference is made to the constitution of the United States and what was laid down by Chief Justice Marshall: "In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the State Legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial Legislatures under section 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91." Then: "Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated Provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General." And that, I submit, is a very important consideration: any law passed by any Province which unduly interfered with any matter under the control of the Dominion Parliament might be nullified by the action of the Lieutenant-Governor.

LORD MOULTON: That is only an administrative or legislative safeguard; it cannot help us on the interpretation of it.

SIR ROBERT FINLAY: It was very much relied on. In the United States, where there is no central controlling authority with regard to State legislation, it was pointed out by your Lordships' Board, not only in this case, but also in a more recent case, that that rendered the decisions in the United States of little value in construing a constitution where there is a central authority, and where every law must run the gauntlet of that central authority.

LORD MOULTON: I think the distinction was that the whole residuary power lay in the Dominion in this case; and it was different there.

THE LORD CHANCELLOR: A little more than that;

there is no power of disallowing laws in the United States; therefore the Supreme Court has taken the wide view of the meaning as distinguished from the letter. Here there is a power, and Lord Hobhouse said you must confine yourself to the letter.

Sir ROBERT FINLAY: The same thing was said emphatically in an appeal from Australia, where the question was the taxation of federal officials by the particular States, and Lord Halsbury pointed out that the distinction was between a monarchy where there is a central power which may disallow and the United States which is made up of an aggregate of States each of which speaks for itself. In the same connection, may I mention the *Brewers' Association of Ontario v. The Attorney-General for Ontario*, reported in the Appeal Cases for 1897, at page 231? It was a case of a Brewers' Association. There was an Act in Ontario, the Liquor Licence Act, which required every brewer and distiller to obtain a licence thereunder to sell wholesale within the Province. It was held that that was *intra vires* of the Provincial Legislature, as being direct taxation within sub-section 2 of section 92, and as comprised within the term "other licences" in sub-section 9 of the same section. The Judgment was delivered by Lord Herschell, and, at page 236, he says this: "Their Lordships are quite unable to discover any substantial distinction between the case of *Bank of Toronto v. Lambe* and the present case. So far as there is any difference, it does not seem to them to be favourable to this appeal. Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act." Then I need not read the rest of that, because no question arises here of indirect taxation.

Lord MOULTON: That was on the question of its being direct taxation.

Sir ROBERT FINLAY: Yes, my Lord; therefore I pass over the rest of that: "It was argued that the provincial Legislature might, if the judgment of the Court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the

consumer or customer"—and so on. "But if the Legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation"—

The LORD CHANCELLOR: You must look at the substance of the transaction to see.

Sir ROBERT FINLAY: Yes, my Lord.

Then I go on with the British North America Act, item 3 is immaterial, 4, 5, 6 and 7. Then we come to "Municipal institutions in the Province"; that, of course, does not directly bear on the present case, but No. 9 does, "Shop, saloon, tavern, auctioneer and other licences in order to the raising of a revenue for provincial, local or municipal purposes." Whether under Item 2 or under Item 9, requiring these licences, I submit, was *intra vires* of the Legislature of British Columbia. Then Item 10, "Local works and undertakings"—that is an important subsection not directly on the matter with which I am now dealing, but I have already dealt with it fully, having regard to the argument of my friend, Mr. Newcombe, as to its bearing on section 91. Then 11, "The incorporation of companies with provincial objects." 13, "Property and civil rights in the Province." 14, "The administration of justice in the Province," including Courts of both civil and criminal jurisdiction. 15, "The imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province," etc. 16, "Generally, all matters of a merely local or private nature in the Province." I, therefore, most respectfully submit to your Lordships that it is perfectly clear that all matters affecting "property and civil rights in the Province" are subject to the provincial Legislature, and so all local matters; and I, therefore, put it in this way. You cannot read a power inferred to be vested in the Dominion Parliament from the general words, and the general words alone, at the beginning of section 91, that there is to be any overriding, by virtue of that incorporation, of the rights of the provincial Legislature under section 92. I submit to your Lordships that the effect of incorporation is to put the corporation so created in the same position as if it were a natural person, to make it *intra vires* of that corporation to do certain things, but, as regards the right to carry on business in a particular Province, as regards the

conditions on which it should be carried on, all that rests absolutely with the Provincial Government. Take as a very good illustration a case which I think has been mentioned by my friend, Mr. Newcombe, of the law affecting the holding of land by corporations. It is admitted, and stated in one decision of your Lordships' House, which I think my friend referred to by name.

Sir CHARLES FITZPATRICK: *Citizens' Insurance Company v. Parsons*, as to the law of mortmain.

Sir ROBERT FINLAY: Yes; although a corporation may be created for the purpose of trading in land, it might be impossible for that corporation to carry on business in any single Province in the Dominion because each Province might forbid the holding of lands by corporations.

The LORD CHANCELLOR: That is a law that applies not merely to trading corporations but to all sorts of corporations, and to some natural persons.

Sir ROBERT FINLAY: Yes, my Lord.

The LORD CHANCELLOR: Where there is a trust, for instance.

Sir ROBERT FINLAY: It might; but, practically speaking, it relates to the holding of lands by bodies corporate; and I submit, inasmuch as it is conceded, and has been settled by the decision of your Lordships' Board, that the corporation may not be at liberty to carry on such land business in any Province in the Dominion, that, necessarily, proceeds on the view that it is for the Legislature of each Province to say what business shall be allowed.

Lord MOULTON: It obviously makes a great impression on your mind, but all those references do not affect me at all. Let me give an example. Supposing there is a brewing company, a provincial company, and the Province goes in for absolute prohibition; there is no business for a brewing company to do there, and it cannot do it. Its powers remain just the same; it only suffers like all other companies do and all other individuals in that Province because there is no alcohol there, and the consequence is it cannot trade in alcohol. That does not seem to me to touch its status the least in the world. Nobody pretends that you can over-ride the power of provincial legislation on things like that.

Sir ROBERT FINLAY : But here our legislation does not touch the status of this Company at all.

Lord MOULTON : Indeed, it does.

Sir ROBERT FINLAY : We do not say : You shall change your name ; all we say is : We cannot allow you to trade under that name here, and if you want to be licensed to trade here you must have something to distinguish you from another company, an American Company, the Illinois Company, already in possession of the field.

Lord MOULTON : You forbid it to trade. It has only one name. It is not allowed to trade under any other ; you say it shall not trade under that name ; that is prohibition.

Sir ROBERT FINLAY : We give it full enjoyment of the name ; we say : You shall not carry on business,—just as they said, with regard to alcohol, you shall not sell alcohol.

Lord MOULTON : You not only interfere with the status but with the incorporating documents ; you pass an Act that certain things contained in this amending Act shall be deemed to be within the incorporating documents.

Sir ROBERT FINLAY : We do not touch it ; it remains with its corporate name and powers, only we say : You shall not exercise them here unless you become registered under a name which enables people to see that it is not the Company already there.

Lord MOULTON : Which you cannot do ; you are not allowed to trade under any other than your own name.

Sir ROBERT FINLAY : That is not interfering with the incorporation of the Company or with anything which falls under that head ; it is imposing a condition as to trading in British Columbia.

Sir CHARLES FITZPATRICK : Your argument comes to this : while you may concede the power vested in the Dominion to create a company to carry on business throughout the whole Dominion, the Province says, You can come to the door of the Province, but you cannot enter here unless you change your name.

Sir ROBERT FINLAY : We cannot allow you to trade here, because it is clear it is within our jurisdiction to

prevent confusion by companies of the same name carrying on business.

LORD SUMNER: Apart from trading, these letters patent provide that the Company is incorporated with all the rights and powers given by the Canadian Companies Act. Although I have not actually found the section, I have no doubt that provides that an incorporated company has the power and right of suing and being sued in its corporate name. When we look at section 141 of Part VI of the British Columbia Act it is provided that "an extra-provincial company licensed or registered under this or some former Act may sue and be sued in its corporate name." I suppose that has the effect, unless it is licensed or registered it cannot sue or be sued even in its corporate name, and, if the condition of registration is that it should change its corporate name, then it can only sue or be sued, even though licensed and registered, by its new corporate name. Surely, an interference like that with the right of suing and being sued, which is incidental to its incorporation, is a derogation of status by provincial legislation. You see the distinction between the trading point: it is one thing to say: We shut the door, but it seems a different thing to say: Though you are incorporated to sue in your Canadian name, you shall not enter our Courts unless you add on a registration, or, if so required, change your name.

SIR ROBERT FINLAY: But, surely, it would be a tremendous innovation as to the powers of the Province. I am very sorry to be so long in this case, but this case is one of really capital importance to Canada. Your Lordships may have an opportunity of considering the point——

THE LORD CHANCELLOR: It is a case in which we intend to take considerable time before giving our Judgment.

SIR ROBERT FINLAY: If your Lordship pleases, and there is the other case in which the Reference is coming up.

THE LORD CHANCELLOR: It is because we have that in view we are going to be extremely careful.

SIR ROBERT FINLAY: If that case is heard before Judgment is given in this——

The LORD CHANCELLOR: I think you may assume that that will not be so; it will not be heard before Judgment is given in this.

Sir ROBERT FINLAY: Then I will deal with this case as fully as I may on the special circumstances of this case. I think you should know that the circumstances are not the same by any means in all the Provinces, that the Acts which the Provinces have passed vary considerably, dealing with this subject, and the question that arises here is with regard to the particular legislation in British Columbia.

Lord SUMNER: I think one can pick out five or six matters in Part VI, each one of which may be determined on different considerations; there is the right to sue, the obligation to take out a licence, the obligation to have an agent; there is an obligation to pay fees on licences; all those may depend on substantially different considerations.

Sir ROBERT FINLAY: To return to the point your Lordship put to me with regard to suing, the importance of which I recognise, I submit that section 92 (14) shows that that is absolutely within the jurisdiction of the provincial Legislature.

Lord SUMNER: It is "civil rights?"

Sir ROBERT FINLAY: It falls under "property and civil rights."

Lord SUMNER: It is, clearly, civil rights?

Sir ROBERT FINLAY: "Property and civil rights" is (13), but if falls under (14), the administration of justice, establishing Courts, and including procedure in civil matters in those Courts.

Lord MOULTON: Do you mean to say they could pass an Act saying that no-one other than those born in British Columbia could sue in the Courts?

Sir ROBERT FINLAY: That is a matter that would require consideration.

Lord MOULTON: It is very near this.

Sir ROBERT FINLAY: With great deference not, because your Lordship will see that they must have power to prevent confusion of names, and they must have power, under their faculties with regard to the administration of justice and procedure, to say in what

cases, and under what conditions, a Company, or a person, shall be allowed to sue.

LORD MOULTON: It is the administration of justice, not the refusal of justice. It comes to exactly what I say; for instance, that nobody but those who are born in British Columbia shall sue in the British Columbian Courts.

SIR ROBERT FINLAY: The administration of justice, including the constitution of Courts of civil and criminal jurisdiction, and including procedure and civil matters in those Courts.

LORD MOULTON: Procedure in civil matters?

SIR ROBERT FINLAY: A proposition of tremendous scope, and actually prevents the provincial Legislature from prescribing the conditions on which suits are to be brought in their own Courts——

LORD MOULTON: Procedure is expressly within their powers; but, if they said, nobody but a native born British Columbian could sue, that is neither the administration of justice nor procedure.

SIR ROBERT FINLAY: Instances of that kind, if I may be permitted to say so, do not help much, on account of the existence of a central authority which could disallow such a law.

LORD MOULTON: I took that because it seems to me exactly the same as this case, if you allow that incorporation makes it a legal entity with powers.

SIR ROBERT FINLAY: It makes it a legal entity, I agree, but the question what it may do within the Province is for the Province.

LORD SUMNER: Of course the Statute of Frauds is "procedure," and I suppose no one questions that legislation of that kind would *prima facie* be within (14). I do not think it quite follows that it is "procedure," to say: "You shall not come into Court at all," when that is for the purpose of compelling compliance either with a revenue section or with a regulation of companies section. No doubt it takes the form of "procedure," because you avail yourself of that section by plea, but whether one would normally describe it as "procedure" to say that a person who has not complied with some public duty, for example, if you had an express section "that no undischarged bankrupt shall bring an action

for debt"—which is the substance of the thing—you could hardly call that "procedure"; that goes to substantive right.

Sir ROBERT FINLAY : I agree, but we were supposing at the moment that a Company should not sue unless licensed and the licence involved having a name preventing confusion with existing companies in the field already. I put it that if it appeared that anything, although procedure, was manifestly introduced into the Act with some side purpose, that might be a reason for disallowing the law, and it is there that the importance of the considerations which were adverted to by Lord Halsbury, and in the case which I read to your Lordships this morning, comes in, the central authority which can disallow the law. Here the law has not been disallowed. I submit it is on matters manifestly within the competence of the Province; therefore, it is impossible it can be overridden by the general power which does not come in under any express head of section 91 but only under the powers of general good government of the Provinces.

Mr. NEWCOMBE : The provision with regard to companies suing and being sued is found, not in the Companies Act, but in the general Interpretation Act, section 30, chapter 1, of the Revised Statutes of 1906.

The LORD CHANCELLOR : I have been looking through the Companies Act, and could find nothing on this.

Sir ROBERT FINLAY : This is in the Revised Statutes of Canada, section 30. I had better read the material words of that : "In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall,—(A) vest in such corporation power to sue and be sued, to contract and be contracted with by their corporate name, to have a common seal"—I need not read more, I think—to sue and be sued, contract and be contracted with by their corporate name. That is quite *intra vires* the Parliament of Canada, but it is always subject to this, that the procedure in any particular Province is under the control of the Provincial Legislature, and the clause with regard to the effective incorporation in this Canadian Interpretation Act cannot possibly affect it.

Lord MOULTON: That affects the statute of incorporation, and the consequence is by the Dominion legislation this Company has the right to sue in its corporate name. You say it shall not sue in its corporate name.

Sir ROBERT FINLAY: I submit the Dominion Legislature cannot, adversely to the Legislature of a Province, say that the Corporation shall have the right to sue in the Provincial Courts—it is for the Provincial Legislature to determine the conditions annexed to that.

I have dealt with the various clauses in sections 91 and 92 of the British North America Act, and I now propose to refer to the various sections which my learned friend has dwelt upon as being *ultra vires* in the British Columbia Act, the Act as to Joint Stock Companies. Now, section 18, your Lordships observe, applies to Provincial companies as well as to extra-Provincial companies: “18 (1) A company or society may not be incorporated nor may an extra-provincial company be licensed or registered by a name identical with that by which a company or society or firm in existence is carrying on business or has been incorporated”—I do not think I need read any more. Your Lordship sees that is a general enactment applying to all companies, whether provincial or extra-provincial. I submit to your Lordships, if anything is within the power of the Provincial Legislature, that is in the power of the Provincial Legislature, and that the attempt to refuse them the power to apply that to extra-provincial companies cannot be supported by reference to the power conferred by the general words to incorporate companies for purposes throughout the Dominion. Then the next section referred to was section 139, that is, forbidding to carry on business within the Province until it has been licensed or registered. I submit that that is *intra vires*—that cannot be *ultra vires*—that the local Legislature may require that any extra-provincial company before it carries on business shall be licensed or registered. Now, I take the specific provisions that my friend relies upon, and I say that in like manner none of them are objectionable. He referred to section 149, giving power to the Lieutenant-Governor-in-Council to “suspend or revoke and make null and void

any licence granted " " to any company which " " fails to keep a duly appointed attorney within the Province, or to comply with any of the provisions of this part of this Act, or for other good cause." That is incidental to the powers of the Province, and, I submit, no objection can be based on that. If the licence may be required, there must be power to suspend it. Then my friend referred to section 150, which applies sections 102 to 110 to every extra-provincial company. These are sections which apply to provincial companies; they contain provisions as to mortgages, charges, and so on. I submit to your Lordships that there is nothing in these sections 102 to 110 which can even plausibly be alleged to be beyond the power of the Legislature of the Province. They are elaborate provisions as to a register of mortgages, and so on.

LORD MOULTON: Those apply to all companies, I take it?

SIR ROBERT FINLAY: To all companies, yes. Then section 152 provides: "Any extra-provincial company duly incorporated under the laws of—(A) The United Kingdom; (B) The Dominion; (C) The former Province of Canada," and so on, "may obtain a licence from the Registrar authorising it to carry on business within the Province on compliance with the provisions of this Act, and on payment," of certain fees.

THE LORD CHANCELLOR: That is a strong section.

SIR ROBERT FINLAY: Yes, but not stronger, I submit, than the powers of the Provincial Legislature warrant, because they say that this licence may be got on compliance with the provisions of this Act. I have gone through the provisions of the Act so far, and I hope have shown that there is nothing in them up to this point beyond the powers of the Provincial Legislature. I will go through the others, of course, presently. Then it goes on: "and shall, subject to the provisions of the charter and regulations of the company, and to the terms of the licence, thereupon have the same powers and privileges in the Province as if incorporated under this Act." That is not a disabling clause. These words are intended in furtherance of the incorporation of the Dominion company, that is to say, as soon as you are licensed you shall,

subject to the terms of your incorporation, have every right that a company incorporated in the Province under the same powers would have. It is really in furtherance of the powers of the extra-provincial company if it complies with the essential conditions of being registered.

MR. NEWCOMBE : Subject to the terms of the licence.

SIR ROBERT FINLAY : Yes. Then it refers to the Trust Companies Act.

LORD MOULTON : The Trust Companies' Regulation Act is a very very broad Act indeed. It refers to loans and securities. I should have thought it affected all banking.

SIR ROBERT FINLAY : I submit not, and it is not impugned on the ground that it would touch upon banking. I submit it must be within the powers.

LORD MOULTON : It does not concern us here.

SIR ROBERT FINLAY : I will pass that.

LORD MOULTON : I do not think it applies to this case, but if it is a question of *ultra vires* I think that is very astonishing. It is not what we should call confined to Trust Companies, I think.

SIR ROBERT FINLAY : It relates to a particular class of companies, and I submit that it must be within the jurisdiction of the Provincial Legislature to say: We do not desire that this class of business should be carried on here except under the authority of the Provincial Legislature. Your Lordships see that the definition of "Trust Company" in the Act referred to shows that it relates to companies that have the power of holding money on trust.

LORD MOULTON : Much more than that—receiving deposits.

SIR ROBERT FINLAY : More than that, but that is one of the objects. Stopping at that object for the moment, it is essential, I submit, that the local Legislature should have the power of saying: We do not desire operations of this kind, where we must take special precautions for solvency and ability to meet engagements, should be carried on by extra-provincial companies; we reserve to the Registrar power to refuse to issue a licence for any such purposes to an extra-

provincial company. If any power is to be left to the Provinces at all, they must have that.

LORD MOULTON : I suppose you say they might say the same with regard to any trading company?

SIR ROBERT FINLAY : They have not said so, but with regard to this provision, it must be *intra vires*, and was indeed highly essential. I think the same thing applies to the other provisions : "Receiving deposits of money and other personal property for investment and loaning such money on real or personal security, or receiving deposits of money and other personal property and issuing its obligations therefor, and every mortgage company, and every loan company, and every company issuing shares, debentures, bonds, or other evidences of investment or indebtedness, the repayment whereof, with profits or with interest, is intended to be procured by the investments of the funds of the company at interest upon real or personal securities." All these are things which must necessarily be controlled by the local Legislature. Therefore, it was highly proper, and certainly within the powers of the British Columbian Legislature, to impose the proviso at the end of section 152. Then my friend referred to section 153 : "Before the issue of a licence to any such extra-provincial company," the company are to file "a true copy of the charter and regulations . . . showing that the company by its charter has authority to carry on business in the Province." Then an affidavit of the continued existence of the company. "In the case of an insurance company, a copy of the last balance-sheet and auditor's report thereon." Then "(D) A duly executed power of attorney, under its common seal, empowering some person therein named, and residing in the city or place where the head office of the company in the Province is situate, to act as its attorney and to sue and be sued, plead or be impleaded, in any Court, and generally, on behalf of such company and within the Province, to accept service of process and to receive all lawful notices, to issue and transfer shares or stock."

LORD MOULTON : Just look at that : "to issue and transfer shares or stock" ; that is not a power you can give to an attorney, is it ?

SIR ROBERT FINLAY : There must be some person

there who is qualified to do such acts in the Province, if the company is carrying on business there.

LORD MOULTON: "to issue and transfer shares or stock"—I doubt whether it is within the powers of an ordinarily incorporated company to give an attorney power to issue shares.

LORD SUMNER: There are a number of instances—I do not know by what machinery, in which American and Canadian companies have offices in London where they keep a London register. The Canadian Pacific does it, and I am sure two or three of the American Railway Companies; so that I suppose they have some power.

SIR ROBERT FINLAY: It is highly convenient that there should be in the Province where business is carried on, some person authorised on behalf of the company to do these acts. It goes on: "and to do all acts and to execute all deeds and other instruments relating to the matters within the scope of the power of attorney and of the company to give to its attorney." I submit that on every principle it is within the power of the Provincial Legislature to require a thing like that, which is a matter of everyday convenience.

LORD SUMNER: My difficulty about that is I should have thought those provisions particularly were what you would call "regulation of trade and commerce." If you had found, apart from this case, section 153, and said: "I wonder under what section of the British North America Act that comes and under which of the enumerated heads in the two sections," I should have thought anyone would have pitched on "regulation of trade and commerce." It is a "regulation of trade" to say that, if a company is carrying on its trading business in nine Provinces in the Dominion, it shall have in each one of its Provinces a local head office, and at that office an attorney who can issue stock and register transfers of stock.

SIR ROBERT FINLAY: Having regard to the interpretation given of "trade and commerce" in the *Citizens Insurance Company v. Parsons*, more than once referred to, I submit the head to which one would naturally look in this connection is "property and civil rights in the Province," because all you have is, you shall have

an attorney in the Province with power to sue and to do these things which are necessary.

LORD SUMNER: I can understand if it has been concluded by authority, but, going by the words of the Act, that would be to my mind the natural head to put it under.

SIR ROBERT FINLAY: It manifestly falls within "property and civil rights."

LORD SUMNER: I think everything would be that except "criminal procedure."

LORD MOULTON: If it is "civil rights" it is only if you take it to mean the whole of the legislation affecting people in the Province. If you are going to do that, what is the use of the many other enumerations?

SIR ROBERT FINLAY: The power given to the Dominion to incorporate Companies for general purposes cannot supersede the power of the Provinces to say what business they choose shall be carried on in the Province under what conditions. According to that argument, the decision about mortmain would be wrong, because it would be an enactment by provincial Legislatures of provisions which prevented a land company incorporated by the Dominion from carrying on business in any Province. That has been held to be *intra vires* of the Provinces, and I ask your Lordships to apply exactly the same principle to the present case.

THE LORD CHANCELLOR: Without expressing a final opinion about it, I should say "civil rights" was a residuary expression, it was intended to bring in a variety of things not comprised in the other heads, including what was not touched by section 91 in the specifically enumerated heads there.

SIR ROBERT FINLAY: Yes, but "trade and commerce" under section 91 does not relate to the transaction of business within a particular Province. Your Lordship has in mind the definition given in *Citizens' Insurance Company v. Parsons*.

THE LORD CHANCELLOR: I remember that definition distinctly.

SIR ROBERT FINLAY: I submit that definition holds the field and is right in itself, because "trade and

commerce" never can be intended to include the regulation of trade within the Province.

The LORD CHANCELLOR : Therefore, that any Province can legislate on trade and commerce locally ?

Lord MOULTON : If that be so, "trade and commerce" is within the powers of the Dominion, provided the trade and commerce is not carried on in any Province.

Sir ROBERT FINLAY : Not at all ; I object to that mode of stating the question ; the definition given in *Citizens' Insurance Company v. Parsons* is what I take my stand upon, and I say that it leaves to the Provinces the right of regulating what goes on in their own Provinces.

Sir CHARLES FITZPATRICK : Does the Provincial law of mortmain affect a Dominion railway company in the Province ? Take the Canadian Pacific Railway, would the Provincial law of mortmain, say, in Quebec, apply to that Company ?

Sir ROBERT FINLAY : It might not, I should say, because it falls under a different head.

Sir CHARLES FITZPATRICK : Is not this it, when a company is incorporated under one of the enumerated powers of section 91, then the Province cannot affect it at all ?

Sir ROBERT FINLAY : That is my distinction.

Sir CHARLES FITZPATRICK : If the Company is incorporated, on the other hand, under the section respecting "peace, order, and good government," then your contention is it may be affected so far as "property and civil rights in the Province." That is your distinction ?

Sir ROBERT FINLAY : Yes ; it makes all the difference, it is absolutely essential where you have a head specifically assigned to the Dominion, as is the case with lines of railway running through several Provinces—it is essential that no Province should have the power to interfere with that ; section 91 dominates ; but the present is not that case at all ; it is not the case of anything specifically enumerated in section 91 ; it is the case merely of the general power to make laws for the order and good government.

Lord SUMNER : May I put this illustration, which

will perhaps bring home to you the difficulty I feel about it: the Dominion passes an Act in which it says, for the better regulation of trade throughout the Dominion no action shall be brought for the price of goods sold upon credit of less than £10 in value. That is an intelligible section, and it would be a regulation of trade; it would require that trade should be carried on on a cash basis under £10. Then, suppose a Province passes this section: "The civil right of recovering the price of goods sold and delivered upon a sale on credit is hereby taken away," it would be very difficult to say, would not it, that the second section could stand in face of the first?

Sir ROBERT FINLAY: I respectfully submit that the first section passed by the Dominion Parliament would be *ultra vires*.

Lord SUMNER: Not within "regulation of trade"?

Sir ROBERT FINLAY: It is not within the meaning of that section. It would be enabling the Dominion Parliament to pass a law which affected every contract made purely within one Province.

Lord SUMNER: If that is the answer, it disposes of the illustration; I was assuming something which would be within "the regulation of trade."

Sir ROBERT FINLAY: May I just refer to *Citizens' Insurance Company v. Parsons*.

The LORD CHANCELLOR: I remember the passage.

Sir ROBERT FINLAY: If your Lordship will look at the passage beginning at page 112—it goes on to page 113—this is really vital, and although it has been adverted to before, I make no apology for calling attention to it again.

The LORD CHANCELLOR: The famous illustration of the Scotch and English Union.

Sir ROBERT FINLAY: Yes; that is not in this paragraph, but in the subsequent one: "The words 'regulation of trade and commerce' in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments requiring the sanction of Parliament down to minute rules for regulating

particular trades. But a consideration of the Act shows that the words were not used in this unlimited sense. In the first place, the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the Legislature, when conferring this power on the Dominion Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in section 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency. 'Regulation of trade and commerce' may have been used in some such sense as the words 'regulation of trade' in the Act of Union between England and Scotland (6 Anne, chapter 11), and as these words have been used in Acts of State relating to trade and commerce." Then the illustration from the Scotch Union is a little elaborated; I need not read the rest of the paragraph. "Construing, therefore, the words 'regulation of trade and commerce' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single Province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the Legislature of Ontario by No. 13 of section 92." I submit that is the sound view.

LORD SUMNER: I daresay that is a complete answer to my illustration; I must think of another.

Sir ROBERT FINLAY : I hope one favourable to the argument.

Lord MOULTON : The reference to Scotland seems dead against your argument, because such a thing as deciding what are the "prohibitions, restrictions and regulations of trade" is clearly looked upon as a regulation of trade, for instance "that all the subjects of the United Kingdom shall have 'full freedom and intercourse of trade and navigation.'"

Sir ROBERT FINLAY : If your Lordship would go on—"to and from all places in the United Kingdom and the Colonies ; and Article VI enacted that all parts of the United Kingdom from and after the Union should be under the same 'prohibitions, restrictions, and regulations of trade.'"

Lord MOULTON : Therefore, a provision that certain corporate bodies should not have the power of suing is clearly looked upon by that—

Sir ROBERT FINLAY : Not within the meaning of this, if your Lordship will take the next sentence : "Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only," and so on.

Lord MOULTON : That is getting out of the point, but it clearly looks upon, in fact gives its authority to, our recognising that anything which would affect the things being carried on "under the same restrictions" "the full freedom of intercourse of trade and navigation" would be a "regulation of trade." Suppose you say, such and such companies shall not trade in British Columbia, that is a regulation of trade according to this reference.

The Lord CHANCELLOR : I should be very sorry to pursue this reference. I think it is misleading.

Lord MOULTON : It is very misleading.

The Lord CHANCELLOR : Why it was introduced in Sir Montague Smith's Judgment I do not know. I can conceive nothing more dangerous.

Sir ROBERT FINLAY : He only meant to give an illustration of the words "regulation of trade" which shows it did not apply to regulating a particular trade locally, that is the point that Sir Montague Smith was on, and he develops that in the following paragraph.

LORD MOULTON : I think all he wanted to say was, making certain prescriptions as to the form of contract in a particular trade is not within the "trade and commerce." I do not think it went further.

THE LORD CHANCELLOR : I do not see how this has very much to do with it, because the Dominion is not purporting to regulate the trade in the Province in a particular way. What has happened is that the Province has interposed restrictions which might from one aspect be looked at as a regulation of trade in that particular Province ; that is what has happened.

SIR ROBERT FINLAY : Therefore *intra vires* the provincial Legislature.

THE LORD CHANCELLOR : A local matter within section 92, or, possibly, "civil rights."

SIR ROBERT FINLAY : That is the point.

THE LORD CHANCELLOR : A point I desire to consider very carefully.

SIR ROBERT FINLAY : Then I will go on with the sections my friend relied on. I was on section 153 : The other requirements there I do not think can be quarrelled with : "(E) Notice of the place where the head office without the Province is situate ; (F) Notice of the city, town, district, or county in the Province where the head office of the company is proposed to be situate ; (G) The amount of the capital of the company ; (H) The number of shares into which it is divided." All these are eminently reasonable. I submit up to that point I have shown there is nothing which is beyond the powers of the provincial Legislature. Then my friend goes on to a group of sections, from 166 to 170 inclusive. These are penalties for carrying on business without licence, and a provision that the unlicensed company, section 168, is not capable of maintaining an action. I submit every one of these is thoroughly within the powers of the provincial Legislature. Then section 169 my friend, Mr. Wegenast, I think did not question : "No extra-provincial company required by this Act to be licensed or registered shall be capable of acquiring or holding lands or any interest therein in the Province, or registering any title thereto under the 'Land Registry Act,' unless duly licensed or registered under this or some former Act." I say that that section carries

everything else with it. If they impose upon the Company a disability to hold land, why may not they deal with it——

LORD MOULTON : They say that the cases are too strong for that. I do not see that that case touches this much more than any other one.

SIR ROBERT FINLAY : But if the local Legislature has the power, as it undoubtedly has according to a direct decision of your Lordships' Board, to prescribe the conditions on which the land may be held——

LORD MOULTON : Do you mean mortmain ?

SIR ROBERT FINLAY : Yes, my Lord.

LORD MOULTON : This is not mortmain.

SIR ROBERT FINLAY : It is exactly the same principle ; no distinction can be drawn. The previous case did not turn on the Mortmain Acts in any way ; it turned upon the conditions on which land may be held, and I submit to your Lordships that if this section is *ultra vires* there is no ground for saying that the others are *intra vires*.

SIR CHARLES FITZPATRICK : You say that the Province may declare that a Dominion Company may be subject to the law of mortmain, but not a Provincial Company.

SIR ROBERT FINLAY : I think that such a law as that would probably be disallowed.

SIR CHARLES FITZPATRICK : Disallowance is one thing and constitutional powers another.

SIR ROBERT FINLAY : I say that that would not be *ultra vires*.

SIR CHARLES FITZPATRICK : Is there any authority for that ? It strikes me very strongly that the case of the *Citizens' Insurance Company v. Parsons* decides exactly the reverse.

SIR ROBERT FINLAY : But I do not think that any such line has been laid down.

SIR CHARLES FITZPATRICK : I think that the case of the *Citizens' Insurance Company v. Parsons* says that if such a law was applicable to all companies in the Province then the Dominion governed it. That is what they said in the case of *Dobie v. The Temporalities Board*.

SIR ROBERT FINLAY : Which was a case of the regulation of all contracts of a particular kind, applic-

able to all. In the first place, such a law would certainly be disallowed.

The LORD CHANCELLOR : You say it is *intra vires*.

Sir ROBERT FINLAY : Yes, my Lord.

Sir CHARLES FITZPATRICK : You say it is *intra vires* to make the distinction between the Dominion and the Provincial corporation ?

Sir ROBERT FINLAY : Yes, my Lord, I do. I say that it is *intra vires* ; it might not be proper. Then the next section my learned friend referred to is section 170, which imposes a penalty on the agent for carrying on if the business is carried on by an unlicensed company. Then the last section, I am glad to say, is section 173, which relates to the acts of former companies carrying on business in the Province prior to the passing of the Act of 1897 not being attacked or invalidated by reason of the fact that the company or directors have become liable to any penalties under this Act. I think that fairly read there is nothing in any of these sections and I come back to the main point in this case, before I conclude by referring to one or two cases which have come before your Lordships' Board which have not been quite fully handled, to submitting that it is *intra vires* to require the licence ; it is *intra vires* to impose as a condition of the licence that the Company shall not carry on business under a name calculated to deceive.

Now, my Lords, I turn to the case of *La Compagnie Hydraulique de St. Francois v. The Continental Heat and Light Company* which is reported in 1909 Appeal Cases.

The LORD CHANCELLOR : We have had that case referred to.

Sir ROBERT FINLAY : What I was going to put to your Lordships is this : That that case is really to be supported only on the ground that that company had power to have works without any restriction as to their being in one Province only. I have got the case here. The section of the Act incorporating the Company was one which contained clauses which are not set out in report ; the report is only a very short one. I have got here the record forming part of the brief in the case, and at the end of the Appellants' Case the material

portions of the Dominion Statute incorporating the Respondent Company are set out. It gives them power to manufacture, supply, sell and dispose of gas and electricity; to lay, erect, maintain and operate all works for holding, receiving and purifying gas and all other buildings and so on; and then under section 8 power to enter on any highway with the consent of the municipal council. Those powers are not at all restricted to one Province, and under those powers they clearly might have constructed works within the meaning of section 92, head 10.

The LORD CHANCELLOR: Anywhere in the Dominion?

Sir ROBERT FINLAY: Yes, my Lord, anywhere in the Dominion extending from one Province to another.

Lord MOULTON: They might carry on their business all over the Dominion.

Sir ROBERT FINLAY: Yes, my Lord. Now it is only in view of that, I submit, that the decision in this case of *La Compagnie Hydraulique de St. Francois* can be sustained. In the very short Judgment on page 198 there occurs this passage: "The Respondents took steps to act under their charter by establishing works within thirty miles from Disraeli. The Appellants applied for an injunction to restrain them from so doing. The Courts in Canada refused the injunction, and against that refusal the present appeal has been brought. The contention on behalf of the Appellant Company was that the only effect of the Canadian Act was to authorise the Respondent Company to carry out the contemplated operations in the sense that its doing so would not be *ultra vires* of the Company, but that the legality of the Company's action in any Province must be dependent on the law of that Province. This contention seems to their Lordships to be in conflict with several decisions of this Board. Those decisions have established that where, as here, a given field of legislation is within the competence both of the Parliament of Canada and of the Provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the Province if the two are in conflict, as they clearly are in the present case."

The LORD CHANCELLOR: That requires a little con-

sideration, because it is only when it is within section 91 that the Dominion prevails over something which is within section 92, the enumerated heads of section 91.

SIR ROBERT FINLAY: Yes, my Lord, and if those observations are read in connection with what your Lordship has just pointed out they are right enough. They are not right if read in the Judgment in the sense of applying to a company which had power to carry on business in every Province in Canada or over the whole Dominion. That is not an enumerated head. Works which extend from one Province to another are within the enumerated head by virtue of the inclusion within the exclusive powers of the Parliament of the Dominion of everything that is expressly excepted in section 92, and I submit that the qualification is a most important one and that this case must be read subject to that qualification.

Now, my Lords, that difference is illustrated very well by the case of the *Toronto Corporation v. Bell Telephone Company*, which is reported in 1905 Appeal Cases at page 52. There it was held that where a company was entitled by a Dominion incorporating Act without the consent of the Municipal Corporation to enter upon streets and highways of the City of Toronto—it was to lay conduits or cables thereunder—that any attempt by the local Legislature to interfere with it was excluded. There again you have the case of works which fall within the express exceptions in section 92, and, therefore, fall within the exclusive competence of the Dominion Parliament; and for that reason, just as in the case which was put by one of your Lordships to me some time ago, the local Legislature cannot interfere. They could not interfere with the Canadian Pacific Railway on the ground of any local laws as to holding land. They could not say that no such railway shall hold land in the Province, because that would be interfering with a subject expressly reserved, namely, intercommunication between the several Provinces or a railway running from sea to sea.

Then, my Lords, I have so recently referred to the case of the *Citizens' Insurance Company v. Parsons* that I do not think I should read any of the passages there again. I refer your Lordships respectfully to the

two passages, one dealing with trade and commerce, which I have just referred to, and the other dealing with the capacity to hold land at pages 116 and 117. On these grounds I submit that this case is, not only one of very great importance, but is one in which the decision should be affirmed.

I should just mention that the reports of the Reference will be found in the 48th Volume of the Reports of the Supreme Court of Canada on page 331. That Reference ranged over a great number of matters. Of course, I do not refer to any of the judgments there; the judgments are very many and very long and they occupy the whole of this number.

The LORD CHANCELLOR : It is a convenient abstract.

Sir ROBERT FINLAY : Yes, my Lord. They contain a great deal of matter bearing upon it. Of course, I do not suggest for a moment that they are binding upon your Lordships, but I do say that there is a great deal of matter there that requires attention, and if your Lordships will allow me to put the reference to that case in that compendious way I would respectfully ask you to take into consideration the matters that are there dealt with, particularly, if I may say so, in the judgment of Mr. Justice Duff. There were other judgments the other way, and they, of course, will receive most careful consideration at your Lordships' hands, but I think on this point we had the majority of the judgments in our favour.

Sir CHARLES FITZPATRICK : I was going to ask you what is the general result ?

Sir ROBERT FINLAY : It is very difficult to state that in a word. I may put it very compendiously that the general result was in my favour.

Sir CHARLES FITZPATRICK : You think so.

Sir ROBERT FINLAY : I think so, my Lord, but I admit that there are a great many cross currents.

Lord MOULTON : A somewhat barren victory.

Sir ROBERT FINLAY : We should have liked to have succeeded more completely, but I think it ought to carry us through on this case.

Lord SUMNER : You are not afraid to invite us to read them ?

Sir ROBERT FINLAY : No, my Lord, I invite your Lordships to do that.

The LORD CHANCELLOR : I have been looking at the head-note, and it appears to me to be almost a case of *non omnes poscentes*; there is an opinion given by almost everybody.

Sir ROBERT FINLAY : I submit, my Lords, on these grounds that we are entitled to succeed. I do not know in what order your Lordships desire to hear Counsel.

The LORD CHANCELLOR : I think it would be better to conclude the general argument.

Mr. GEOFFREY LAWRENCE : If your Lordships please, the contention which my learned leader has advanced on behalf of the Province of British Columbia is one of complete simplicity and one which I submit is supported by authority. It is this : That the power of the Dominion to incorporate companies is the power to create legal persons, but that as to the rights of those legal persons in the Province they are subject to the Provincial law.

Sir CHARLES FITZPATRICK : Is that your general proposition ?

Mr. GEOFFREY LAWRENCE : Yes, my Lord.

Sir CHARLES FITZPATRICK : Do you say that as to a railway company or a bank ?

Mr. GEOFFREY LAWRENCE : I am referring to companies other than companies which are dealt with in the enumerated heads of section 91.

Sir CHARLES FITZPATRICK : You ought to begin by making a distinction as to the powers.

Mr. GEOFFREY LAWRENCE : Of course, my Lord, we are only dealing here with companies which are incorporated under the general powers of the Dominion.

Sir CHARLES FITZPATRICK : Assuming that these companies in question here are not incorporated under any of the enumerated heads of section 91.

Mr. GEOFFREY LAWRENCE : That is a limitation of my proposition and I intended that to be implied. The passage I was going to refer your Lordships to which I say is an authority for that proposition is the passage in the case of the *Colonial Building and Investment Association v. The Attorney-General of Quebec* in 9 Appeal Cases at page 166. Of course, your Lordships

remember that was a company incorporated by the Dominion for the purpose of dealing in land by selling and leasing land throughout the Dominion. What their Lordships said there was this : " What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, namely, throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any Province, consistently with the laws of that Province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of Incorporation gives it capacity to do so."

LORD MOULTON : I should have thought that was really in substance the passage most against your contention. It clearly points out that this is a trade entity, of course, subject to the general laws of the Province with regard to the material in which it trades, but not otherwise affected by it.

THE LORD CHANCELLOR : We have had this passage read to us three or four times already. Speaking personally, I have the whole point upon it fully in my mind.

MR. GEOFFREY LAWRENCE : If your Lordship pleases. I will pass to the difficulties that are raised, but I submit to your Lordships that that is really conclusive in favour of the proposition that the power of the Dominion under the general words of section 91 is to set up artificial persons, and that when those artificial persons are set up they are just as much subject to the legislative authority of the Province as natural persons are, and I submit that it is clear that natural persons could be prevented from carrying on business in the Province and that they are subject to what is really the passing-off law of the Province.

The first difficulty which is put in answer to that contention is that this legislation is really an interference with the corporate name. My Lords, even if it was an interference with the corporate name, which I submit it is not, if it is justified under the general words of section 91, there is nothing in the fact that it is an interference with the corporate name, which prevents it

being overridden by powers which are expressly given to the Province under section 92. The general words of section 91 must be read subject to the powers given to the Provinces in section 92, and if the Dominion power to incorporate companies rests upon the general words of section 91, then any legislation competent to the Provinces under the enumerations of section 92 is not *ultra vires* because it interferes with the powers to incorporate companies under the general words of section 91. But, my Lords, I submit it does not interfere with the corporate name or the corporate entity of the Dominion Company in any way or form. It is simply legislation which provides against passing off; the ordinary action of passing off. Now, undoubtedly, in the Province the ordinary principles of common law are in force as to the passing off action, and I submit to your Lordships that it is perfectly clear that the Provincial Legislature can alter and affect in any way that it pleases the principles of the common law upon that subject, and I submit to your Lordships that equally it could alter the law as to passing off with reference to companies as it could with reference to natural persons. It can say to natural persons: You cannot come into this Province and trade under your own name if that name is such as that it would be likely to deceive the public on account of somebody else already trading in the Province under that name. That is clearly within the provincial power, and I submit to your Lordships that it is equally within the provincial power to pass legislation with reference to companies. That is not companies' legislation; that is passing-off legislation. In order that I may bring home to your Lordships how local the matter is in this case, there is no evidence before your Lordships that this company, which is trading in British Columbia under the name of the John Deere Plow Company, trades anywhere else.

Sir CHARLES FITZPATRICK: Surely.

Mr. GEOFFREY LAWRENCE: I mean in Canada. The John Deere Plow Company of Illinois—

Lord MOULTON: I thought there was a case which decided specifically that the question whether it had exercised its power in any other place but that Province was quite immaterial.

The LORD CHANCELLOR : Yes, it is constitutional.

Mr. GEOFFREY LAWRENCE : My Lords, I am dealing with the American Company, not with the Canadian Company. The observation which I was making was that there is nothing in this case to show that the American Company, which had the name of the John Deere Plow Company—

Lord MOULTON : The John Deere Plow Company of Illinois ?

Mr. GEOFFREY LAWRENCE : No, your Lordship is mistaken in that. If your Lordship will look at page 5 of these letters you will see that the Company's name is "John Deere Plow Company of Illinois." That is not the name of the Company.

Lord MOULTON : I do not know that. I should think it is very likely that that is the name of the Company, because very likely there would be an Illinois Company and another Company.

Mr. GEOFFREY LAWRENCE : If your Lordship reads on I think it is perfectly clear.

Lord SUMNER : Take Wharton's action. Wharton alleged in paragraph 2 of his Statement of Claim that the Company is incorporated under the Companies Act of Canada with its head office at Winnipeg in the Province of Manitoba. Surely that is not enough for the purposes of this case that they have a head office and they do carry on business and try to do business in the Dominion elsewhere than in British Columbia.

Mr. GEOFFREY LAWRENCE : Your Lordship is dealing with the Canadian Company.

Lord SUMNER : The John Deere Plow Company.

Mr. GEOFFREY LAWRENCE : Your Lordship sees there are two John Deere Plow Companies.

Lord SUMNER : Is Wharton's case the one as to the Canadian Company ?

Mr. GEOFFREY LAWRENCE : Yes, my Lord.

Lord SUMNER : The other one is an Illinois Company.

Mr. GEOFFREY LAWRENCE : No, my Lord. The John Deere Plow Company, which is the company involved in this case, applied for licence in British Columbia. There was another company at that time on the Register, not a Canadian Company at all, a company incorporated in Illinois, which had taken out a licence in

British Columbia. The name of that company was the John Deere Plow Company, not the John Deere Plow Company of Illinois, but simply the John Deere Plow Company.

The LORD CHANCELLOR : We quite understand that, and I am assuming that it is so.

Mr. GEOFFREY LAWRENCE : If your Lordship pleases.

The LORD CHANCELLOR : I never had any idea that there was a difference as to the name.

Mr. GEOFFREY LAWRENCE : If your Lordship pleases. The point that I was making was this, that it is a matter purely of British Columbia concern. The confusion between these names will not arise anywhere except in British Columbia. It is purely a local matter ; purely a matter of civil rights in the Province, and, therefore, that it is a matter of such essential importance for the Province that they should be able to enact this passing-off legislation. If it was a matter which the Dominion had to deal with, the Dominion authorities sitting at Ottawa know nothing about this John Deere Plow Company of Illinois ; that company, so far as I know, does not carry on business anywhere else in Canada and has not had anything to do with the Dominion authorities. Therefore, I submit to your Lordship that this is essentially a matter of a local nature.

Lord Moulton : If these facts are necessary for your argument—I do not think that they are facts—I still think that the title of the Company is Illinois from the next letter ; but still you ought to have shewn that.

Mr. GEOFFREY LAWRENCE : My Lord, I am appearing for the Attorney-General for British Columbia, who is an Intervenant in this Appeal.

Sir CHARLES FITZPATRICK : You are appearing to support the legislation which presents the abstract question for consideration.

Mr. GEOFFREY LAWRENCE : I quite agree, my Lord, but I am only putting this by way of illustration, to shew how local these matters may be, and how much a matter of civil rights in the Province. I submit that I have sufficiently dealt with the difficulty which is raised that this is an interference with the corporate name, and then comes the difficulty that such legislation,

I imagine, Dominion Company legislation, is justified by section 91, head 2, the Regulation of Trade and Commerce. I respectfully submit that it does not fall under that head within the meaning which has been put upon those words in the case of the *Citizens' Insurance Company v. Parsons*. I ask your Lordships to consider how far the decision in this case upon that ground would carry your Lordships. I submit that it would carry your Lordships to the extent of saying that Dominion Companies are absolutely beyond and above the Provincial Law. If the power to legislate for Dominion Companies is justified under the regulation of trade and commerce it must involve the regulation of the operations of those Companies; and if that is so I submit that your Lordships cannot draw the line between the regulation of the name and the corporate entity of those Companies; but it must include also the regulation of their contracts, which has been expressly held not to be so in the *Citizens' Insurance Company v. Parsons* case, and the regulation of their dealings in land in the case of the *Colonial Building and Investment Association v. The Attorney General of Quebec*. There the Company was incorporated for the purpose of trading in land. If it had been incorporated under the power of regulation of trade and commerce, then surely the Provincial Legislatures would have had no power at all to deal with its operations in land. I submit it is absolutely clear that if it had been attempted to justify the incorporation of that Colonial Building Association under Trade and Commerce that Company would have been not subject at all to the Provincial Legislatures; and similarly in the *Citizens' Assurance Company v. Parsons*, where a Company was incorporated for the purpose of insurance, then it was held that the Company was subject to the Provincial Legislation as to insurance. If the incorporation of that Company had been under the regulation of trade and commerce, how could the Province have interfered with the regulation of trade and commerce?

For these reasons, and for the reasons of my learned leader, I submit that this Appeal should be dismissed.

Mr. LAFLEUR : My Lords, I apprehend that at this

stage in the discussion the general canon of construction applicable to sections 91 and 92 of the British North America Act may be considered as definitely settled. May I just state what I understand to be the proper canon of construction to apply in my own words, to see if I carry your Lordships with me in my premises, before I pass to the application of them to the case under consideration ? In ascertaining whether a Statute of the Province is *intra vires* you must first of all see whether it is contained in the enumerations in section 92 ; secondly, you must make sure that it is not comprised within the enumerated heads in section 91, for in that case it is withdrawn from the Provincial jurisdiction to the extent of the overlapping. If the legislation satisfies both those tests, then my submission is that it is within the exclusive competence of the Provincial Legislature ; that in that case the Provincial legislation overrides and dominates the Dominion legislation. There is no division of the field then ; it becomes exclusively within the power of the Province to legislate upon any of the enumerated subjects in section 92, provided that they do not come into conflict with the enumerated heads of section 91. So that when the Dominion is legislating under its general, or what we have called its residuary powers, it cannot compete with Provincial legislation. That being so, that principle, I submit, is settled by the decisions in the cases of the *Attorney-General for Ontario v. The Attorney-General for Canada*, which is reported in 1896 Appeal Cases, at pages 360 and 361, and in the case of the *City of Montreal v. Montreal Street Railway*, which is reported in 1912 Appeal Cases, at pages 343 and 344. Now the subject-matter of this enactment, chapter 39 of the Statutes of British Columbia, is an Act relating to Joint Stock Companies, or, as my friends for the Appellants have called it, it is legislation on Company Law. Now I submit that Company Law is clearly, and *prima facie*, within the enumerated subjects in section 92, that is, property and civil rights ; and then negatively it is not to be found in the enumeration of subjects in section 91. There is no such title as "Company Law" under the enumerated heads of section 91. There is Railway Law ; there is Banking, and Patents, and Copyright, but there is no

such enumeration as Company Law. Therefore the whole body of Company Law, minus the incorporation of Companies, is within the exclusive jurisdiction of the Province. Now may I just go a step further, after establishing that the only part of the subject that is withdrawn, by implication, not expressly, from the Provincial jurisdiction, is the incorporation of Companies with objects other than Provincial; then I submit that the legislation, the British Columbia Act, does not purport to deal with the incorporation of extra-provincial Companies at all. It contains elaborate provisions for the incorporation of local companies, but it in no way pretends to create artificial persons outside of the Province. It does not deal with the incorporation of companies outside the Province. It has provisions which extend to all Companies outside the Province, and whether they be incorporated by the Dominion, or by Foreign countries, and it applies a universal rule to all of them; but it in no way attempts to create or to confer a status upon these foreign corporations.

Now may I advert briefly to one of the sections which has been criticised by my friends for the Appellants as trenching upon the powers of the Dominion, namely, section 152? Section 152 says:—“Any extra-provincial Company duly incorporated under the laws of (A) The United Kingdom; (B) The Dominion; (C) The former Province of Canada; (D) Any of the Provinces of the Dominion; and (E) Any insurance Company to which this Act applies; duly authorised by its charter and regulations to carry out or effect any of the purposes or objects to which the legislative authority of the Legislature extends, may obtain a licence from the Registrar”; and at the bottom of the page: “subject to the provisions of the charter and regulations of the Company, and to the terms of the licence, shall thereupon have the same powers and privileges in the Province as if incorporated under this Act.” Now it has been argued that this was an attempt to confer status and capacity on the Dominion Corporation. My submission is that, far from doing that, it refrains from interfering with the Dominion status, because it is expressly qualified by the words that the application of this section is merely to

Companies in so far as they are authorised to carry out or effect any of the purposes or objects to which the legislative authority of British Columbia extends. It is only to this extent that the Legislature of British Columbia purports to come to the assistance of corporations, and says :—We should not interfere with you in so far as you may be operating in pursuance of Dominion objects, or of objects over which we have no legislative control ; but in so far as our legislative authority extends, then, and only then, we put you on the same footing as our own corporations. My submission is that that is an enabling Act. It is in aid of the Dominion Corporation, and it in no way purports to conflict with it, or to import status, or to modify status. The fundamental assumption of the Appellants in their argument appeared to me to be that a Company law was somehow within the exclusive jurisdiction of the Dominion in so far as Dominion Companies are already concerned. I have already submitted to your Lordships that there is absolutely no warrant for that proposition, because that subject is not included in the enumeration of section 91, and I think your Lordships are by this time convinced that the incorporation of the Company itself is not to be ascribed to any of the enumerated heads of section 91, but to the general powers at the beginning of the section. That being so, even if we did interfere with the incorporation of a Company by legislating on the subject of property and civil rights, my submission is that in that case the Provincial Legislation must override the Federal Legislation. The Provincial Legislation is exclusive under the terms of section 92, and we do not come into conflict with any of the subjects exclusively assigned to the Dominion ; we come into contact merely with exercise of the Dominion's general powers, and in that case I submit we must prevail.

Sir CHARLES FITZPATRICK : Even if your legislation is directed to the regulating of foreign corporations ?

Mr. LAFLEUR : Yes, I think so, my Lord.

Sir CHARLES FITZPATRICK : The Companies you are seeking out for special treatment are extra-provincial corporations ?

Mr. LAFLEUR : It might be very foolish legislation, but it would not be unconstitutional for that reason

only. It might, though, not be considered as legislation concerning property and civil rights if it were avowedly directed to the status and capacity of a special kind of corporation.

Sir CHARLES FITZPATRICK : Could you, for instance, say that an extra-provincial corporation, subject to the laws of mortmain, could not be applicable to a provincial legislation ?

Mr. LAFLEUR : I do not see why. It is inconceivable that such a law would be passed, but I do not see why such a law would be unconstitutional.

Sir CHARLES FITZPATRICK : Your argument brings you to that ?

Mr. LAFLEUR : Yes, my Lord. I go that far. Now may I put this to your Lordships : that we undoubtedly have the power to restrict the operations of a Corporation created in the United States when it trades in British Columbia. I do not think that the Dominion Legislation as to that could be supported supposing that this Company, the John Deere Plow Company, which is an American Company, and which trades only in British Columbia——

Sir CHARLES FITZPATRICK : Not unlicensed ?

Mr. LAFLEUR : Yes, my Lord.

Sir CHARLES FITZPATRICK : It is a Dominion Company.

Mr. LAFLEUR : I am speaking of the other Company, the Company whose name is interfered with, an Illinois Company, which is situate, and obtained registration, in British Columbia, and which trades exclusively in British Columbia. Now take that special case, which is the case under consideration. Surely there is no other Legislature except that of British Columbia which can authorise, or prohibit, that Company in its operations within the Province ?

Lord MOULTON : I am not sure of that ; I mean it is one of the things we have to think about.

Mr. LAFLEUR : I submit it to your Lordships as a good test, and I say that if that be so, it is not a matter of Dominion importance, it is the trading of a foreign company within only one of the Provinces of Canada, and I submit that under none of the heads of section 91, and none of the powers contained in that section, could

the Dominion pretend to legislate in order to allow or permit that corporation to trade within that one Province. That being so, it must be that we have the power in British Columbia to do that.

Lord MOULTON : Take this case : A law passed by the Dominion that the subjects of a friendly nation have the right to trade all over the Dominion. Would not that be the regulation of trade and commerce ?

Mr. LAFLEUR : No, my Lord. I would submit this : The Dominion has the power to enforce any agreements made between Great Britain and Foreign Governments, and to that extent it could dominate and overbear provisional legislation ; for instance, if an arrangement were made between Great Britain and the United States that their rival joint stock companies should enjoy certain privileges, then the Dominion could pass a law to enforce that. There is a special section of the British North America Act which gives the Dominion power to do that, but in the absence of any such international agreement sanctioned by Parliament, the only competent authority to allow that company to come and trade in British Columbia is the Legislature of British Columbia.

Lord MOULTON : Take a simpler case, that of a company under the incorporating Acts for the British Islands shall be registered in Ottawa, and shall have the right to trade throughout Canada, supposing it said that, would not that be the regulation of trade and commerce ?

Mr. LAFLEUR : That is merely a re-statement, I think, of the question we have been discussing all along. That does not appear to me to add any force to the case, that the company should be incorporated in England—

Lord MOULTON : I am taking a case in which the Dominion says that the person who registers under the Dominion shall have the right to trade throughout Canada. Now, is not that a case of the Dominion exercising its sole power of legislating as to trade and commerce ?

Mr. LAFLEUR : That is so, if you extend the words “ regulation of trade and commerce ” further than they have ever been extended by this Board. Those words have been considered in five or six cases, and I cannot find one where that meaning, or any meaning analogous

to that has been put upon those words. As defined by the decided cases, I should say that that would not come within the meaning of those words. I do not want to repeat what my learned friend, Sir Robert Finlay, said upon that ; I think he has said everything that can usefully be said upon that point.

Now let me follow out the line of thought which I was endeavouring to develop with regard to our right, I submit our undoubted right, in British Columbia to inhibit an American company from trading in British Columbia only, or to permit it under proper conditions to trade there. If we have that right, and we exercise it, as we have done in the case of this particular company, do we touch the corporate rights of that company ; do we pretend to affect its status ? Its status is never extra-territorial ; an American company cannot pretend to have its status recognised beyond the United States, beyond the territory which created it, except by the comity of nations, and we have the right to impose conditions upon that company, and yet in doing so we do not change its status. We may say : you cannot come and create a confusion by trading under a name which is bound to create or perhaps give rise to frauds and most likely to mistakes. Now, if we can do that with regard to a United States Company without affecting its status or the capacities which it has received from its own State, then why should it be said that we necessarily interfere with the status of a Canadian company when we do the very same thing by asking the Dominion company to obtain a licence before it does any local trading. It seems to me that neither in the one case nor the other do we interfere with the capacities or the status of that corporation. We are dealing with a matter which is peculiarly company law, just as we would be dealing with partnership law if we made the requirement, which all our local laws make, that a partnership should be registered before it trades in the Province. Why is it any more a matter of Dominion concern that a joint stock company should be restricted in regard to its trading operations in a particular Province than in the case of a partnership ? After all, the only distinction between them is, that in the case of a

partnership the liability is unlimited, but by the creation of this artificial person the liability is limited, but in both cases, it seems to me, the principle applicable is the same. It is the exercise of our legislative jurisdiction in regard to property and civil rights.

Sir CHARLES FITZPATRICK : Power to do business throughout the Dominion.

Mr. LAFLEUR : We do not affect that capacity.

Sir CHARLES FITZPATRICK : That is part of it.

Mr. LAFLEUR : Yes, my Lord, that capacity is derived from the laws of the Dominion.

Sir CHARLES FITZPATRICK : And if you say that they shall not carry on business in the Province do you say that that is not interfering ?

Mr. LAFLEUR : No, my Lord, I say that it has that capacity ; when you come to exercise it within our Province it must be subject to such rules and conditions as we may make not only for you but for every other company, and such as we may make for any incorporated concerns that are in our Province.

Sir CHARLES FITZPATRICK : Even to the extent of exclusion ?

Mr. LAFLEUR : Yes, my Lord.

Sir CHARLES FITZPATRICK : That surely is interfering with the corporate capacity, is it not ?

Mr. LAFLEUR : It is interfering with the exercise of that capacity, but the capacity remains there. It seems to me that the case which has been very much discussed, the case of acquiring land, is exactly on the same footing. There you have the capacity to acquire land, and you get the powers from the Dominion or from the old Provinces as the case may be, but you cannot exercise them in any particular Province without satisfying the laws of mortmain and getting a licence.

Sir CHARLES FITZPATRICK : But the law of mortmain is applicable throughout the whole of the Provinces. That is what they say in the *Citizens' Insurance Company v. Parsons*.

Mr. LAFLEUR : Not in that case, is it, my Lord ? I do not recollect it.

Sir CHARLES FITZPATRICK : The distinction between the case of the *Citizens' Insurance Company v. Parsons* and the other case is very well made in *Dobie v. The*

Temporalities Board on page 148, where they say that the Ontario Act which is declared to be *intra vires* was an Act which was applicable to all companies doing business. The words are : "It dealt with all corporations, companies, and individuals alike who might choose to insure property in Ontario—it did not interfere with their constitution or status, but required that certain reasonable conditions should be held as inserted in every contract made by them. The Quebec Act, 38 Vict., c. 64, on the contrary deals with a single statutory trust and interferes directly with the constitution and privileges of a corporation created by an Act of the Province of Canada and having its corporate existence and corporate rights in the province of Ontario as well as in the Province of Quebec." There is the distinction between the two you know. You see in the case of the *Citizens' Insurance Company v. Parsons* it decided that it dealt with all corporations. This was a very well-known case ; we know it by heart.

MR. LAFLEUR : The ground of that decision is that this corporation having been created by the two Provinces, the old Provinces of Canada——

THE LORD CHANCELLOR : The case which related to the power of repealing.

MR. LAFLEUR : Yes, my Lord. The Dominion had the powers of repealing in regard to the Province of Canada, but the Province of Canada had not.

SIR CHARLES FITZPATRICK : That is not the aspect in which *Dobie v. The Temporalities Board* had any bearing on this case. It has a bearing on this case inasmuch as it distinguishes between the case of the *Citizens' Insurance Company v. Parsons* and the *Colonial Building and Investment Association v. Attorney-General of Quebec* at the foot of page 148 and the top of page 149.

MR. LAFLEUR : I see that, my Lord, but I do not think that is the ground of the decision ; that is merely a recital of the facts of the case. How does that distinguish that case from this case ? In this case we do not legislate especially with respect to Dominion companies ; we do not single them out for exclusion. We say every outside company, every extra-provincial company, not merely those that are incorporated by the Dominion.

Sir CHARLES FITZPATRICK : In the case of the *Citizens' Insurance Company v. Parsons* you do not say that all companies doing business in the Provinces shall be subject to those limitations, but you say all companies which are subject to extra-provincial legislation.

Mr. LAFLEUR : Yes, my Lord, because we first of all incorporate our own companies, our domestic companies, and we impose limitations as to name which are the same as we impose upon extra-provincial corporations. Your Lordship will see that that is what we pretend to do with respect to extra-provincial companies and what we pretend to do with respect to Dominion companies. That applies to domestic companies as well as to extra-provincial corporations, and the only difference between the extra-provincial corporations is that, not having their home in the Province, they must furnish such documentary and other reasonable evidence as will enable persons to sue them in the Province, and to get such information as may be useful if they contract in the Province. But there is no greater restriction in regard to the extra-provincial corporations than with regard to domestic corporations. They have to furnish certain material information, and in the case of extra-provincial corporations it is done in two ways.

Lord MOULTON : That is in order to get incorporation. Those others have got incorporation, and requiring them to do that, after they have been incorporated, is interfering with their incorporation, is it not ?

Mr. LAFLEUR : I respectfully submit not, my Lord, that we do not interfere with a United States corporation at all, except that we require it before trading in our Province not to use a name which is going to create confusion and deceive people. That surely is not changing any of the capacities of that corporation ?

Now, my Lords, may I say one word more with regard to the case of *La Campagnie Hydraulique de St. Francois v. The Continental Heat and Light Company* before I leave this branch of the case ? That is the only authority which is apparently against the view that I have been contending for ; that is, it appears to introduce a different canon of construction in construing sections 91 and 92. The passage that I should like to

draw your Lordships' attention to is on page 198. You find that Sir Arthur Wilson, who is delivering the Judgment of the Board, says : "The Respondents took steps to act under their charter by establishing works within thirty miles from Disraeli. The Appellants applied for an injunction to restrain them from so doing." Now that shows that what was in question in that case was the physical works of the company, and his Lordship further says : "The contention on behalf of the Appellant Company was that the only effect of the Canadian Act was to authorise the Respondent Company to carry out the contemplated operations in the sense that its doing so would not be *ultra vires* of the company, but that the legality of the company's action in any Province must be dependent on the law of that Province. This contention seems to their Lordships to be in conflict with several decisions of this Board. Those decisions have established that where, as here, a given field of legislation is within the competence both of the Parliament of Canada and of the Provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the Province if the two are in conflict, as they clearly are in the present case." Those words, my Lords, have reference to the case of the *Toronto Corporation v. Bell Telephone Company of Canada*, which was the case relied on by the Appellants in the Court below and it was the *ratio decidendi* of the Judgments of the Court below. You will find it cited by the Chief Justice, Sir H. T. Taschereau, as the controlling case. That is the only class of case that is referred to, and it shows that the Court of King's Bench, at any rate, considered that the *Hydraulique* case came within the category of cases enumerated in the heads contained in section 92, subsection 10 of the British North America Act, and I feel convinced from that that Sir Arthur Wilson never intended to lay down the broad proposition, unqualified as it seems to be, stated in the concluding words of that Judgment. If the *Hydraulique* case really was authority for such a proposition I would submit that it had been overruled by the more recent decision in the case of the *City of Montreal v. Montreal Street Railway*, which is reported in 1912 Appeal Cases. I cite at

page 343 because he refers there to the broader proposition. This is the Judgment of Lord Atkinson: "It has, no doubt, been many times decided by this Board that the two sections 91 and 92 are mutually exclusive, that the provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a provincial Legislature over a field of jurisdiction common to both the former must prevail." That is the proposition which was laid down by Sir Arthur Wilson in the *Hydraulique* case. Then Lord Atkinson proceeds to say that this must be qualified. He says: "But, on the other hand, it was laid down in *Attorney-General of Ontario v. Attorney-General of the Dominion*: (1) that the exception contained in section 91 near its end, was not meant to derogate from the legislative authority given to provincial Legislatures by the 16th sub-section of section 92, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in section 91; (2) that to those matters which are not specified amongst the enumerated subjects of legislation in section 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the Provincial Legislature by section 92; (3) that these enactments, sections 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in section 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in section 92; (4) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by section 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the Provinces." So that even if the dictum of Sir Arthur Wilson in the *Hydraulique*

case was intended to mean what my friends for the Appellants seem to contend, which I submit is not the case when you come to look at the real facts that were in issue in that case, that statement of the law must be taken to be over-ruled or qualified by the Judgment more recently rendered by the Board in the *Montreal Street Railway* case.

May I ask your Lordships to look at the decisions or the opinions of the judges in the Company's Reference in order to show your Lordships how much perplexity has been caused to our judges by this *Hydraulique* case. It has been the subject of discussion in every constitutional case that has arisen since then. Your Lordships will find the observations of Mr. Justice Duff in 48 Supreme Court Reports on pages 438 to 440 ; of Mr. Justice Idington in the same volume at page 296 (that is in the Insurance Reference) and the observations of Mr. Justice Davies in the same volume at pages 345 and 346.

The only other observation which I desire to make is as to the applicability of section 91, head 2, "Regulation of trade and commerce." The cases which have put a construction upon those words have been cited to your Lordships. It results from those cases that those words have no application to the regulation of a particular trade in one Province. That is the case of the *Citizens' Insurance Company v. Parsons*. In the second place, it has no application to a law imposing a condition that a licence should be obtained for the holding of lands. That is the case of the *Colonial Building and Investment Association v. Attorney-General of Quebec*. Then it has no application to taxation by the Province—even oppressive and excessive taxation sufficient to effectively prevent the exercise, or practically prevent the exercise, of the powers of a company in the Province. That is the case of the *Bank of Montreal v. Lambe*.

SIR CHARLES FITZPARICK : It was the case of the *Bank of Toronto*, was it not ?

MR. LAFLEUR : There were several banks concerned ; I think your Lordship is right, it was the Bank of Toronto. In that case the power of legislation was said to be supreme, and their Lordships expressly say that

it is not to be presumed that these powers will be injudiciously or oppressively exercised ; that the power is there and it does not become unconstitutional because the legislation may be deemed to be unreasonable. Then, again, the meaning of those words has been dealt with in the *Brewers* case, which is reported in 1897 Appeal Cases, where it was held that even a company created by a Dominion licence by the Dominion to do that business might be restricted within the limits of one Province by Provincial legislation ; and then, lastly, the *Prohibition* case, which is reported in 1902 Appeal Cases, where the prohibition of the sale of liquors in the Province was held to be application to trades trading under Dominion licences. I submit that with all these interpretations there is very little left really of the words "Regulation of trade and commerce" except in so far as you may apply that section to general international or extra-provincial arrangements to political arrangements respecting trade. But it has no application to all these functions which may be performed which may be carried out within the Province and which are subject to being licensed and restricted by the Province. My submission is that this British Columbia Act is far less stringent in its provisions than the Act which was the subject of the case of the *Citizens' Insurance Company v. Parsons*. In that case it absolutely regulated the contracts of the insurance business, and unless contracts were made in that form they could not be enforced. So my submission is that all these decisions upon the words "Regulation of trade and commerce" establish that the Dominion cannot confer powers of trading to be exercised in a particular Province in derogation of provincial legislation.

Then I would further observe that the legislation in question is not aimed at trading companies ; it is legislation concerning joint stock companies. It is not an attempt to interfere with the right of the Dominion Government to regulate trade and commerce ; it is not aimed at trade and commerce. It concerns the subject of joint stock companies and, *inter alia*, trading companies that happen to be joint stock companies.

Mr. NEWCOMBE : Having gain for their object.

MR. LAFLEUR : Yes, having gain for their object. They need not always be trading companies ; many of them are not trading companies, although they may have gain for their object. My submission is that that is just as much civil law in the Province as the enactment of a partnership law. You have alongside of this Act in British Columbia a partnership law which contains very similar provisions with regard to the registration of partnerships and the information to be furnished when partnerships are registered and the requirements that such registration shall take place before trading is carried on in the Province.

My Lords, with these observations I submit that the appeal in so far as this Company is concerned should be dismissed.

MR. WEGENAST : My Lords, the ground has been so thoroughly traversed that such observations as I have to make I shall try to put in the form of stating my point without arguing it.

THE LORD CHANCELLOR : Yes ; I think we have had so much argument that you have only to put the points, and all the arguments will come to our mind.

MR. WEGENAST : If your Lordship pleases. In the first place my friends for the Respondents have assumed an issue which, in my submission, is not an issue in the case. It is true that there has been some question as to the name of the company, but the real issue is stated in the pleadings, in the Defence in the Wharton case and in the Reply in the Duck case. I should like to read the reply in the Duck case in paragraph 4 on page 10 of the Record : "The Plaintiff says that its charter, together with the provisions of the Companies Act of Canada, authorise and empower it to carry on throughout Canada the business of dealers in agricultural implements, carriages, wagons and machinery and a general agency, commission and mercantile business, and that the provisions of Part VI of the Companies Act of British Columbia, in so far as they purport to prevent the Plaintiff from carrying on such business in the Province of British Columbia, and from maintaining this action, are *ultra vires*, and of no force or effect."

The LORD CHANCELLOR: You say that the whole right to trade arises in this?

Mr. WEGENAST: Yes, my Lord, the whole right to trade as distinguished from the capacity to trade. I should like to say something as to that. Of course, as one of your Lordships has observed, if there is any defect in Part VI, any condition which it is unreasonable or *ultra vires* for the Province to impose, then the company cannot be required to comply with that condition, and a licence will not be necessary.

Now, I should like to mention very briefly another aspect of the case which I think has not been mentioned. This is company law, but it is also law dealing with the terms and conditions upon which foreign companies shall be recognised as having power and capacity to carry on trade in the Province. It deals essentially with rules of comity, and I should like to submit that, quoad a certain class of companies, the Provinces are not the custodians of rules of comity. That is, when you get a trading company of a certain kind, a company like the Hudson's Bay Company or a company like the French South Africa Company, its status, its power to carry on trade in Canada, is not a matter for Provincial legislation. I should like to contest the submission of my friend, Mr. Lafleur, that the Provinces are the proper authority to establish the conditions on which a United States company shall be recognised as having power to carry on business in Canada. It does not directly affect this company.

Lord MOULTON: Is not that merely a remark emphasising the need for giving substantial meaning to the regulation of trade and commerce which comes actually second in section 91?

Mr. WEGENAST: Yes, my Lord.

Lord MOULTON: It comes in there, or not at all, does it not?

Mr. WEGENAST: No, my Lord, I should like to suggest that it can be assigned to item 11 of section 92, that is, that the regulation of the conditions under which companies of the smaller or provincial type shall be recognised in Canada is a matter for provincial legislation, but that the recognition of companies of a larger type is a matter for Dominion legislation.

The LORD CHANCELLOR : You would have to read an express exception there, and you would have the difficulty in that case, I should think, that the express exception is satisfied by the other exception.

Mr. WEGENAST : In any case, if that is so or not, what the Province is doing here is dealing with a Dominion company as a foreign company, as a company where there is room for comity, as between the Province and the Dominion. Now I should like to state my point briefly in this form : That the Dominion Company and the Provincial company operate in different planes. The Dominion Company operates in a plane which is intersected by provincial law, enacted under competent heads, but the Province has nothing whatever to do with the recognition of the capacity, the status, of a Dominion company ; it has nothing to say to it. It is a company outside the provincial sphere. It is significant, perhaps, of something that the provincial law in question expressly excepts the Hudson's Bay Company.

Lord MOULTON : That may have been from motives of policy ; it will not affect you about *ultra vires*.

Mr. WEGENAST : It may have been, but I want to deal with it for what it is worth. It suggests to my mind that the Province shrank from the idea of endeavouring to prescribe the conditions on which the company of adventurers into Hudson's Bay should carry on business.

With every deference to my friend, Mr. Newcombe, I should like to differ from him as to the ultimate and strongest ground on which this case can be placed. I do not want to dissociate myself from the argument that it is an attempt to regulate trade and commerce, but I submit that there is a stronger ground on which the case can be based, a ground which is invulnerable, namely, that the Province is endeavouring by this legislation to affect the company *qua* company. If the Province were legislating *qua* land, *qua* the evil of holding land in the dead hand, or *qua* a great number of other subjects, it would undoubtedly be good, but the moment that the Province singles out this company, *qua* company, *qua* corporation, *qua* the artificial entity and its capacities and powers, then I submit that it has

gone beyond its sphere. It is necessary, as I said in opening, to assign a subject to this legislation. It is necessary in all cases; and the sub-head, I submit, under which this legislation falls most directly is that of company law, corporation law. I wish to differ as strongly as I may with the submission of my learned friend, Mr. Lafleur, that the company law of Dominion companies is a matter for provincial legislation. Take, for instance, the rule in *Salomon v. Salomon*, the one man company rule. As to Dominion companies, which is the jurisdiction to alter that? That puts my submission to your Lordships.

Now one must, in arguing this case, do so having in mind a certain definition of the word "incorporation," and my friends have contended for a meaning for the word "incorporation" with which I should like to differ.

LORD MOULTON: It makes a conditional individuality.

MR. WEGENAST: I should like to go a little further than that.

LORD MOULTON: Not a complete person, but it is a person with specially limited powers.

MR. WEGENAST: Yes, my Lord; but under my submission the Dominion has given this company more than a legal personality, has given it more than a memorandum of association. I do not know whether the Imperial Companies Act gives to its companies under a memorandum of association outward outgoing powers but I submit that the incorporating power of the Dominion is not a mere power to confer legal attributes; that it is not a power simply to give the company a brain and nerves, but that it gives to the company muscles; that the company has an outgoing, an objective power, and not merely a subjective capacity. I could refer your Lordships to definitions of "incorporation" and "corporations" in Coke and Blackstone, but I should like, if I may, and this is the only authority I will refer to, to ask your Lordships to look at a book printed by the Selden Society, edited by a Mr. Carr, called "Selected Charters of Trading Companies."

THE LORD CHANCELLOR: For what purpose do you want to cite this; I know the book.

Mr. WEGENAST : For this purpose : Even a casual glance at the charters and the discussion of them——

Lord MOULTON : It would not qualify the effect of a subsequent law of limited liability companies.

Mr. WEGENAST : I had not that in mind.

The LORD CHANCELLOR : What is the point ?

Mr. WEGENAST : There are certain inevitable conclusions, in my submission, from a mere examination of the older charters : one is that the idea of the metaphysical attributes, the idea that a corporation was a legal fiction, and so on, was a later refinement, a scholastic refinement, of the idea of incorporation.

Lord MOULTON : That justifies what I was saying. Some of those early incorporations have been held to have all the powers of a person, but later, under definite Acts, have been held to have only such powers as they get from the incorporation of the Act.

The LORD CHANCELLOR : I hope we shall not go into this, because we shall have to consider the Judgment in the *Sutton Hospital* case, and also the case which was decided in the Court of Exchequer, and then to see again what the decision of Lord Cairns in the House of Lords did in the way of drawing distinctions between common law companies and statutory companies. We know the whole thing generally, but you are embarking, I warn you, upon a sea in which you will travel a very long way without finding land.

Mr. WEGENAST : My only object in referring to this is to say that it is not necessary for your Lordships to go into those questions, that when the British North America Act says "incorporation of companies," it does not divide the bone from the marrow and the soul from the body. Section 92, and by implication section 91, carries with it a substantial power, and not simply the power to create a legal fiction. Referring to the book that I have mentioned, the conclusion there is also, I submit, inevitable, that the idea of incorporation is inseparably associated with the idea of trade and commerce. If the British North America Act confers upon the Dominion the power to give substantial power to companies, has the Dominion exercised that power ? I think section 29 of the Dominion Companies Act is conclusive. It enacts that the company shall have all

the powers, privileges and immunities necessary for the carrying out of its business, and it is those substantial objective powers that the Province is attacking in its legislation, and my submission is that that is the strongest ground upon which the case can be placed.

My Lords, my friend strongly argued that it had been conclusively decided that a Province could prevent a Dominion Company from holding land. I should like to point to the dicta in the *Citizens' Insurance Company v. Parsons* and *Colonial Building and Investment Association* cases.

LORD MOULTON : We know those dicta.

The LORD CHANCELLOR : You do not wish to read them.

Mr. WEGENAST : I shall not read them, my Lord, but I should like to point out that Sir Montague Smith in the subsequent case, the *Colonial Building and Investment Association* case, went out of his way, if one may say so, to impress in three different places that he has not meant to decide in the *Citizens' Insurance Company v. Parsons* case that a Province could prevent a Dominion company from holding land. If it were to have been considered closed as the result of the *Citizens' Insurance Company v. Parsons* it was expressly opened by Sir Montague Smith in the *Colonial Building and Investment Association* case, and if it were necessary for me to carry with me section 167 of the Act, I think it is, which denies the companies capacity to hold land, I should not shrink for a moment from doing it. Let me point out also in that connection that if the scholastic idea of incorporation is to prevail, the provincial company has transgressed even against that. The section dealing with the power to hold land, as also the section denying the companies power to maintain actions expressly uses the word "capable" ; it shall not be capable. And if anything more were necessary, it is there. I do not want to press that too strongly, but I do want to add that if these words had not been there the effect of the enactment would have been the same. The collective effect of the whole of the legislation is a denial of capacity.

Then, at the risk of repeating myself, I should like to call attention to the dicta in the *Citizens' Insurance*

Company v. Parsons and the *Colonial Building and Investment Association* cases in which it was said that those laws were directed against all persons and corporations, and in the one case were directed to contracts and in the other case were directed to the business of insurance and applied to all insurers alike.

The LORD CHANCELLOR : That was pointed out in a subsequent case.

Mr. WEGENAST : There is another question of fact to which I should like to refer. The transaction in the Duck case was a transaction of inter-provincial commerce. The goods were ordered from Vancouver, the order sent to Winnipeg, goods to be shipped f.o.b. Vancouver.

I need not point out to your Lordships that there are dicta in three of the cases in which it has been held in very express language, in effect that property and civil rights in section 92 must give way even to the exercise of the general power. If the incorporation of this company is to be placed under the general power, "property and civil rights" cannot stand in the way. The case I should like to refer to particularly on that point is the *Manitoba Liquor* case, which is reported in 1902 Appeal Cases. I should also like to point out that the penalties in this Act are not appropriate to a tax.

Lord MOULTON : I do not think it is said that it is a tax.

Mr. WEGENAST : In aid of that contention I should like to refer to the item of section 92 which gives the Province power to impose penalties because the penalty here may depend on that item. The penalty section of Part VI of the Companies Act may depend on the penalty item of section 92. It is item 15 of section 92. "The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section," but what the Province has here done is to outlaw.

Then also with regard to the *Brewers* case, in that case it was held that a tax was not necessarily invalid as a tax because it came in the form of a licence ; that

is, it was held that a tax might be a licence, but that is not saying that every licence is a tax.

LORD MOULTON: I think we are quite aware of that; the licence depends on the conditions.

MR. WEGENAST: Then this one last point. A good deal has turned on the question of discrimination. I should not like to argue that discrimination was *per se* bad; I should not like to argue that it was good. But I submit that we need not go so far. Discrimination may not be bad *per se*, but it is strongly indicative of the real intention of the Legislature, and in this case, of course, the submission is that the discrimination between companies and individuals and between Dominion companies and local companies is indicative of the real intention of the Act, which was to aim at Dominion companies; and (if one might read into this case what every lawyer in Canada knows) an attempt to oust the Dominion from its incorporating power—because that must be the effect—that may, I submit, be read as the intention. In that connection I should like to refer to some official correspondence which your Lordships will find in Hodgins—it is referred to in my case—in which Sir John A. Macdonald in reporting on the predecessor of this British Columbia Act away back in 1882—I think it may have been in the 70's—assumed that the licensing power of the Province over companies was divided along the same lines as the incorporating power.

THE LORD CHANCELLOR: I think we have now heard the whole argument. You see this is really a private litigation, but the Dominion and the Province have both intervened. We have heard a full argument from each of them in addition to the ordinary argument in the case; therefore, I think we have got everything before us.

MR. NEWCOMBE: Have not I a right to reply to my learned friend?

THE LORD CHANCELLOR: No, because you are an Intervener. If you have anything which you particularly wish to say, of course, we shall not shut it out, but unless you have got something very special you have no right to reply. You are not a litigant in this case.

Sir ROBERT FINLAY : I should be entitled to reply too.

Lord MOULTON : Have not we heard everything ?

Mr. NEWCOMBE : I did not intend to detain your Lordships very long, but I thought, following the practice which has heretofore prevailed, that I had a right to say a few words in reply as Intervener ; that I had a right to answer the argument of my learned friend.

Lord MOULTON : Is there anything new ? You may be perfectly sure that we shall think over everything that has been said.

Mr. NEWCOMBE : I am in your Lordship's hands.

The LORD CHANCELLOR : I think, unless there is some quite specific thing you want to tell us, we have really heard a very full argument in this case.

Mr. NEWCOMBE : Might I make one observation ; I do not want to detain your Lordships.

The LORD CHANCELLOR : If it is something you want to put before us, will you mention it.

Mr. NEWCOMBE : It is just this, although I would have said more, because I anticipated that I had the right to reply. There is one point that I hope your Lordships will not lose sight of ; I think I made it in my opening, and my learned friends have not touched upon it, and that is this : That this licensing provision, this prohibition of the Dominion Company by means of a licence, must be justified here, if at all, in the exercise of the licensing clause of section 92.

Lord MOULTON : Not *ejusdem generis*.

Mr. NEWCOMBE : The power which the Province has exercised here would be aptly described by such words as these, which may be contrasted with item 9 : Licences conferring the right to the exercise of corporate capacity and franchise in order to the regulation of trade and commerce within the Province. If they had that power they could enact their Companies Act ; in the absence of that power they cannot.

The LORD CHANCELLOR : I think we have this question very much before our minds. I just wish to say, in case the question arises again : This a private litigation, the Attorney-General of the Dominion and the Attorney-General of the Province have intervened.

The persons who have the right to open primarily are the learned Counsel for the Appellant; then the learned Counsel for the Respondents, and then the learned Counsel for the Appellant has the right of reply; but if Interveners come in, however eminent, it does not follow that they are entitled to do more than to present their view to the tribunal on each side. If we said that they were in the position of litigants, and that there was a reply, it might lead to a very endless extension.

We will consider our Judgment in this case.