

INSURANCE REFERENCE.

IN THE PRIVY COUNCIL.

COUNCIL CHAMBERS, WHITEHALL, S.W.1.

Tuesday, 21st July, 1931.

Present:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

SECOND DAY.

MR GEOFFRION: May it please your Lordships. When the discussion was diverted when I was reading the Judgment of 1924, I was about to give your Lordships the amendments to the Canadian legislation created by that Judgment. I would ask your Lordships to take page 13 of the Appendix to the Case of the Intervening Companies. Summarised what happened there is that the second subsection to Section 2, page 14 of that Appendix, which I have described as the subsection defining immigration in an abnormal manner, having been expressly declared illegal by the Privy Council in the 1924 Judgment, was repealed.

VISCOUNT DUNEDIN: I quite understand from your point of view that you have a point on this, but that does not affect me, but assume -- I do not say "assume" because there is no question -- that the Privy Council Judgment upset what was done in the earlier statute, you are perfectly entitled to have another statute to do anything that was right, so that it is a sort of gibe which is very natural in your mouth, but does not have much effect on me.

MR GEOFFRION: No, my Lord, but it may be, in my later effort to demonstrate in respect of this question and the second question that it is purely and simply an effort to use a pretext to invade the principal field, that a very brief history of the way they proceeded would be helpful. The argument I want to make is that by a statute which I am attacking under Question 2, they are putting a supertax on those who contract with Insurance Companies and are using the taxing power as they used the Criminal Code.

LORD MAGMILLAN: Very much the same thing was attempted in the Proprietary Articles case. Then the first effort of the Dominion Parliament was unsuccessful, and they tried again and they were successful. They used the Criminal Code. Second thoughts are sometimes best.

MR. GEOFFRION: Undoubtedly, my Lord, but I am going to try and show that they are not. With regard to the Proprietary Articles case that was on two trials in respect of the Combines Act. The first one purported to regulate civil rights, and the second was, as strictly stated, an inquiry into whether there was a crime, and the employing of the criminal procedure if it was.

LORD MACMILLAN: You are perfectly entitled to say that the second effort is a colourable effort and not a genuine effort.

MR. GEOFFRION: Yes. I want to show your Lordships what they did to colour that effort. They repealed that. Secondly they reinserted in the Insurance Act a penalising clause, but, thirdly, they forgot to repeal the Criminal Procedure Code.

They enacted a Criminal Code at the same time they were enacting *the other statutes and while they repealed the immigration* clause, while they reinserted the punitive clause in the Act they did not repeal the Criminal Code and even reenacted it.

VISCOUNT DUNEDIN: It is quite settled by the case in 1924 that it is no use bringing ⁱⁿ a Criminal Code when what you are really doing is insurance work, so that there is an end of that.

MR. GEOFFRION: They did not repeal it, and it is still in force.

VISCOUNT DUNEDIN: I am afraid it is my way, but I always think in the end you can come to see that there is really just about one question in the case and no other, and it seems to me that the question which is dealt with by the Judges, and which I would be most glad to hear you upon as far as it is obviously within the power, according to what the Privy Council said at the end of the Judgment in 1916, to grant a licence to aliens, one way to put it against you is that if they could refuse a licence altogether, why should not they saddle the licence with such conditions as they choose. That is one

way of putting it. The other way of putting it, and it is quite well worked out by the Judges in this case is: That is all very well, you are perfectly entitled to put such conditions as goes to the original granting of the licence, but once a licence has been granted you have nothing to do with how the business is to be carried on, because that goes into the old Decision that although the Dominion has to do with status it has nothing to do with the conditions under which a business has to be carried on, that is for the Province, and, therefore, if in those conditions that you have put in this Insurance Act you are really trenching on Provincial Legislation the thing is bad. Those are the two views.

MR GEOFFRION: I quite agree, my Lord.

LORD MACMILLAN: Perhaps one might venture to add this: in addition to the general question of status, and the admitting of aliens, there may be the greater interests of the State involved vis-a-vis aliens after their admission which would require from the point of view of the Dominion special precautions for example, it might well be under their powers in dealing with the defence of Canada they might provide that no aliens shall be employed in the munition factories, and so on. There are certain matters in which the Dominion would be interested and in which it would ^{be} proper for them to say, not merely what particular alien shall be admitted, but what he shall be permitted to do after he is admitted. The question that seems to me to be the critical one in the matter is this: Are you entitled in matters which do not relate to the general affairs in Canada, the Defence of Canada and matters of that sort, to regulate day to day transactions in the ordinary business life of aliens not with a general view to the interests of Canada as Canada, but possibly an ulterior motive which is not alien legislation at all, but commercial legislation, or

concerns property and civil rights. Is not that the tender part of the case?

MR GEOFFRION: Your Lordship has exactly put the case as I understand it. I am trying to give the history of the matter. I have given your Lordships the Tomey Homma case, which contains that which helps me to explain away Bryden's case, which also helps me.

Now, my Lords, the next case is Brooks-Bidlake and Whittall, Ltd. v. Attorney General for British Columbia, reported in 1923 Appeal Cases, page 450. Of course it is in British Columbia where the difficulties arise because they have the Japanese problem. Your Lordships will also find the case in the Second Volume of Cameron, at page 318. There the Judgment is given by Viscount Cave. The measure of the British Columbia Legislature was one forbidding employment of Chinese or Japanese labour by licensees of the Crown to cut timber. They could not employ for that labour the Chinese or Japanese. At page 456 Lord Cave says: "The points raised for consideration are two - namely: (1) Was the stipulation against employing Chinese or Japanese in connection with the timber licences valid, or was it wholly or partly void as conflicting with (a) the British North America Act or (b) the Japanese Treaty Act of the Dominion; and (2) If the stipulation was void, were the appellants entitled to a renewal of their licences? The threat to cancel the licences as existing on August 24th, 1921, is no longer material, as those licences would in any case have expired on February 11, 1922. It is right to renewal which is now the substantial issue. Their Lordships will deal first with the contention that the stipulation in question is void as conflicting with the British North America Act, 1867. It is said that, as section 91, head 25,

of the British North America Act reserves to the Dominion Parliament the exclusive right to legislate on the subject of 'naturalisation and aliens', the Provincial Legislature is not competent to impose regulations restricting the employment of Chinese or Japanese on Crown property held in right of the Province. Their Lordships are unable to agree with this contention. Section 91 reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalised persons; but the Dominion is not empowered by that section to regulate the management of the public property of the Province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race. These functions are assigned by section 92, head 5, and section 109 of the Act to the Legislature of the Province; and there is nothing in section 91 which conflicts with that view. In *Union Colliery Co. v. Bryden* this Board held that a section of a statute of British Columbia which prohibited the employment of Chinamen in coal mines underground was beyond the powers of the Provincial Legislature; but this was on the ground that the enactment was not really applicable to coal mines only -- still less to coalmines belonging to the Province -- but was in truth devised to prevent Chinamen from earning their living in the Province. On the other hand, in *Cunningham v. Tomoda*, where another statute of British Columbia had denied the franchise to Japanese, the Board held this to be within the powers of the Provincial Legislature, which had the exclusive right to prescribe the conditions under which the Provincial legislative suffrage was to be conferred. And in *Attorney General for Canada v. Attorney General for Ontario* it was held that the reservation to the Dominion Parliament by section

head 12, of the Act of 1867 of the right to legislate as to 'sea coast and inland fisheries' did not prevent a Province in which a fishery was vested from settling the conditions upon which fishing rights should be granted." The rest of it does not concern us.

LORD ATKIN: That is rather an important case, and I understand the ground for decision there was that Provincial legislation was merely in dealing with the way Provincial property should be managed, and they had tried to impose the condition that only particular people should be employed and to exclude aliens. I notice that Lord Cave at the top of page 457 deals with the plain question whether the stipulation conflicts with the British North America Act. He says: "Their Lordships are unable to agree with this contention. Section 91 reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalised persons but the Dominion is not empowered by that section to regulate the management of the public property of the Province, or to determine whether a grantee or licensee of that property shall or shall not be permitted to employ persons of a particular race." That is the essence of that decision, is it not?

MR. GEOFFRION: Yes, my Lord.

LORD ATKIN: But it is in fact a statement as to what is the meaning of section 91 subsection 25 as regards the general right to legislate as to the rights and disabilities of aliens and naturalised persons.

MR GEOFFRION: Yes, my Lord. Then it goes on to approve of Tomey Homma and then goes on to say that in Bryden's case it was beyond the particular powers of the Provincial Legislature, but this was on the ground of the Provincial Legislature really applicable to coalmines only belonging to the Province. So their Lordships gave an indication that a regulation applicable to coalmines even if they had been Provincial coalmines would have been a Provincial matter.

LORD BLANESBURGH: Might not you put it a little more strictly having regard to the illustration that Lord Cave gives. He is bound by the Tomey Homma case just as much as we are, and he had recognised that as an existing decision. He said that the effect of that decision was that the Province had an exclusive right of saying whether an alien should or should not have the franchise. That rather qualifies the statement that section 21, subsection 25 enables the Dominion to legislate with regard to the rights and disabilities of aliens in any unqualified sense.

LORD MACMILLAN: In the earlier case with regard to the coalmines he said if this had really been coalmine legislation, it would have been for the Provinces to have dealt with aliens in relation to the Province in their Province, but it was not; it was legislation as to the right of an alien to have any existence at all in a Province, although we have said he should be admitted.

MR GEOFFRION: May I add another consideration on this point for argumentatively. Section 22 puts all the powers on the same footing. Section 21 at the end says: "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 exclusi

to the Legislatures of the Provinces". So that all the provincial powers are on an equal footing. In one case it was under the power of the Province, and the question was under section 92 (1): "The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor". The other one was the sale of public lands.

LORD BLANESBURGH: Have you put it quite high enough; is not the meaning of that clause in section 91 that if you find something specific in section 92, that is to override anything not general in section 91?

MR GEOFFRION: Yes, my Lord, but not anything special.

VISCOUNT DUNEDEN: I do not think it is a question of "general" and of "special"; it is a question of enumeration. Enumerated things override the general in the sense of peace, order and good government.

MR GEOFFRION: Yes, my Lord.

LORD MACMILLAN: The order of discussion is laid down by this Board in one of the cases in which it says the first step is to say: Is it in section 92 among the enumerated things, if so, that is enough. If you are driven from that, the next point you go to is section 91.

MR GEOFFRION: The Province must show that it is in section 92, otherwise it is out of Court.

LORD ATKIN: As section 91 is paramount, the enumerated clauses in section 91, if it is there, cadit questio, cover everything; if it is not in section 91 enumerated, then it is not enumerated in section 92.

MR GEOFFRION: The point is that it must be in section 92, otherwise you do not need to bother further. If it is in section 92 you bother further and look in section 91 at the enumerated clauses.

LORD MACMILLAN: Do you know the case in which that was set out?

MR GEOFFRION: The Montreal Street Railway case was one of them. It has been stated several times. One might approach it from either end according to whether you have to make the two steps or not. You may have only one step to make, according to which angle you start from.

Now, my Lords, I was pointing out the Brooks-Bidlake case is under section 92, subsection 5: "The Management and sale of the Public Lands belonging to the Province and of the Timber and Wood thereon" I suggest that an individual owner in a Province is quite as independent of Dominion control as the Province is as owner in view of the equality of all Crown powers under section 92.

LORD ATKIN: I thought perhaps the most attractive way of putting it for you was to say this: In view of the history of legislation that this has always been insurance legislation, and it is a general Act for the purpose of securing insurance to Canadian Companies under a licence. That has completely failed in every respect, but the present legislation is exactly the same; they have not taken the suggestion of the Privy Council and withdrawn the insurance legislation and confined themselves to legislation dealing with aliens with the view of restricting the general rights of aliens and so on, but they still have a general Insurance Act, and this clause is to be found in an Insurance Act coupled with foreign Companies and with British Companies and so forth. That is one way of putting it. So according to you, I understand it is really only dealing with aliens colourably; the real pith and substance of it is to try to regulate insurance in the Province. That is what you say?

MR GEOFFRION: Yes, and there are various considerations which

support that view, but before I deal with that, I thought it might be enlightening if I read your Lordships some authorities.

VISCOUNT DUNEDIN: I think your sheet anchor is the older case of Parsons, which is in 7 Appeal Cases, because that is insurance.

MR GEOFFRION: Yes, my Lord, and it was statutory conditions as here. I am going to point out that they dealt with a Dominion Company and a British Company. My Lords, is it useful if I take your Lordships rapidly as far as I can go through the Insurance Act? After all it is really a consideration of the general character of the whole Act that is in issue. Is that insurance law restricted to aliens, Dominion Companies and British Companies, or is it a law respecting aliens, and exactly similar law respecting Dominion Companies and exactly similar law respecting British Companies. Is it a law respecting insurance restricted to those three classes, or is it a special law respecting aliens, an identical law respecting British Companies, and an identical law respecting Dominion Companies?

VISCOUNT DUNEDIN: I do not quite follow what you mean by that. There is nothing said in the Insurance Act about aliens, is there?

MR GEOFFRION: Yes, my Lord, the section we are attacking, section 11, contains a prohibitory clause extending to British Companies and aliens.

VISCOUNT DUNEDIN: I beg your pardon; of course, I know of sections 11 and 12, but I thought you meant other than sections 11 and 12. It is sections 11 and 12 that the questions are about, but the real difficulty for the opponents consists in this, does it not; I was assuming it was good law -- perhaps I am assuming too much -- but I do not think I am in view of what was said by the Privy Council at the end of

the Judgment in 1916 -- that it was within the power of the Dominion to stipulate that an alien should have a licence.

MR GEOFFRION: I grant that, my Lord.

VISCOUNT DUNEDIN: But where the difficulty for them comes in is that it says according to that "granted pursuant to the provisions of this Act". Now the provisions of this Act in section 11 does not mean section 11 itself; it means all the other provisions; that is rather what I meant when I said there was no reference to aliens in the Act. It means sections 11 and 12.

MR GEOFFRION: My argument is that there is no reference to the alien except very casually; that the Act contains exactly the same provisions in respect of the three is a strong argument against the idea that it is a three-fold Act, one against aliens, one against British Companies, and one against Dominion Companies.

LORD BLANESBURGH: Is this the first proposition of the syllogism; This Insurance Act so far as ordinary Canadians are concerned is beyond the power of the Dominion, and has been so held?

MR GEOFFRION: Yes, that is the first undoubtedly.

LORD BLANESBURGH: That is the main proposition.

MR GEOFFRION: Undoubtedly.

LORD BLANESBURGH: You start with that main proposition, and it is unfortunate to omit it.

MR GEOFFRION: I may have forgotten it, I think while reading the 1916 Decision. I had drawn that inference. My suggestion was that under the 1916 Decision following Parsons case the statute of 1910 had been declared void. I added that this is the same statute and, therefore as regards Canadians would be void. Then the question is on the same statute how could it

be restricted to three classes. I insist on the three classes because it would be strange, because in alien legislation we have the same legislation for three classes, aliens, British and Canadian Companies.

Now, my Lords, perhaps it will be useful if I proceed with the Statute, and then I will make my arguments. Your Lordships will find at page 7 of the Appendix the definitions. There is not much in the definitions except that your Lordships get the definition of "Canadian Company" in sub-paragraph (i); sub-paragraph (g) is the definition of "British Company"; sub-paragraph (n) is the definition of "company". That is important. A British Company in a nutshell is a non Canadian British Company; A Canadian Company is a Dominion Company and "Company" is a little important. "'company' means any corporation incorporated under the law of Canada or under the laws of Great Britain, Ireland, or of any British possession, other than a Province of Canada".

VISCOUNT DUNEDIN: I do not want to stop you in any way, but I do not want enormous citations of what seems to be a perfectly obvious proposition. The obvious proposition is -- at least it is for the people on the other side and, therefore, it is not as I think for you to go on to prove it affirmatively -- that if you will cut out sections 11 and 12, there is not any trace in the Act of any discrimination between the three classes of Companies. That is what you want to make out. I think the moment you have said that you have said enough. I do not need to read the whole Act viva voce to see that.

MR GEOFFRION: Then, my Lords, I will try and summarise it very briefly. It deals exhaustively with two aspects, the business of these underwriters, and the contracts of these underwriters. Perhaps I ought not to say exhaustively - considerably.

VISCOUNT DUNEDIN: It deals exhaustively with how the business is to be carried on.

MR GEOFFRION: Yes, my Lords, and what contracts have to be made. Let me put my arguments. Let me try the reductio ad absurdum. What is true of this invasion of business and contracts would be true of an exhaustive appropriation within those limits of insurance. What is true of insurance is true of any other contract, the sale of goods, lease and hire, and so on, and what is true of aliens is true of naturalised people, and is true of immigrants, British and foreign, entering, or Canadians when they have emigrated and re-entered. You will have contracts by these people with Canadians governed by special civil law so far as the Dominions are concerned side by side with contracts with Canadians being governed by another civil law, and what is true of contracts would be true of successions and inheritances.

Secondly, historically it is the very same Act which in 1910 was an Insurance Act which in 1917 was still an Insurance Act. They have omitted to insert the classes. The whole field of insurance can be put in five classes. The Canadian unincorporated - very insignificant; the Provincial Companies - very insignificant; the British - the most important of all; the Dominion Companies - of some importance; and the foreign - chiefly American. Thus the former Act being general took in five classes. The present one keeps the three big ones, the alien, the British and the Dominion Companies, and leaves out the Canadian incorporated which never does that sort of thing, and leaves out the Provincial Companies.

LORD BLANESBURGH: And the immigrants.

MR GEOFFRION: It takes them in.

LORD BLANESBURGH: Are you sure it does?

MR GEOFFRION: It tries to. I suggest the elimination of those

two minor classes with the same Act repeated cannot make much difference. I suggest that the character of the Act itself is an Insurance Act -- and I suggest that the Canadians are of the very same disposition -- for three different classes.

Now, my Lords, I will call your Lordships' attention to the case of Parsons, reported in 7 Appeal Cases, page 96. It is a very long Judgment, and I will not read it. In that case they held in substance that an Ontario statute imposing on Insurance Companies certain statutory conditions, certain classes of contracts which would be available to all those doing business with them would be within property and civil rights and not trade and commerce. At the bottom of page 113 and the top of page 114 this is what is said: "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."

VISCOUNT DUNEDIN: That case is very familiar, and it has been said again and again that what it really laid down was the distinction between the status of a Company and the conditions under which the Company should carry on business, and no

amount of quotation will get you beyond that. The whole thing really is in a very narrow compass, and very well developed by the Decision. Of course, the Dominion is the person who has got the most checks in these things, but, remember, the Province got a check in the John Deere Flow case. They tried to interfere with status, and it was held that they could not do it.

MR GEOFFRION: I was going to approach that group of cases.

The Province has a check in three cases, the John Deere Flow case, The Great West Saddlery Co. case and the Sale of Shares case. The sale of shares case was the last case, the Attorney General for Manitoba v. The Attorney General for Canada and the Attorney General for Ontario, which is reported in 1929 Appeal Cases, page 260. I will not read them; I will summarise them in a few words. In those three cases following the rule laid down in Parsons case, they repeatedly affirmed that the Province cannot interfere with the status and powers of a Dominion Corporation. They, therefore, said that you could not deny them the right to sue, and in the third case that you could not deny them the right to sell their shares because all these ~~were~~ held to be vital and fundamental statutory powers. Under the peculiar conditions in the Bryden case, denying them the right to work in the coalmines, it was denying them the right to live. The parallel in the two cases is obvious, and it has never been our attitude that the Province can do anything to a Dominion Company. The Parsons case is one instance of it. I suggest that there is a parallel, The parallel is that the Dominion creates the Corporation, and as it is a Company with non provincial objects and Dominion objects it must necessarily define the objects, or we would not know whether it has Dominion objects or not. Then the Province can do almost anything to it except strike out its statutory

and essential powers, and the three instances mentioned above are the three Provincial defeats in that respect. But as I say as regards aliens, there is no defining of the powers. The alien is admitted and being admitted the Province cannot strike at his status or prevent him from living and earning his living there, but beyond that the same jurisdiction belongs to the Province against him as belongs to the Dominion, and the jurisdiction of the Province against the Dominion Companies in the Parsons case was held to go to imposing contractual conditions. The converse is what is done here, and the powers of the Province have been held to interfere with Mortmain laws and things of that kind.

Now, my Lords, I do not know whether it is necessary that I should emphasise the trade and commerce argument. If it is trade and commerce for a British or foreign Company, to open an agency to do insurance business in Canada, why would not it be possible for an Ontario Company to open an insurance business in Quebec. The reason I am anticipating this argument is because I may not be here to reply, and my learned friends will argue that this is international and they find some help in some words used in Parsons case, where they refer to inter-Provincial trade, and curiously enough, notwithstanding that in Parsons case the reference dealing with the words "regulation of trade and commerce" is to inter-Provincial and not international, nevertheless in 1916

 your
 LORD ATKIN: I do not see how/apponents can rely upon
 trade and commerce, because that is gone in the past general
 decisions. This legislation has to be founded on aliens,
 has it not; trade and commerce in itself will not do?

VISCOUNT DUNEDIN: It is only aliens, because you hold
 judgment on the other. You are only addressing us on the other

part of the case.

MR. GEOFFRION: As I shall not be able to reply, may I just say this in respect to immigration. I have just a few things to say about it. In the first place every argument with regard to aliens would apply to immigration. Secondly, I do not understand how a Company immigrates. It certainly does not immigrate by opening an agency.

LORD ATKIN: We have not yet read the Judgments.

MR GEOFFRION: Shall I argue the second question first?

LORD BLANESBURGH: Is not there this general observation to be made with regard to immigration; that an argument might be based against you on general principles with regard to aliens such as my Lord Macmillan was stating. An alien might be put under restriction by reason of his alienage. That would not be necessarily compatible to an immigrant as such if the immigrant was coming from the United Kingdom or a Canadian returning home. Is not that in your favour?

MR GEOFFRION: Yes, my Lord, I admit it is. What I am suggesting is that the reason is that the Dominion has over an alien and over everybody in addition to the alien jurisdiction under section 91. The reason why the example suggested by my Lord Macmillan would be a good example would be because the power there comes under other subsections of section 91, militia and defence, for example, that would not apply to an immigrant.

VISCOUNT DUNEDIN: What do you mean by the second question, because there are so many questions. You said: Shall I argue the second question; what do you mean by that; do you mean the special revenue?

MR GEOFFRION: Yes, my Lord.

VISCOUNT DUNEDIN: But you have won on that, have you not?

MR GEOFFRION: No, my Lord, I lost on that.

VISCOUNT DUNEDIN: I beg your pardon; they say they are all good. Then I think you must argue the second question.

MR GEOFFRION: As to my the first question, the burden is on my learned friends as to immigration. That brings me to the second question before reading the Judgments. The second Question is at page 24, and it reads as follows: "Are sections 16, 20 and 21 of the Special War Revenue Act within the legislative competence of the Parliament of Canada? Would there be any difference between the case of an insurer who has obtained or is bound to obtain under the Provincial law a licence to carry on business in the Province and any other case?" The statute is at pages 66 and 67. The answers were against me.

VISCOUNT DUNEDIN: They are unanimously against you.

MR GEOFFRION: Yes, my Lord. "Every person resident in Canada, who insures his property situate in Canada, or any property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, against risks other than marine risks, (a) with any British or foreign company or British or foreign underwriter or underwriters" -- your Lordships will note there is no immigration here -- "not licensed under the provisions of the Insurance Act, to transact business in Canada; or (b) with any association of persons formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as inter-insurance and not licensed under the provisions of the Insurance Act, the chief place of business of which association or of its principal attorney in fact is situate outside of Canada" -- there is no alienage there -- "shall on or before the thirty-first day of December in each year pay to the Minister in addition to any other tax payable under any existing law or statute a tax of five per centum of the total net cost". My suggestion is that is not designed

to get in revenue; it is a penalty called a tax. In the same way in 1917 we had a penalty called a crime.

LORD BLANESBURGH: In this case the tax is thrown on the assured.

MR. GEOFFRION: Yes, for entering into a contract with us. My suggestion is that the intent and effect coupled with the notice of increase are clearly shown by imposing a prohibition which ex hypothesi is a void prohibition to bolster it up by imposing a tax on those who deal with people who do not comply with the prohibition, or again, on those who participate in that which is forbidden by law. Of course, it is not intended to get revenue. It is intended to enforce the Act, and that is the way it works anyway.

VISCOUNT DUNEDIN: You mean it is not intended to get revenue but intended to force them to take licences.

MR GEOFFRION; Yes, my lord.

LORD BLANESBURGH: The meaning I suppose of this burden placed on the assured is that they would never insure with such Companies in comparison with other Companies.

VISCOUNT DUNEDIN: Are these Companies to protect themselves and take out licences which ex hypothesi they are not bound to do?

MR GEOFFRION: That is the argument in a nutshell.

LORD ATKIN: What is the history of this Act. From when does it start?

MR GEOFFRION: I am told by my friend Mr Foster of the Insurance Department in Ontario that it was under consideration in 1924, and was presented as a Bill to deal with reciprocal underwriters. Objections were made in the Legislature about its constitutional validity, and the Premier of Ontario promised that there would be a Reference. This Reference was the one that was decided in favour of the Province in 1924. The Dominion Parliament was in Session.

LORD ATKIN: A Reference as to its validity went to the Supreme

Court.

MR GEOFFRION: Yes, my Lord, the 1924 Judgment finished it.

That was the final Judgment on that Reference; but I am dealing with the promise of it, because this promise prompted the introduction in the House of Commons, which was then in Session, of this taxing Bill, and this year the Bill has worked against British Companies; it does not work against a certain group of insurers.

LORD ATKIN: 1917 was the first year it was passed?

MR GEOFFRION: No, my Lord, in 1922; it was passed in 1922.

The two Parliaments were in Session. This was to be referred to the Courts on the question of validity, and the answer of the Dominion was the presenting of this taxing Act. Then, of course, the Ontario Reference came up to this Board, and it was decided in favour of Ontario in 1924. This is not limited to immigrants alone; it is British and all immigrants. The British Companies felt the handicap of the 15 per cent imposed on their clients. But they did not get revenue; they got licences; The two groups stayed out; Lloyds stayed out, because they cannot comply with the Dominion Insurance Act. The Dominion Insurance Act seems to imagine that they are Provincial. The New England Mutual stayed out on account of their system. Now the new amendment which has been proposed replaces the 5 per cent on net by 15 per cent on gross. This is the result; in the New England Mutual the net is only 5 per cent of the gross. According to an ancient system which they have, these people who are very conservative charge at the beginning of the year an enormous sum, and at the end of the year they returned what they have saved. They often returned 95 per cent I am told. So that 15 per cent gross is four times the net cost of the insurance to the insured. It is obvious under this new system that the New England Mutual if they want to comply with the Insurance Act must come in, or if they cannot must go out of the country. So that it is clearly an endeavour to get everybody in

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LORD BLANESBURGH: Would it be unfair to describe the Statute as a protective Statute? Is it not in effect a tax on imports, with which you are thoroughly well accustomed?

MR GEOFFRION: It is analogous, but a distant analogy, I suggest. My case, therefore, in a nutshell is that if, therefore, that principle is adopted, then it is perfectly useless to decide constitutional questions; there is an exceedingly easy way to get round it: Enact a prohibition which is void, and then impose a tax upon those who do not comply with it. I suggest that we have two parallel sections, one saying to the Underwriters: You will pay a fine if you enter into a contract with anyone without a licence; and the other one saying to the assured; You will pay a tax if you enter into a contract with a Company that is not licensed. I say tax and fine are exactly the same here; it is a mere question of words.

LORD ATKIN: If you have settled the constitutional question and held there is no power to licence for insurance purposes, do not you knock out the operation of this tax in respect of people who are not licensed; and if you cannot pay licences, there is no operation of the tax, is there?

MR GEOFFRION: Quite, my Lord.

LORD ATKIN: You say "quite"; if that is so, it is not necessary to consider the validity or not of this, is it?

MR GEOFFRION: Yes, my Lord.

LORD ATKIN: Perhaps it is. It is invalid because it refers to a condition which cannot validly be performed.

LORD RUSSELL: The effect of deciding that the licence is invalid simply enables the Company to carry on business without a licence, but it would still be open under this Act to say: You, the assured, shall be taxed if you deal with a company which does not take a licence.

MR GEOFFRION: If it is possible to come for a licence under

law they are taxing everyone.

LORD ATKIN: The invalidity is the invalidity as to issuing a demand for licenses at all.

LORD RUSSELL: In the prohibition against carrying on business without a licence?

MR GEOFFRION: Yes, my Lord.

VISCOUNT DUNEDIN: I suppose what is said against you is that this is a general power of taxation?

MR GEOFFRION: Yes, my Lord.

VISCOUNT DUNEDIN: Then as to a tax on the assured under a general power of taxation, what you say, as I understand, is that this is not really a genuine procedure of taxation; it is a tax that is put on not with a view to taxation, but with a view to back-slapping a tax, namely, that it will force these visiting Companies, if they want to get business, to take licences, which by the direct method under Sections 10 and 11 it has been found impossible to do.

MR GEOFFRION: Exactly, and no tax will be paid in that event.

LORD BLANESBURGH: The purpose of this taxing Act was to keep all insurance business within Canada?

MR GEOFFRION: Within the Dominion.

LORD BLANESBURGH: If you please. If that is what is its purpose, is not that legitimate protection to make those who are in Canada to insure in Canada with Canadian Companies, and not with those who are referred to as authorised Canadian Companies? Why should not that be legitimate?

VISCOUNT DUNEDIN: Supposing you do out out those words "not having secured a licence"?

MR GEOFFRION: I should have nothing to say; no objection at all undoubtedly. Then they would not discriminate between those who come and take a valid licence from the Dominion and those who do not. I could not object to taxing all foreign and British; but that is not what it says, and that is not the

way it operates. It is not intended to mean that, and does not operate in that way.

VISCOUNT DUNEDIN: It is a temptation to them to take a licence.

LORD ATKIN: I thought the effect of the other decision was that the whole licensing system of insurance has gone, so that they had no power to require licences, and if so, if that is invalid, then this Section as it is now drawn cannot operate because it has a reference to companies not licensed when there can be no license, and it is really only supporting an invalid provision of the licensing Act.

MR GEOFFRION: What will happen and what does happen is this, that if all the licensing is bad, we must strike out from the taxing Act the word "except", and transform it into a general tax for all foreigners. That was not the intention. You cannot rewrite a statute in that way.

LORD RUSSELL: Is it right to say that the licence has been declared invalid? All that has been declared invalid is the prohibition of carrying on business without a licence. Is not that true? I am speaking of a licence with these conditions. Supposing the Section had run thus, instead of the words "not licensed under the provisions of the Insurance Act", it had been "without holding a licence from the "Dominion"; would that be invalid?

MR GEOFFRION: My answer is that it is the law respecting the licence. If the Dominion requires a valid licence, I have nothing to say.

VISCOUNT DUNEDIN: I do not know whether any of you have been in India, but there they hang a thing round your neck, which you go away with. Nobody suggests that you should have a licence really, and if you have a licence it makes no difference about trade, but after all it is a licence; it is an advertisement. Why should not they do it like that if they

like?

MR GEOFFRION: At present the present licensing Act and the only one in force is one which imports an invasion of provincial rights.

LORD ATKIN: I thought the granting of a licence to anybody to do anything meant granting him permission to do that, and implied the power of refusing him the permission. If you grant him a licence, apparently you can refuse him a licence.

VISCOUNT DUNEDIN: I think you might even say more. Not only implied a power to refuse, but implied this, that the licence if granted would have a practical effect.

LORD MACMILLAN: It is not a mere ornament; not like the Indian garland.

LORD BLANESBURGH: This is how you put it. On the true construction the licence referred to is a licence we are discussing. We will assume for the moment that it is going to be declared that the licence has no operative effect; therefore, the licence which is referred to here has no operative effect, and from that point of view and on this construction of the Statute, do you say the Statute is unworkable? If you were to make it workable according to the constitution, leaving out all reference to the licence, and making it apply to all foreign insurance companies, it would be within the power of the Dominion, and you say the Dominion would never enact it. It is a totally different proposition.

LORD ATKIN: We are not asked to deal with that.

LORD BLANESBURGH: No, but that is why it is important for Mr. Geoffrion to draw a distinction.

LORD ATKIN: That is the well established rule on the question of severability, is it not?

MR GEOFFRION: Yes. The last Japanese case is another instance of severability. I should develop that.

LORD ATKIN: Perhaps the Judgments deal with that, and we might have them now.

VISCOUNT DUNEDIN: No, I think they just simply say there is power of taxation, and there is an end of it.

MR GEOFFRION: Yes, my Lord; so now I can read the Judgments.

VISCOUNT DUNEDIN: I think you might well leave out of them, what is perfectly right to be there but which we need not have over again, the long citations of the Privy Council cases.

MR GEOFFRION: I will try to do that, my Lords. I would suggest that your Lordships should turn to page 30 of the Record, at the bottom of the page, Mr. Justice Allard's Judgment.

(Learned Counsel read the Judgment).

LORD BLANESBURGH: He is of opinion, even if the licence under the taxing Section was bad, the taxing Statute is good.

LORD ATKIN: He has not addressed himself to the precise form of the taxing Section.

MR GEOFFRION: Yes, to this extent that he says: "The Licence described in the Statute". I do not know what he would with other Statutes.

LORD BLANESBURGH: Is it necessary for you to say, according to your view, that this is colourable legislation?

MR GEOFFRION: No, I am not using the word loosely.

LORD BLANESBURGH: Your position might be very weak if you relied on colourable legislation?

MR GEOFFRION: My position is two-fold. I should like to challenge the idea that they cannot ever support a valid prohibition by tax. Then Mr. Justice Bernier at page 41. He is rather long in his exposition, but I do not think I have passed anything. At line 27: (Learned Counsel read the Judgment).

In other words he is against us.

LORD BLANESBURGH: He does not give any reasons.

VISCOUNT DUNEDIN: No reasons for the second question.

MR GEOFFRION: Mr. Justice Howard is extremely lengthy, and I find considerable difficulty in choosing the parts. We might begin at the foot of page 45, line 34: "Counsel for the Attorney General of Quebec point out that the question as to the validity of these licensing sections of the Insurance Act has already been dealt with, though not expressly decided, by the Privy Council". Then he refers to the 1916 and 1924 judgments. "But that it has since been squarely presented to the Court of Appeals of Ontario by the Government of that Province (in re Insurance Contracts, 2. D.L.R., 1926, page 204)" -- my learned friend Mr. Tilley will go into the judgment.

VISCOUNT DUNEDIN: I do not think you need go into the question of the Ontario judgment.

MR GEOFFRION: "And that that Court has decided in effect that the said sections are ultra vires of the Parliament of Canada. In this I am unable to agree with the learned Counsel, for I consider that the question submitted to the Ontario Court of Appeals is essentially different from that which we are now called upon to answer. As already seen, this Court is asked whether sections 11, 12, 65 and 66 of the Insurance Act are within the legislative competence of the Parliament of Canada, whereas the question submitted to the Court of Appeals of Ontario included sections 134 and 134 (a) (now 135) of the Act. As a matter of fact, the reference to the Ontario Court in its original form did not mention sections 11, 12, 65 and 66 at all, but related exclusively to sections 134 and 134 (a)".

VISCOUNT DUNEDIN: I do not think you need go into that, because it is only the Court of Ontario. We are not bound by it, and, as a matter of ~~of~~ fact, they disagreed amongst themselves.

MR GEOFFRION: I will stop there, but I will make this comment about it: He must close his eyes to the rest of the Act.

The conflict is based upon the validity of this section.

LORD MACMILLAN: Will you go to page 47, line 3?

MR GEOFFRION: "I shall confine attention to the sections of the Insurance Act mentioned in the Reference, without taking into consideration other sections of the Act which might possibly encroach upon the legislative domain of the Province of Quebec". I suggest his foundation is wrong.

VISCOUNT DUNEDIN: When he says: "without taking into consideration," he leaves out a licence under the conditions of this Act.

LORD RUSSELL: "Granted pursuant to the provisions of this Act".

MR GEOFFRION: I can go on reading this if you like, but that is at the root of all this judgment. Sometimes he seems to forget it, and goes into the other branches. May I go to page 48, line 8: "Indeed, that the Dominion has authority to require a foreign insurer to take out a Dominion licence, as a condition of its doing business in Canada, is admitted in so many words by the Attorney General of Quebec. Referring again to Mr. Justice Masten's judgment (page 212) mutatis mutandis, the present enquiry is, by the decision in the Reciprocal Insurance case, narrowed to this question: is the legislation of the Dominion referred to in question 1 'properly framed?'"

VISCOUNT DUNEDIN: I think you may go to line 35.

MR. GEOFFRION: "Returning now to the question which we have to answer, let us first consider the validity of this legislation in its application to foreign (not British) underwriters. The Attorney General of Canada takes his stand upon the provisions of the British North America Act which give the Dominion exclusive legislative authority in respect of 'The Regulation of Trade and Commerce' (section 91, No.2).

and 'Naturalisation and Aliens' (section 91, No. 25), while the Attorney General for Quebec relies upon the provision which assigns to the provinces the rights to legislate with regard to 'Property and Civil Rights within the Province' (section 92, No. 13). It is a well-established rule of interpretation of statutes that a special enactment prevails over one that is general in its terms and scope. As between 'Trade and Commerce' and 'Property and Civil rights,' there seems to be little to choose in that respect, for both are broad and general. But the case is different with regard to 'Aliens'. That is, to my mind, specific and definite: at any rate no one can question that it is less general than 'Property and Civil Rights', and, therefore, especially, since it is backed by the power to control trade and commerce generally, and the fact that the residuum of legislative authority belongs to the Dominion, it gives authority to the Dominion to legislate with regard to aliens who seek to enter and do business in Canada, even to the extent of encroaching upon the provincial legislative field of property and civil rights within the province. That was held in effect in re Citizens Insurance Company and Parsons, 1881, 7, Appeal Cases, page 96, and it follows from the decision in Union Colliery and Bryden, 1899, Appeal Cases, page 581, where it was held ultra vires, of the Province of British Columbia to forbid the employment of Chinese in mines, showing that the Dominion alone is competent to deal with the civil rights of aliens in that way". Your Lordships will note he forgets the classification in Bryden and the subsequent cases, and he misconstrues, in my humble view, Parsons. "From which it manifestly follows that legislation which determines what an alien must do to obtain permission to enter Canada and carry on business here, and what will be his duties as well as his privileges while carrying on business in Canada, is properly framed legislation." I admit the first part; I deny the second.

LORD BLANESBURGH: That he bases upon a passage from Lord Watson.

LORD ATKIN: You did not read the quotation from Lord Watson.

MR GEOFFRION: No, my Lord. "The subject of 'naturalisation' seems prima facie to include the power of enacting what shall be" -- I will read it from the judgment, it is incomplete there, it is in the Union Colliery Company of British Columbia and Bryden, reported in 1899, Appeal Cases, at page 580. Lord Watson says, on page 586: "Section 4 of the Provincial Act prohibits Chinamen who are of full age from employment in underground coal workings. Every alien when naturalised 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 31, subsection (25), might possibly ^{be} construed as conferring that power in the case of naturalised aliens after naturalisation. The subject of 'naturalisation' seems prima facie to include the power of enacting what shall be the consequences of naturalisation, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalised. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term 'naturalisation' was intended to bear, as it occurs in section 31, subsection (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 Chinaman', 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 naturalised". The passage of Lord Watson

must be read with the context. It loses a good deal of its force against me. Then the judgment proceeds: " From which it manifestly follows that legislation which determines what an alien must do to obtain permission to enter Canada and carry on business here, and what will be his duties as well as his privileges while carrying on business in Canada, is properly framed legislation. And I do not know of any reason for differentiating between an alien individual and an alien corporation. There is, to my mind, no logical principle which would justify distinguishing between the granting of a licence to an alien insurer on condition that he shall pay fees, furnish security for the due performance of his contracts, and submit his business to inspection, and the granting of the licence on condition that only certain kinds of contracts may be entered into by him in Canada. The licence is no more than an agreement between the Dominion and the alien insurer, whereby the latter is permitted to begin to do business in Canada, and, if the alien insurer does not like the conditions exacted by the Dominion for its licence, it need not accept them, but the licence will not issue;" -- it is not a fight between aliens and the Dominion; it is between the province and the Dominion -- "if it does accept them, it may enter the Provinces of Canada on the understanding that it will offer the citizens only certain sorts of contracts. That, to my mind, is not an interference with property or civil rights in any province which the alien company may enter. The citizen of that province will find that, when he plans to take out a policy with the foreign company, he will be asked to agree to certain conditions in the policy. He has no 'civil right' to demand another sort of contract from the company with different conditions, whether the conditions contained in the policy were inserted by the Company of its own volition, or at the request of the

Dominion". It is not a question of the individual being free to deal, or not to accept the condition of the Dominion.

"The only restriction so far placed upon the Dominion's exercise of its licensing power is that resulting from the judgment in the Insurance Act Reference of 1916, where it was held that the Dominion cannot regulate by a licensing system a particular trade in which citizens of the respective provinces would otherwise be free to engage. As section 11 of the Act now stands, it affects only a particular set of people -- aliens -- over whom the Dominion unquestionably has jurisdiction, and does not, in my opinion, affect the particular trade of insurance in the sense submitted on behalf of the Attorney General of Quebec". Then comes the reference to Mr. Justice Smith, and then he proceeds: "In short, the provinces are left by these sections, as now framed, in full possession of the legislative field of property and civil rights". I cannot understand how that conclusion is arrived at. "It follows that, if the Dominion has the right to exact these conditions before granting a licence, it is intra vires in imposing penalties upon the licensee for failing to comply with the conditions. Once the general power of the Dominion to legislate as it has done in the section now under consideration is admitted, one must also admit its power to impose penalties for non-compliance with the legislation, and that without any regard to whether the licensee holds a provincial licence or not. At the argument at the Bar, sections 134 and 135 were referred to as though the conditions therein contained applied to all classes of insurance. It is interesting to note that, while the Act purports to apply to the major branches of insurance -- life, fire, marine, maritime -- and to more than a score of what are generally considered minor branches, these sections 134 and 135 apply to only three of the minor branches, namely, accident, sick-

ness and automobile insurance. No attempt is made to impose a complete set of conditions in respect of any of the other kinds of insurance". This is partly right and partly wrong. There are many statutory conditions. If it is good for part, it would be good for all. "Sections 80 and following deal with policies of insurance in general, but I fail to find therein anything that could be construed as an encroachment upon the provincial field of civil rights". I do not know if your Lordships wish me to go into those sections of the Act?

VISCOUNT DUNEDIN: Afterwards he finds that a British subject is an alien.

MR GEOFFRION: He is not quite sure.

VISCOUNT DUNEDIN: Obviously, if he was right on the first he would be right on the second; there would be no question about that.

MR GEOFFRION: Then comes the judgment of Mr. Justice Bond. May I begin on page 56, line 45: "In view of the foregoing holdings and especially the observations of Viscount Haldane and Mr. Justice Duff, I should say that the right of the Dominion Parliament, in principle, to enact such legislation as is contained in sections 11 and 12, under the terms of the sections of the British North America Act invoked, is sufficiently well established; and there only remains to be considered the question whether such legislation as is contained in the said sections 11 and 12 is -- to use the expression of Viscount Haldane -- 'properly framed'. It was objected, on behalf of the Attorney General of Quebec, that this is not 'alien legislation', or legislation dealing with aliens, because it does not appear in an 'alien' Act" -- I only suggested the name of a statute would not impress me -- "but is introduced into the Insurance Act for the purpose of appropriating jurisdiction. But, if the Dominion Parlia-

ment has the right to deal with the matter at all, it seems to me to be of little moment what vehicle is employed, if the intent is to restrict the rights of aliens in connection with the business of insurance". Then he goes on to discuss the argument, because it is not an "alien" Act, I should not succeed.

LORD ATKIN: I am rather interested in that reference to the Alien Act. I suppose that was not passed for the first time; there must have been an Alien Act of some kind in Canada from the very beginning.

MR GEOFFRION: "The 'Alien Act' -- 'An Act respecting British Nationality, Naturalisation and Aliens' -- (Revised Statutes of Canada, 1927, Chapter 138) might be amended so as to include in its terms the provisions of section 11 (b) of the Insurance Act, as well as the provisions of section 65, in so far as it relates to aliens." I submit that is begging the question. "But ~~while~~ the Insurance Act is equally convenient, if not more so, for the purpose, and while the 'Alien Act' might contain an enumeration of the various restrictions placed upon aliens in connection with various classes of business, these restrictions may equally well be inserted in the provisions of the particular Acts dealing with these various businesses in which restrictions are provided. Precedents to that effect may be found," -- that begs the question -- "in the Bank Act, and in the Railway Act, in both of which are incorporated restrictions upon the rights of aliens as Directors". This is Bank Act legislation. Insofar as 91 was concerned, aliens were for the Dominion. "I should therefore conclude, in respect to this objection, that if the right otherwise exists, the particular Act in which the right is exercised is of little importance, provided it be correctly expressed or framed". I concede that. "It is further contended on behalf of the Attorney

General for Quebec," etc., etc. (Reading to the words, at line 25, page 58) "inasmuch as they are not before this Court on this Reference".

LORD BLANESBURGH: Pausing there for a moment, do I understand you aright, that your criticism of this part of the judgment would be this, that this learned Judge, if his argument is followed to its logical conclusion, would reach the conclusion that the Dominion Parliament could legislate with reference to anything throughout the whole Dominion that could properly be described as trade and commerce, even though it was a matter of a transaction within the province? I do not think myself he combines the two. He gives a reason which would be good if there was no question of alien involved. I think he goes almost as far as you say. You do not require to introduce the element of alien.

VISCOUNT DUNEDEN: Would you read line 31?

MR GEOFFRION: He does make a distinction.

LORD BLANESBURGH: I had only taken it as far as we had gone.

MR GEOFFRION: The criticism I want to make on line 22 is, he expressly refrains from any opinion as to whether any of the other sections of the Act are ultra vires, as, inasmuch as they are not before this Court, the Act is indivisible. "I do not think that my conclusion is in any way opposed to the principles laid down in the case of The Citizens Insurance Company v. Parsons (7, Appeal Cases, page 96), for the province is not debarred from legislating in respect to these alien insurers quoad the province, provided such legislation be not inconsistent with the provisions in this respect of the Dominion Act as to the right to do business at all." What would be left by the Dominion could still be taken care of by the province; but that is not what the province is contending for. "I would distinguish, however, (on purely legal grounds), sections 12 and 66, which relate to any

British company or a British subject not resident in Canada. As I have attempted to point out before, the jurisdiction of the Dominion Parliament, in my opinion, rests upon the combined effect of the two subsections of section 91 of the British North America Act dealing respectively, with trade and commerce, and aliens -- and this opinion is fortified by the intimation above quoted from the observations of Viscount Haldane and Mr. Justice Duff. But in the case of British insurers, one of the essential elements is lacking. The only definition of an alien that is applicable, is that contained in the Naturalisation Act (Revised Statutes of Canada, 1927, Chapter 138, section 2), namely: 'A person who is not a British subject', and, consequently, in so far as the jurisdiction of the Dominion Parliament is based upon the right to legislate in respect to aliens, it fails at this point. It is contended, however, apparently, that the introduction into sections 12 and 66 of the words 'To immigrate into Canada for the purpose, etc.,' brings the sections within the purview of section 95 of the British North America Act. It seems to me, however, that such an unnatural use of words in an insurance Act cannot create a jurisdiction which would not otherwise exist. The second subsection of section 12 ascribes an inadmissible meaning to the word 'immigrate' -- he overlooked the fact it was repealed -- which, if governing the interpretation of subsection (1), would extend the scope of section 12 to matters obviously ^{not} comprised within the subject of immigration. In the case of aliens, I should say that there was clearly intended legislation in respect to aliens in connection with insurance. But I can see no reasonable connection between the subject of immigration and the subject of insurance. As was said by Mr. Justice Newcombe (Reference in re: Validity of the Combines Investigation Act, 1929, Canadian Law

Reports, at page 423): 'The principle is illustrated by a remark of Lord Dunedin in the Grand Trunk Railway of Canada vs. Attorney General of Canada, which may be applied mutatis mutandis; his Lordship said: 'Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right -- which may be conceded - but whether this law is truly ancillary to Railway legislation.'" It was a Dominion statute, providing that Dominion railway employees could not contract themselves out of liability. It was said that was true railway legislation.

LORD BLANESBURGH: The learned judge means this, that, if you were dealing with immigrants properly so-called, and not as fancifully defined, there would not be power in the Dominion to propose restriction in relation to insurance as they do with regard to aliens. How does he get at that distinction? Could there be an association between aliens and insurance and no association between immigrants and insurance?

MR GEOFFRION: "In the case of aliens, I should say that there was clearly intended legislation in respect to aliens in connection with insurance. But I can see no reasonable connection between the subject of immigration and the subject of insurance".

LORD BLANESBURGH: Is there any connection between either, or is it closer in the one case than in the other?

MR GEOFFRION: In naturalisation you have three classes.

LORD BLANESBURGH: We could not go beyond the two.

MR GEOFFRION: Then he quotes what Mr. Justice Duff said in 1924, Appeal Cases: "In accordance with the principle inherent in these decisions," etc. etc. (Reading rest of judgment). We do not suggest there is any distinction. Those, my Lords, are all the judgments of the Court of Appeal.

My Lords, I do not think there is much to be gained by my repeating the same argument. I therefore respectfully submit that there is in this Act not a statute respecting

aliens, but an Act respecting insurance.

VISCOUNT DUNEDIN: You have put it very clearly and fully.

Mr. Tilley, you appear for Ontario, and you are on the same side?

MR TILLEY: Yes, my Lord. All that I desire to do is to show your Lordships how the matter stands in Ontario on the decisions there. The Reciprocal Insurance Act in 1924 was an Ontario statute passed in 1922. It came before this Board in 1924, and the question there was whether the Ontario legislation was good. Ontario had a department of insurance for upwards of 50 years and the previous Ontario Acts in a general way covered matters quite the same as those covered by the Dominion Act. The question was whether the Ontario Act was good, being in opposition to the Dominion statute. It was held that the Ontario Act was good and at the same time the Criminal Code section was before this Board and it was held to be bad. This taxing provision was not before the Board because it was passed by the Dominion at the same time that the Province passed the Reciprocal Insurance Act, so that that was not ready to be submitted.

VISCOUNT DUNEDIN: It did not directly refer to reciprocal contracts of insurance?

MR TILLEY: Not the reciprocal insurance.

VISCOUNT DUNEDIN: Therefore it was not absolutely necessary to decide the question. That that was the reason I remember perfectly well in Mr. Justice Duff's Judgment in the Reciprocal Insurance Case in the Privy Council.

MR TILLEY: Yes, my Lord. Then after the Judgment in the Reciprocal Insurance Case the Province of Ontario submitted questions to the Appellate Division as to the validity of the Dominion sections, and your Lordships will find the Judgments at page 24 of the Appendix to the Ontario Case.

VISCOUNT DUNEDIN: It is decided by a majority in your favour.

MR TILLEY: Mr Justice Masten read the leading Judgment; Chief Justice Latchford was against. Following upon that, the Dominion refused to appoint counsel to take part before the Provincial Courts in that argument, and in order to endeavour to bring the matter to a definite head the Province brought an action to restrain the officials of the Dominion from acting under sections which were claimed to be ultra vires.

VISCOUNT DUNEDIN: You mean that in the Ontario case which is presented, it was heard ex parte?

MR TILLEY: The Court appointed Counsel to argue the case for the Dominion, the Dominion not exercising its franchise in that regard. Then an action was brought and was tried before Mr. Justice Garrow, the Attorney General of Ontario against the Attorney General of Canada. In that action it was claimed that the whole of the Dominion Insurance Act was ultra vires; that if there was anything in it that was good, it was so mixed up -----

VISCOUNT DUNEDIN: To restrain them doing what?

MR TILLEY: To restrain the Superintendent of Insurance from granting licences or professing to grant licences and professing to control companies. The Companies put up security and it was impossible to get it back, and all these questions were arising. The whole matter was in a state of chaos. That was tried before Mr. Justice Garrow, and his judgment is at page 44. There the Dominion was represented, and he reached the conclusion that the key sections, if we may describe them as such, of the Dominion Act, - that is the licensing sections - were all bad. He granted a declaration that the officials were not entitled to act.

VISCOUNT DUNEDIN: Would not he be bound to follow his own

Ontario case that had gone before?

MR TILLEY: He would; and then he made a declaration, but he also on page 55 of the Appendix deals with a taxing section of the Special War Revenue Act. He says: "The argument is, of course, that in its pith and substance this is not a tax, in the proper sense of the word, for the purpose of raising revenue, but is in fact an indirect method adopted by Parliament of compelling insurers to come within the Dominion fold in regard to insurance matters".

VISCOUNT DUNEDIN: He gave an opinion. I do not see how this would come up directly. He gave an opinion that is contrary to what has been the opinion in this case.

MR TILLEY: He agreed that the taxing clause was good. He said it did not look very good.

VISCOUNT DUNEDIN: I see he began by saying that it did not look very good.

MR TILLEY: It raised a very serious question whether any legislature of a Province in Canada could comply with an ultra vires section and impose indirect consequences where it could not impose any direct consequences.

LORD BLANESBURGH: As a matter of practice this second point is just as important for you as the first.

MR TILLEY: It is of vital importance.

LORD BLANESBURGH: It has been treated very lightly, but it is of vital importance to you. If you are right on the first, it would not do you much good if you are not right on the second.

MR TILLEY: If the officials knew the law, they could not grant any or would not grant any licences at all.

VISCOUNT DUNEDIN: Your point is that we must deal with the section strictly as the section stands?

MR TILLEY: Yes.

VISCOUNT DUNEDIN: And not as the section might be made.

MR TILLEY: I submit that the reference to "licence" must be to a licence that is good in law, and not a mere piece of paper; not whether some official in the department has, without any authority by statute, granted what is assumed to be a licence. It means a licence good in law. There is no such thing to which the taxing statute in our submission can apply.

MR EVAN GRAY: May it please your Lordships. I appear for Belding-Corticelli, Ltd., the Massey-Harris Company of Canada, Ltd., and the other Companies named as Interveners. In view of the very comprehensive and cogent argument that my learned friend Mr. Geoffrion has put to the Board, I have decided not to enter into the rather full argument which I had prepared, but to leave that and deal with only one point which I think is new and seems to have been not mentioned in the Courts below, or referred to in the Judgments that have been read to you. That concerns the matter of the taxing statute. I want to give your Lordships a reference to section 7 of the Income War Tax Act, which is chapter 27 of the Revised Statutes of Canada, 1927. The section is in these words: "A taxpayer shall be entitled to deduct from the tax that would otherwise be payable by him under this Act, the amount paid for corresponding periods under the provisions of Parts II and III of the Special War Revenue Act". That section has been in effect throughout the whole period of the special war revenue tax.

LORD BLANESBURGH: Would you read that again?

MR EVAN GRAY: "A taxpayer shall be entitled to deduct from the tax that would otherwise be payable by him under this Act, the amount paid for corresponding periods under the provisions of Parts II and III of the Special War Revenue Act".

The rather restricted effect of that section is this, that during the whole period in which this taxing Act has been applicable, those whom I represent have not in fact been required to pay a single dollar by way of additional taxation under the Special War Revenue Act; and, on the converse, not a dollar of additional revenue has accrued to the Dominion.

LORD BLANESBURGH: Does that apply to people who have no income? If you have no income, you will not pay?

MR EVAN GRAY: That is quite true, my Lord Blanesburgh; and that, I intended to say, was so unusually extraordinary that as a matter of revenue to the Dominion it was unlikely to be relied upon, and that therefore in real fact the Special War Revenue Act, since it was enacted, has not indeed added to the revenues of the Dominion in any important respect.

LORD MACMILLAN: It is taxed, and then it is taken off as tax again, having done its duty for the particular purpose designed?

MR EVAN GRAY: That is it, my Lord.

VISCOUNT DUNEDIN: It says "shall be entitled to deduct the amount paid for corresponding periods under the provisions of parts 2 and 3". Now, what are the amounts payable under the provisions of parts 2 and 3?

LORD MACMILLAN: That is 5 per cent on the policy or premium; so the result of this is that it is first of all laid on with one hand and taken off with the other hand, having in the meantime served the purpose of an embargo upon this kind of business?

MR EVAN GRAY: That is my submission.

LORD RUSSELL: How does that work? According to that, a man could insure with an unlicensed company, pay the tax, and then deduct it.

MR EVAN GRAY: Yes; that is the effect. It has this effect:

It attaches this badge of an unlicensed character to all such insurance, and it puts the individual assured to the difficulty and trouble of making returns and paying this tax as an item.

LORD RUSSELL: It was put by Mr. Geoffrion that the way it operated was that nobody would insure with a company which was not licensed; therefore you must take out a licence. If in point of fact the taxpayer is going to pay and get it back immediately, it has not the same terrifying effect that it would otherwise have.

MR EVAN GRAY: It is not being as effective as intended, but it has, as my learned friend Mr. Geoffrion put to the Board, had an important effect, because it has driven into the licensing fold of the Dominion the British Companies to which he referred.

LORD ATKIN: You are appearing for Companies who are assured as well as insurers, Companies who do in fact have insurances?

MR EVAN GRAY: Yes, my Lord.

LORD ATKIN: And have to insure goods?

MR EVAN GRAY: Yes.

LORD ATKIN: You may fortunately be so prosperous that you would in any case be paying income tax in excess of 5 per cent on your premiums, and so on?

MR EVAN GRAY: Yes.

LORD ATKIN: There might be persons in Canada in these days who are not so prosperous as all that and who would not have sufficient income tax to deduct from their insurance. That might happen.

MR EVAN GRAY: I quite agree.

LORD RUSSELL: Any tendency that this particular section has is in this direction -----

LORD ATKIN: It is a mitigating section.

LORD MACMILLAN: Insurance business is highly competitive, and I should imagine that competing companies would not omit to draw attention to the fact that these are unlicensed.

MR EVAN GRAY: That is it, my Lord.

VISCOUNT DUNEDIN: Does it come to this: the person who is going to insure and who says "I am not going to a British Company" is told by them: "Oh, well, it does not matter; you get back what you pay"; but he says: "I do not want to have the bother of that".

LORD MACMILLAN: I have had experience of trying to get back money, and I have not found it easy.

LORD ATKIN: To the ordinary business man it would be a deterrent?

MR EVAN GRAY: Yes, my Lord.

LORD ATKIN: Because he has to make the return.

MR EVAN GRAY: May I make that clear to your Lordships. There are a few points which I desire to present on their behalf. This Act turns out to be in reality not an Act for the raising of revenue for the Dominion, but a statute for the declaration of an authority respecting insurance by virtue of its licensing provisions.

LORD MACMILLAN: One of the recent cases before the Board was really very much in the same way. An export tax on timber was imposed in British Columbia, and then it was reduced to a perfectly illusory figure, but the only purpose of it was to keep the trade to British Columbia. I think that was the purpose of it - I forget - but it was under the guise of an export tax intended to do something quite different, rather than in the guise of a direct tax.

MR EVAN GRAY: With respect, this in my submission is similar to that, as I understand your Lordship to put it, but this is in reality an effort to declare the jurisdiction of the Dominion as to insurance, and it has that practical effect

through the terms which it is intended to apply.

I had intended to submit to your Lordships some other points, but I desire not to press them at the moment. May I just mention this in passing, so that if anything should come up in the Case for the Respondents I perhaps will be permitted to refer to them again. I wish to press upon your Lordships' attention the submission that the 1924 Reference was really conclusive for the protection of the interests of my clients in respect of this insurance; that what was decided there with regard to reciprocal insurance was in reality the question that is before your Lordships in this Reference, in so far as it affects those whom it is my duty to represent. These Canadian members of mutual assurance associations are doing exactly the same thing in substantially the same way that those who were members of the reciprocal insurance group in the 1924 case were doing then. The difference between the two cannot be found certainly on any such ground as aliens, nor on any such ground as immigration; and therefore I wish to leave that point.

VISCOUNT DUNEDIN: I think, paraphrasing Mr. Justice Duff's judgment, he was saying: I will not tell you what I think about 11 and 12, but I think you may guess.

MR EVAN GRAY: That is the way I would like to have your Lordships find it. So far as those whom I represent are concerned I should like to put them in exactly the same position as those who are associated as reciprocal insurers were before this Board in 1924. One other point which I had in mind to develop was this, that any competent legislation respecting aliens must of course be directed towards that quality of alienage which is represented by those words, and that this legislation now in question, being in fact insurance legislation, is not in reality directed to any quality of alienage

in the person to whom it is going to apply.

LORD ATKIN: You might help me about that. Could you give me the first Dominion Act on aliens?

MR EVAN GRAY: I have a note of it, and will give it to you later, if I may.

LORD ATKIN: If you can give me a reference to it I would like to see it. The law as to aliens was certainly not fully developed in this country in 1867. At that time they could not hold land, for instance. One can imagine that they might have intended to give to the Dominions, as Lord Watson seems to have thought they did intend to give, the power to define what the rights and liabilities of aliens should be in the country in which they are forming a temporary residence.

MR EVAN GRAY: I can give your Lordships this information. There was legislation respecting aliens and their rights in Canada prior to Confederation, and enacted by the Province of Canada, Upper and Lower Canada, from time to time. Then that legislation after Confederation, was re-enacted by the Provinces and appears in the Ontario statutes as part of the civil law of Ontario. That is the law respecting aliens and their right to hold land, and as to their civil rights, but the Dominion also enacted laws respecting aliens arising out of that pre-confederation statute, and called it the Naturalisation of Aliens Act, and there is incorporated in the Dominion statute similar provisions on the same subject matter as appears in the provincial law, so that at the moment the rights of aliens are in my understanding affected, or at least they purport to be established by both Dominion and Provincial laws not inconsistent with one another; in other words, no conflict has arisen, and therefore the question is not at issue.

LORD BLANESBURGH: Has no province except Ontario?

MR EVAN GRAY: I think they have all done so. Quebec has in its Civil Code prescriptions which provide for their rights of property and otherwise.

LORD BLANESBURGH: Are they the same as the Dominion legislation on the subject?

MR EVAN GRAY: There is no conflict, my Lord.

VISCOUNT DUNELIN: I think what my noble friend Lord Atkin wanted was if you could give the text of any one of these statutes.

LORD ATKIN: I should have liked the first Dominion statute dealing with the naturalisation of aliens, or dealing with aliens separately.

MR EVAN GRAY: I will get that and give it to your Lordship.

LORD BLANESBURGH: May I ask you a question, because it might become important in this discussion: With whom would it be competent to make this legislation enacting that aliens shall not be permitted to hold property in Canada? Would that be the Dominion, or, confining it to a Province, would it be provincial.

MR EVAN GRAY: I would like to answer that by saying I cannot answer it. It is an exceedingly difficult question. May I explain it a little, so that you will see why I find it difficult to answer? I think my learned friend Mr. Geoffrion has already answered that in a way that is no doubt quite correct and satisfactory, but I think he has answered it by saying that that is for the province.

LORD BLANESBURGH: Quite plainly, without reservation or hesitation.

MR EVAN GRAY: I have no wish in any way to weaken the authority of that answer, because I have no doubt it is correct, but I do not wish the rights of my clients in this situation to depend upon the answer to that question. Supposing, for

example, that were answered otherwise, and held by this Board that the Dominion might prescribe whether aliens could or could not hold land, I would want still to have my clients entitled to succeed in the reference in this case on the ground that this is not that sort of legislation. For that reason I answer your Lordship's question, my Lord Blanesburgh, in that way, and submit that so far as the issue here is concerned the question is very clearly decided on another ground, namely, that this legislation is not in reality legislation respecting aliens, but is legislation respecting insurance. May I give you one illustration which has occurred to me since I have been thinking about this matter. I have observed in the hotel in which I am staying, a notice that aliens are required to register in the hotel directory the port of entry, the destination, and the probable time of departure. That is a regulation apparently enacted respecting hotels and also respecting aliens. I have no doubt that this is quite competent legislation respecting aliens, even though it affects what they must do in the hotel, and in a local way, but if that regulation respecting aliens was of a different sort, namely, how the hotel should be conducted in relation to aliens, then I would submit, with respect, it could not be alien legislation.

VISCOUNT DUNEDIN: Thank you very much.

MR. ST. LAURENT: My Lords, may I, before proceeding with my argument, give your Lordships perhaps some information upon this matter of how aliens were dealt with prior to Confederation and what has been done in that regard since Confederation. As your Lordships know, our Civil Code in the Province of Quebec came into force just prior to Confederation, the 1st July 1866, as an enactment of what was then a united legislature having full power to deal with the subject matter.

Articles 18 to 28 exclusively deal with the subject of the enjoyment of civil rights. "18. Every British subject is, as regards the enjoyment of civil rights in Lower Canada, on the same footing as those born therein, saving the special rules relating to domicile. 19. The quality of British subject is acquired either by right of Birth, or by operation of law. 20. A person born in any part of the British Empire, even of an alien, is a British subject by right of birth, as also is he whose father or grandfather by the father's side is a British subject, although he be himself born in a foreign country; saving the exceptions resulting from special laws of the empire. 21. An alien becomes a British subject by operation of law, by conforming to the conditions the law prescribes". Article 22 appears to have been amended in 1916 by the Provincial Legislature to read: "The conditions of naturalization are determined by the Federal laws on that subject passed by the Parliament of Canada within the limits of its legislative jurisdiction." Then 23 is: "An alien woman is naturalized by the mere fact of the marriage she contracts with a British subject. 24. Naturalization confers in Lower Canada, on him by whom it is obtained, all the rights and privileges he would have if born a British subject. 25. Aliens have a right to acquire and transmit by gratuitous or onerous title, as well as by succession or by will, all moveable and immoveable property in Lower Canada, in the same manner as British-born or naturalized subjects". That is the old section which comes back.

LORD ATKIN: Is that the only disposing power?

MR ST. LAURENT: "Aliens have a right to acquire and transmit by gratuitous or onerous title, as well as by succession or by will, all moveable and immoveable property in Lower Canada, in the same manner as British-Born or naturalized subjects". Then aliens may serve as jurors.

LORD ATKIN: "Dispose of" means testamentary capacity as well?

MR ST LAURENT: Yes, my Lord; transmit as well by succession or by will. That was the provision as it existed.

LORD ATKIN: That is in advance of the British statute, then?

MR ST LAURENT: Yes, my Lord.

LORD BLANESBORGH: That would mean that property on death of an alien intestate would pass to his next of kin or heir at law, as the case may be?

MR ST LAURENT: Yes, my Lord. That was dealt with by the Naturalisation Act in a form which really coincides in substance with the provisions which we have in the Code. It is now Chapter 138.

LORD ATKIN: I saw a reference in the Judgment to chapter 138. I want to know where 138 comes from; what is the date of it?

MR. ST. LAURENT: I will have to look that up. It really antedates confederation. It may have been in some minor details modified.

LORD ATKIN: I think it was probably all revised in accordance with the British Act of 1914.

MR ST LAURENT: Yes, my Lord.

LORD ATKIN: But it is before that that I wanted it.

MR ST. LAURENT: I will find the reference for your Lordship.

VISCOUNT DUNEDIN: Is this Civil Code of Lower Canada still the Civil Code of Quebec?

MR ST LAURENT: Yes, it still is the Civil Code of Quebec. There are some portions which cannot be modified by the Quebec legislature because they do deal with matters in which the jurisdiction has since been transferred to the Federal Parliament, but at the time it was enacted of course there was no reason for distinguishing.

VISCOUNT DUNEDIN: I do not mean that no amendment has been made of it by the appropriate legislature, either Provincial

or Federal, as the case may be, but it is the same thing; they did not re-enact the whole Code?

MR ST LAURENT: No, my Lord. There have not been very many or substantial amendments to the Code; it is substantially the Code as originally given to us.

VICOUNT DUNEDIN: I expected to find it in French.

MR ST. LAURENT: In the statute which provided for the appointment of the Commission to draw the Code, one of the principal reasons given was that it so happened that the laws in force at the time did not exist in the language which was the language of some of the inhabitants, and then all the private laws existed only in the French text. It was desirable to have an official English text which might be available to those residents of Lower Canada whose mother tongue was English. That is set out as one of the main considerations for appointing this Commission to determine the text of the laws in application in the Province at that time.

LORD BLANESBURGH: Some of the provisions of the Code at confederation may have been superseded by Dominion legislation since?

MR ST LAURENT: Yes, my Lord. There was a whole chapter dealing with bills of exchange which was entirely superseded by the Dominion Bills of Exchange Act. The sections here are 20 and 21. "20. Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to a natural-born British subject".

LORD BLANESBURGH: That purports to be applicable to the Code of Canada?

MR ST LAURENT: Yes.

LORD BLANESBURGH: Supposing you found in the Code of Quebec something which was not entirely consistent with that, your views would be that that would prevail?

MR ST. LAURENT: That would prevail.

LORD BLANESBURGH: Because that is section 91?

MR ST. LAURENT: Because that is section 91 by which the jurisdiction over aliens and over naturalisation - and in my submission the consequences of naturalisation to the fullest extent - reside in the Dominion. This section shall not operate so as to (a) qualify an alien for any office or for any municipal parliamentary or other franchise; or (b) qualify an alien to be the owner of a British ship; or (c) entitle an alien to any right or privilege as a British subject except such rights and privileges in respect of property as are hereby expressly given to him".

LORD RUSSELL: From what are you reading?

MR ST LAURENT: That is the Dominion statute, section 20, chapter 138 of the Revised Statutes of Canada, 1927. Then it goes on: "or (d) affect an estate or interest in real or personal property to which any person has or may become entitled either mediately or immediately in possession or expectancy in pursuance of any disposition made before the 4th day of July 1883, or in pursuance of any devolution by law on the death of any person dying before that day". Prior to the 4th July, 1883, some other provision existed, the effect of which was conserved in ^{the new} enactment.

VISCOUNT DUNEDIN: Now we will come to the general question.

MR ST. LAURENT: I need not say to your Lordships that the matter is of very great importance and that there is, and there always has been since confederation, a Federal Insurance Department in Canada. Even prior to confederation there was legislation in force in some of the provinces providing

that insurance business shall not be carried on without a licence. The view has always been that the business of insurance was such that it requires an examination by some public authority of the ability of the person undertaking the insurance to carry out his undertakings, and some inspection of the manner in which that business was carried out, to determine, if it became necessary, when in point of time it might become unsafe to the public to allow him to continue to undertake insurance responsibility. That existed in some of the provincial legislation prior to confederation. Immediately after confederation in 1868 a Dominion Insurance Act was adopted which set up an office to exercise the function of examining whether or not those wishing to do insurance business offered the proper security to make it convenient for the public to accept insurance contracts from them. At that time there does not seem to have been any legislation describing at least in any minute or complete manner, what were the provisions that it would be proper to have in insurance contracts. At that time the matter of the contract as distinguished from the capacity or right of the insurer to do business seems to have been left to the stipulations of the parties. The first Insurance Act which established a statutory form of contract, or a statutory requirement of minimum clauses, to be offered by the insurers to the insured, I think was that of the Province of Ontario.

VISCOUNT DUNEDIN: That is a provincial statute?

MR ST. LAURENT: Yes, my Lord. I am indicating this to your Lordship to show how this clash between the Provinces and the Dominion came about.

VISCOUNT DUNEDIN: Let me be quite sure about this. You said after confederation in 1868 there was an Insurance Department, and then, as I understand, there was a Dominion statute?

MR ST LAURENT: Yes, my Lord.

VISCOUNT DUNEDIN: Which left the contract alone?

MR. ST. LAURENT: Yes, my Lord. The first Insurance Act of the Dominion was in 1868, 31 Victoria, chapter 48. Section 2 of that Act provided that except ocean marine companies, no insurance company "shall transact its business in Canada without first obtaining a licence from the Minister of Finance".

LORD ATKIN: It did impose a licence?

MR ST. LAURENT: Yes, my Lord. The requirement of a licence even antedates confederation.

LORD ATKIN: You are only telling us now historically I mean from the constitutional point of view there was no objection to that. It is only when you get a division of function that the question arises?

MR ST. LAURENT: Yes, my Lord; I mention that merely as an economic fact, showing that even before confederation this was a business which it was recognised should be under departmental control.

LORD ATKIN: Now you are saying that in 1868 the Dominion assumed to license all insurance companies except marine.

MR ST LAURENT: They provided that this should not apply to any provincial incorporated company not attempting to do business outside the territory of the province incorporating it.

LORD BLAKEBURGH: But it would extend to any provincial business?

MR ST. LAURENT: Yes, my Lord; under construction it would have extended to inter-provincial business.

VISCOUNT DUNEDIN: That of course is just what was found wrong in 1916, was it not?

MR ST. LAURENT: I would submit that it was not found wrong, my Lord. It was found that a provincial incorporated company could, without getting a Dominion licence, get sufficient power from another source, but it was not held that if the provincial

Company took a Dominion licence, and thereby under the Dominion statute was deemed to be a Dominion incorporated company, it could not carry on as a Dominion company throughout the whole of Canada.

VISCOUNT DUNEDIN: In the case in 1916, the Dominion attempted to stop all business in the provinces unless it had a Dominion licence. That is what they wanted to do?

MR ST. LAURENT: Yes. The statute in question in that litigation did apply to all insurers, whether provincially incorporated or otherwise, unless confined in their operations to the province of incorporation.

VISCOUNT DUNEDIN: That was held to be bad?

MR ST. LAURENT: It even applied in terms to individuals purporting to do business, and it was held that it was an interference with the right which would otherwise exist of carrying on insurance business in the provinces. After confederation - this may be of interest only historically - for a very long period it was apparently taken for granted that it was proper for the Dominion to exercise this control over the capacity and responsibility of insurers, by means of licences and of inspection, and in the first consolidation of the Ontario statutes they had a schedule setting out the form of statutes which were consolidated, as to what had not been dealt with, because it was considered to be of Federal jurisdiction. I am not submitting that as argument, but only as the historical explanation of how it came about. At that time it was taken for granted that this portion of the Act was properly within Federal jurisdiction. The Province of Ontario passed its Insurance Act in 1878, 39 Victoria, chapter 23, and it expressly provided that "This Act shall not apply to any company licensed under Acts of the Parliament of Canada to transact business of insurance in Canada,

nor to any company incorporated by Act of Parliament of Canada, nor to any mutual fire insurance company which does not receive cash premiums in lieu of premium notes but acts exclusively on the mutual principle". That was section 1 of chapter 23 of the Ontario statute, 33 Victoria. In view of the fact that the Dominion Act of 1868 provided for the licensing of companies other than provincially incorporated companies, it seems clear that the Provincial Act was limited in its application to provincially incorporated companies in the Province of Ontario, and that British and foreign companies were recognised or were left to be dealt with as if under Federal jurisdiction. Then in this same Act the Legislature of Ontario provided to secure uniform conditions in policies of fire insurance. That is the statute which gave rise to the litigation culminating before this Board in a decision in *Parsons v. The Queen*. There there was a British company and a Dominion company to which the licensing provisions of the Ontario Act did not apply by express exclusion in section 1, who had written insurances on property in Ontario, and who were contending that they were not bound by this Ontario statute dealing with the form of the contract, because they were subject to Dominion jurisdiction. Therefore in my submission the question which came to be determined was whether or not it was competent for the Legislature of Ontario to determine under property and civil rights what kind of contracts could be written for the insurance of property against fire in the Province of Ontario.

VISCOUNT DUNEDIN: What case was that?

MR ST. LAURENT: That was the *Parsons* case. That was the question which came up for determination. Your Lordships will recollect that the Dominion was not represented in that case at all. That was a case between the insurer and the insured,

a concrete case where the insurer denied that he was bound by the statute then emanating from the Ontario legislation, contending that he could be bound only by legislation emanating from the Federal Authority. That was a concrete case where the question arose as to what extent the parties to the contract were affected by the Ontario legislation.

LORD BLANESBURGH: Would it be competent for a Court in a suit merely inter partes to determine the validity of a provincial Act without the Province being represented?

MR. ST LAURENT: Our Code in Quebec - and I understand the same is true of the Judicature Act in Ontario and probably of the other Provinces now - requires that when any question as to the validity of an enactment comes up, there must be notice to the Attorney General, with a summary of the reasons to be urged against the validity of the Act.

VISCOUNT DUNEDIN: With a view to intervention?

MR ST. LAURENT: Yes, my Lord. That is rather of recent origin; at this time there was no such requirement.

VISCOUNT DUNEDIN: The result would be, I suppose, that it would not be res judicata; in other words, the Attorney General might have come, in a subsequent case, and taken it to the Privy Council if it had not been taken there before.

MR ST. LAURENT: Yes, my Lord; but it was a pronouncement by His Majesty on the advice of the Privy Council.

VISCOUNT DUNEDIN: That opinion they would be bound to follow; they would be bound by their own judgment if it was in the Court below, but it would not be res judicata.

MR. ST. LAURENT: No, my Lord. It might perhaps be submitted that the principle of res judicata might not have the same application to the validity of laws.

VISCOUNT DUNEDIN: Res judicata, remember, in the proper sense of the word, means as between the same parties.

MR ST. LAURENT: When the question at issue is as to the validity of something put forward as a public law, the principles are perhaps not quite the same. In that case it was held that as a matter of public law these enactments of the Ontario Legislature dealing with the form of the contract were matters of property and civil rights within the province, and that the insurance companies were wrong in saying that because they were constituted under Federal authority, or were licensed to do business in Canada under Federal authority, they did not come within the property and civil rights legislation of the province in which they were doing business, but that their trade, or their business, could be controlled only by the Federal Parliament exercising its jurisdiction with respect to trade and commerce. In our submission that recognises the difference between the two things which might be done: firstly, the control by a licensing system of those who would have capacity to do insurance business and who would be allowed by the legislature to enter into insurance contracts.

LORD BLANESBURGH: It is difficult to see, so far, any distinction in principle. If it was within the rights of the province to dictate the terms of the contract, it would be strange to say it was not within their rights to determine the constitution of the company.

MR. ST. LAURENT: It might be within their right to determine the constitution of a company with provincial objects, and having, as was held in the Companies reference, a status enabling it to receive that comity from other jurisdictions the right to carry on in other jurisdictions, but your Lordships have held that it is within the jurisdiction of the Parliament of Canada to incorporate companies to do business in Canada. With respect to such companies, their status cannot be restricted by provincial legislation; provincial

legislation must not be such as to prevent them from carrying out the objects for which they were incorporated, though in carrying out those objects they may have to comply with provincial legislation. To follow that up, if I may for a moment, if it is recognised as economically sound that insurers should be subject to more public control as to their solvency, as to the manner in which their funds are invested, and as to the way in which they from day to day have to satisfy their obligations to the insured, if it is true that the Parliament of Canada can incorporate and authorise the incorporation of insurance companies, must it not then be within the jurisdiction of the Parliament of Canada to exercise that departmental control, or that official control; because if it were attempted to be exercised by provincial officials, would not the provincial legislation be subject to the same objection as was the provincial legislation of Manitoba?

VISCOUNT DUNEDIN: I am not sure that I am not going a little bit in front of what you are absolutely entitled to say, but you say you recognise that insurance should be regulated by a Dominion statute. I am not sure that anything more was done than this: that it was quite within the power of the Dominion to create a new person, a new company, and that it should prescribe what that person should do. It is like in company law the memorandum of association. It is a different thing to say, because the Dominion legislation can incorporate a company and say what it is to do, that it necessarily has complete supervision over it. I do not see that that has been laid down in any of the cases. I think you are rather assuming that more has been decided in your favour in respect of the recognition of status than has really been decided. Status does not seem to me necessarily to connote any question of regulation.

MR ST. LAURENT: I certainly do not intend, and I hope I am not assuming too much in my favour.

VISCOUNT DUNEDIN: You are quite right to say that it is so, but I mean you must give us more chapter and verse rather than assume. At present I do not see, and I shall be glad to be shown how I am to see, how any of the cases that have been quoted to us do more than say that as far as the Dominion legislation is concerned it can create a person. You cannot create a person at common law; you must have an association of persons. You can create a new person - that you can do by statute - the object of whose activities is to be insurance. At present I do not see that anything more than that has been said.

MR ST. LAURENT: Possibly not, my Lord; but I would attempt to press it this much further. If it is competent under Federal legislation to create a person for the purpose of carrying on insurance business, the economic situation being such that it is recognised that insurance business is one which it is proper to determine almost from day to day whether that person should still carry it on -----

VISCOUNT DUNEDIN: You say it is recognised. If you say that it is recognised by people of common sense, I agree with you; but is it recognised by legislation?

MR. ST. LAURENT: No, my Lord; I am not submitting that it is recognised by legislation. I am merely submitting that if in fact in order to carry on the business of insurance with any degree of safety to the public certain things are required, it is not sufficient just to be present at one moment, it is necessary that they be persevered in, that they be there all the time.

VISCOUNT DUNEDIN: Admit all that for the moment, then the question is; Are the people that are to provide for those safeguard

the Dominion legislature, or the provincial legislature; and the mere fact that the Dominion can incorporate and make the person does not seem to me to lead ^{to} a necessarily logical conclusion that it is to be the person who is to provide for those safeguards.

MR ST. LAURENT: My submission would be that the provincial authority would not have the jurisdiction to intervene and to say to a Dominion company: You shall not carry out the objects for which Parliament has incorporated you.

LORD ATKIN: How does this work out exactly? Suppose the Dominion of Canada incorporated an insurance company, is it your view that they could put in its charter a clause restricting its activities as a company and as an insurance company to carry on business only under a licence from the incorporating authority? Can they do that? Can they say to the insurance company: You are a company, but you are only to operate as an insurance company on a licence from us?

MR ST. LAURENT: Yes, my Lord, that is our submission.

LORD ATKIN: That is your submission. If that were so, then they have the control of the company and can impose the conditions under which it is to carry on business.

MR ST. LAURENT: Yes.

LORD ATKIN: That I understand. As a matter of fact, I notice that in this Insurance Act you purport to incorporate foreign companies in Canada, if once you have granted them a licence.

MR ST. LAURENT: Yes.

LORD ATKIN: I do not know whether you are going to rely upon that by analogy. Are you going to say that foreign companies can only carry on business if they are made corporations of Canada and, being made corporations of Canada, you can impose a licence?

MR ST. LAURENT: Yes, my Lord, that is part of my argument.

LORD ATKIN: Supposing you can do that, it is not the same thing, is it? ~~Once~~ you have brought into the world a body armed with legal powers, thereafter when you have cast it adrift in this wicked world to say at a later stage to it: Well, now I am going to say you must not carry on business except under a licence?

MR. ST. LAURENT: Our submission would go that far.

LORD ATKIN: I understand you imposing the licence as a condition of its incorporation, but it is a different thing, is it not, thereafter to say, having brought it into full-grown existence: Now you are a person carrying on business in Canada I am going to put restrictions upon *you*.

MR. ST. LAURENT: The argument I wish to submit upon that head is this: it has been repeatedly held by this Board that all legislative powers of a self-governing dominion are to be found within one or other authority in the dominion. Then I was going to put as the minor that with respect to dominion companies this power to intervene and to say "From such and such a day you shall not exercise the objects for which you are incorporated" has been denied to the provinces. I will endeavour to make that point.

LORD ATKIN: Is not the effect of the decision this, that the Dominion cannot say to even a Canadian insurance company; You cannot carry on insurance business in the province except under our rules?

MR. ST. LAURENT: I submit not. I submit that that is carrying the decision too far.

LORD BLANESBURGH: Do you suggest that a company incorporated under Dominion legislation can be given, by the essential legislation in relation to what I call the provincial field, powers that no other company can claim?

MR. ST. LAURENT: No, my Lord.

LORD BLANESBURGH: Is not that the real crux? Can a Dominion government be authorised by the Dominion legislature to do anything in the provincial field?

MR. ST. LAURENT: No, my Lord, I do not go that far.

(adjourned for a short time)

MR ST. LAURENT: My Lords, I would not like to assure your Lordships that this is the earliest Federal Alien Act, but it is the earliest one I have been able to find in the short time we have had at our disposal. It is the Dominion Statutes of 1881, Chapter 13.

LORD BLAKESBURGH: So far as you have gone, that is the first time they proceeded to legislate?

MR ST. LAURENT: Yes, my Lord; and they did not enact under these Sections that they were a consolidation of anything prior to that.

Now, my Lords, I would not venture to suggest to your Lordships any construction of my own upon the decisions of your Lordships' Board with respect to Dominion Companies or insurance matters, but I would ask your Lordships to allow me to call attention to certain constructions which have been placed upon these earlier decisions, either by decisions of your Lordships' Board or by decisions of the Supreme Court of Canada on the point.

VISCOUNT DUNEDIN: What do you call the earlier decisions?

MR. ST LAURENT: Parsons case and the 1916 Insurance Reference.

VISCOUNT DUNEDIN: Your two stumbling blocks, in fact?

MR. ST LAURENT: I had hoped to make them the sheet anchors on which we base our jurisdiction in this Reference.

Now, the first reference I would like to give to your Lordships is a casual statement in Mr. Justice Duff's decision in the Combines Reference. That is reported in 1929 Supreme Court of Canada Reports, at page 409. The remark to which I would like to call attention is at page 447 at the bottom: "But the Dominion has a special jurisdiction in relation to insurance, jurisdiction touching, that is to say, the rights of foreign countries and foreigners generally to engage in the business of insurance in Canada; and considering that the design of the reigning trade policy is to encourage

domestic trade, and that its effectiveness for that end may depend upon the character of the facilities for, and the rates of, domestic transport, the authority to conduct such investigations" and so forth. Here the argument has been used that because of the combination of the Sections dealing with aliens and trade and commerce is referred to in some of the decisions in the 1916 decision and the Reciprocal Insurers decision, that it might be an argument to support the validity of this Combines Act. Mr. Justice Duff says in that regard: "But the Dominion has a special jurisdiction in relation to insurance, jurisdiction touching, that is to say, the rights of foreign countries and foreigners generally to engage in the business of insurance in Canada".

LORD MACMILLAN: Is that anything more than a gloss upon the previous decisions, a reference to certain decisions?

MR. ST LAURENT: I prefaced this by saying that I would not give any construction of my own to these decisions, but I would endeavour to point out to your Lordships how they have been dealt with by your Lordships' Board or by our Canadian Courts in an endeavour to support our view that the whole matter of insurance is not necessarily Provincial, but that there are aspects which come under Federal control, and that those aspects do arise out of the combination of trade and commerce and jurisdiction over aliens and over Canadian Companies.

LORD ATKIN: That is no more than Mr Justice Duff taking into account and assenting to the decision of Lord Haldane in the 1916 Judgment.

MR. ST. LAURENT: That is all. He is dealing with and observing that he is obliged to state what the Privy Council did, and he is not differing from it.

LORD BLANESBURGH: Do you agree with this, that if you had not had in Section 91 "aliens", you would have nothing about insurance in Section 91 at all?

MR. ST. LAURENT: Nothing express or nothing implied. There might still be implied jurisdiction for such an insurance business as might properly be done by Companies incorporated by the Dominion under Section 91. I do not put it any higher with respect to aliens than with respect to alien companies.

LORD BLANKSBURGH: In Section 91 you have banking specifically mentioned, but no similar reference to insurance, apart from aliens, which brings in the qualification of Mr. Justice Duff's statement that you could restrict anything specifically referring to insurance.

MR. ST. LAURENT: No.

LORD MACMILLAN: I think you may get it under Section 92 (11); you have incorporation of companies with Provincial objects; therefore, the implication of that is that incorporation of

companies with Dominion wide objects is in the Dominion. I think that is agreed, but then you say if they are incorporated Companies with Dominion wide objects, that may include insurance or include other things, in which case they would be chartered to conduct insurance business throughout the Dominion. Is not that right?

MR. ST. LAURENT: Yes.

LORD BLANESBURGH: You would have to relate that to a Company incorporated by the Dominion for the purpose of carrying on any commercial transaction?

MR. ST. LAURENT: Yes.

LORD ATKIN: Those decisions have gone a very long way to protecting a Dominion company, but I think, as Lord Dunedin said at the beginning, that they are intended to be limited to status. It may be a very large view as to what is meant by status, but it never was intended to say that you could incorporate a Dominion company and thereby entitle it to privileges in the Province which a Provincial company had not, which came strictly within property and civil rights within the Province.

MR. ST. LAURENT: No, my Lord; unless it at the same time struck at the root of the status or powers given to the Company by the Dominion.

LORD ATKIN: That seemed to be the distinction in the Manitoba case the sale of shares case. What was said by the Province was: Here is a Company which is going to sell shares, and we are entitled to protect our inhabitants from the sale of bad shares just as we are entitled to protect them from the sale of bad meat or anything else, and this is only a provision for securing our subjects in the Province are not defrauded. What was said was that it is inherent in the status of a company to be able to raise capital by what is called selling its shares, which is really raising its capital. That is not

the same thing as saying that if you give a company powers to carry on an insurance business, it can carry on an unregulated insurance business.

VISCOUNT DUNEDIN: You may put what my noble friend is putting in another form, by saying what is the extent of the status. An obvious one is the last one which he has just mentioned; another obvious one is the right to issue. The actual existence of a person is one and the right to issue is another. It is a different thing, but you come on to the other. However, you had better get on with your argument perhaps.

MR. ST. LAURENT: On this Reference we are not driven to contend that Federal companies should not comply with Provincial legislation.

LORD ATKIN: You would have to go still further, because while you can impose conditions on the constitution of a company when you first bring it to birth, you may apparently embrace it with any conditions you please. Once you have brought it to full birth, it is quite a different thing to say thereafter you can impose restrictions upon it upon the way it carries on its business as a fully equipped person.

MR. ST. LAURENT: We have to contend for that view.

VISCOUNT DUNEDIN: I think you had better get on with your argument. You have given us Mr. Justice Duff's comments. What is the next one? Remember you have been too modest. There is no earthly reason why you should not comment as a like on the decisions, and you may say that they are wrong except in so far as that we cannot say that they are

MR. ST. LAURENT: I would not like to take up your Lordships' endeavours to persuade your Lordships to do what was not in your province to do.

The next reference is that part of the decision of this Board written by Mr. Justice Duff in the Reciprocal Insurers case, which is reported in 1924 Appeal Cases, and the part I would ask leave to read again is at page 346 and the top of page 347. In Cameron it is page 348 of the Second Volume. "It follows that the third question must be answered in the negative, but with this qualification, that, in so answering it their Lordships do not express any opinion as to the competence of the Dominion Parliament, by virtue of its authority in relation to aliens and to trade and commerce, to enact sections 11 and 12, sub-section 1, of the Insurance Act". Those are the very sections which are before your Lordships at the present time. Your Lordships will remember when they came up in that case, Section 12 contained sub-section 2, which put an artificial meaning on immigration, and that sub-section was condemned expressly in this Judgment. "This, although referred to on the argument before their Lordships' Board, was not fully discussed, and since it is not directly raised by the question submitted, their Lordships, as they then intimated, consider it inadvisable to express any opinion upon it. Their Lordships think it sufficient to recall the observations of Lord Haldane, in delivering the judgment of the Board in Attorney-General for Canada v. Attorney-General for Alberta, to the effect that legislation, if properly framed, requiring aliens, whether natural persons or foreign companies, to become licensed, as a condition of carrying on the business of insurance in Canada, might be competently enacted by Parliament (an observation which, it may be added, applies also to Dominion companies)".

LORD ATKIN: That is an interpolation which may be very valuable to you, because in that context I do not quite understand it. It is going quite outside what Lord Haldane said, because he was no doubt attaching importance to the fact that he was

dealing with licences?

MR. ST LAURENT: Yes, my Lord; but I think the ground for the reservation was this, that aliens are persons ^{over} ~~only~~ whom there is jurisdiction in the Federal Parliament. Dominion companies are also persons over whom there is jurisdiction in the Federal Parliament, and if the combination of the jurisdiction over aliens and trade and commerce gives authority, as was held or as was stated by Lord Haldane in the 1916 case, to require a licence from aliens to carry on insurance business, the combination of this jurisdiction over Dominion companies and over trade and commerce would likewise give the Dominion the right to require a licence from Canadian Companies.

LORD BLANESBURGH: And also from immigrants properly so called.

MR. ST. LAURENT: Yes. My submission will be that Section 12 as now drawn does not put any artificial construction or interpretation upon the word "immigrant". There may be very few cases to which it can apply in fact.

LORD RUSSELL: Lord Haldane was only considering the answer to a question which dealt solely with foreign companies. It did not deal with Canadian companies or immigrants.

LORD ATKIN: That is why he referred to aliens.

MR. ST. LAURENT: I think that Mr. Justice Duff, when writing the Judgment and when reserving or omitting to express any opinion as from the Board on the right of the Dominion to require a licence from foreign companies, interpolated this to enact that it was also felt that a similar power will exist with reference to the Dominion Companies over which there was jurisdiction by virtue of the fact that they were not within Section 92, incorporation of Companies with Provincial objects.

LORD ATKIN: That interpolation of Mr. Justice Duff's seems to me to be extraordinarily significant, if you attach the full effect to it, because it means this, does it not, that if the

Dominion can regulate a Dominion company formed for carrying on insurance in its business activities, so it can regulate the business activities of any other company. It is not in any way confined to insurance, grain and transit and retail dealing.

MR. ST. LAURENT: Yes, my Lord; that is so.

LORD ATKIN: Every activity can be regulated in the Province because it is a Dominion company.

MR. ST. LAURENT: If it is the activity of a Company not having provincial objects, then it is the activity of an artificial person which is not under Provincial jurisdiction in its personal capacity and powers.

LORD ATKIN: I should have thought that was dead in the teeth of Parsons case and the 1916 Judgment. However, you go on with your cases, and we must come back to it, I suppose.

MR. ST. LAURENT: Then, my Lords, in that case I would also ask your Lordships to look at what is at page 345, about the middle of the page. "As to the second ground of attack, it is only necessary to observe that contracts of insurance form the subject of the statute, a subject peculiarly within the sphere of Provincial control. It is true that its provisions may incidentally affect aliens and Dominion companies who are, or may wish to become, subscribers to an inter-insurance exchange; it is nevertheless not a statute in relation to aliens, as such, or Dominion companies as such. It is unnecessary and undesirable to attempt to say how far, if at all, the Dominion in execution of its powers in relation to the subjects of aliens and Dominion companies may dictate the rules governing contracts of insurance, to which an alien or a Dominion company may be a party. Nothing in section 91 of the British North America Act, in itself, removes either aliens or Dominion companies from the circle of action which the Act has traced out for the Provinces. Provincial statutes

of general operation on the subject of civil rights prima facie affect them. It may be assumed that legislation touching the rights and disabilities of aliens or Dominion companies might be validly enacted by the Dominion in some respects conflicting with the Ontario statute, and that in such cases the provisions of the Ontario statute, ^{to} were inconsistent with the Dominion law, would to that extent become legally ineffective; but this, as their Lordships have before observed, is no ground for holding that the Provincial legislation, relating as it does to a subject matter within the authority of the Province, is wholly illegal or inoperative".

LORD RUSSELL: He seems to leave the question open there.

MR. ST. LAURENT: Yes, and I wish to call attention to that, because here, again, he puts the Dominion companies, over which the Dominion has some legislative jurisdiction, and aliens on the same footing and reserves the question as to them.

VISCOUNT DUNEDIN: It is very instructive to me, because you are drawing consolation from these various remarks of Mr. Justice Duff, but I confess I should have drawn the opposite inference.

MR. ST. LAURENT: If he was dealing here with the question as to whether or not there could be a system of licensing required from Dominion companies and from aliens, and he was dealing with that which had previously been dealt with in the previous Insurance Reference of 1916, and if we turn to that, at the very end of the decision in 1916, 1 Appeal Cases, Lord Haldane's remarks, it seems to be, at least we have taken it to be, the holding of the Board that the Dominion Parliament has jurisdiction.

LORD RUSSELL: The 1916 decision says that the Dominion Parliament can prohibit the carrying on of insurance business by a foreigner by the means of the licensing system, and then this

0 passage which you have just read seems to leave open the question of whether in doing that it may go further and dictate the rules of contract governing insurance.

MR. ST. LAURENT: Yes, my Lord, and for the purposes of this Reference we are not contending that it may dictate the rules governing contracts of insurance. We are merely contending that it may require Dominion companies, aliens or British companies immigrating into Canada -- using the word as it should be -----

VISCOUNT DUNDAS: I do not want to ask you to answer this question, but obviously what is in Lord Russell's mind is this, that the whole thing put against you is that this Section 11 drags in the whole Insurance Act, and that the whole Insurance Act has a great many stipulations of that sort.

MR. ST. LAURENT: That has been taken, I think, rather for granted, whilst I hope to be able to show that the Insurance Act deals with the licensing of companies which have shown that they are properly qualified to carry on insurance business.

LORD RUSSELL: What you have just said now, it seems to me, to suggest that the sole point of difference between you and the Provinces is: Aye or no, looking at the whole of this Act, is it insurance legislation or is it alien legislation? That seems to bring the whole point really down to that. They do not dispute that you can require as a condition of an alien carrying on an insurance business that issue of a license or a Dominion license?

MR. ST. LAURENT: Yes, my Lord.

LORD RUSSELL: You do not claim by that means that you can dictate the terms of a contract of insurance which aliens are to enter into?

MR. ST. LAURENT: No, my Lord; but we do claim that we can say: You will not enter into an insurance contract unless you put

such-and-such a provision into it.

LORD RUSSELL: That seems to be dictating the terms of the insurance contract.

VISCOUNT DUNEDIN: I understood you at the moment to be going from the alien part of the discussion and going to a whole matter.

MR. ST. LAURENT: Yes.

VISCOUNT DUNEDIN: You are not confining your observations to aliens. You are speaking of British companies as well as aliens?

MR. ST. LAURENT: Yes, but I will develop that specially. I should perhaps restrict it now to aliens and Canadian companies, although the matter of Canadian companies is not expressly involved, unless the Reference has to do with aliens and British companies.

LORD BLANESBURGH: You go as far as this: Supposing we had in the Province of Quebec a fully fledged insurance Act, which in terms was quite different from the Dominion and perhaps gave greater freedom to the insurance companies than the Dominion and perhaps did not insist upon so many conditions, is it your view that the Dominion would have power under the terms of the licence granted to a foreigner to say, if he was carrying on his business in the Province of Quebec, that it would not comply with the Statute of Quebec, but would comply with the Dominion Statute?

MR. ST. LAURENT: No; I would not go as far to say it would not comply with the Statute of Quebec.

LORD BLANESBURGH: I assume that is applicable to all insurance?

MR. ST. LAURENT: No, that it was in addition to what he might have to have in order to comply with the Statute of Quebec; he might also have to comply with some conditions imposed by the Dominion.

VISCOUNT DUNEDIN: If the Quebec statute said you need not; you would have said that was overridden?

MR. ST. LAURENT: Yes, my Lord.

LORD ATKIN: Supposing that there are, as there very well might be, conflicting statutory conditions, and the Provinces have also to legislate to put in statutory conditions, and those statutory conditions might very well conflict. It would not be a case of saying that one is more narrower or less narrower; they are inconsistent one with the other. Which would prevail?

MR. ST. LAURENT: Under section 134 there is special provision made that these conditions are not to comply where they do not coincide with Provincial conditions of that kind.

LORD ATKIN: That only means that kind of legislation. What I said was supposing they did legislate in the terms of section 134 without providing for the conflict, which would prevail in your view?

MR. ST. LAURENT: In the view for which we are contending the Company licensed by the Dominion would not be permitted to enter into a contract if it could not get the other party to agree to the terms which we had prescribed.

VISCOUNT DUNEDIN: The Dominion must prevail?

LORD ATKIN: That would interfere with Provincial rights. It would be paramount over the Provincial rights.

MR. ST. LAURENT: To this extent, that the creature over which we assert jurisdiction would not be permitted to enter into a contract which another person might enter into ⁱⁿ the Province.

VISCOUNT DUNEDIN: Perhaps our observations a little interfere with your order of argument. All I understand you are doing at present is to say that you would call our attention to the remarks that had been made by Members of the Privy Council on

the Privy Council Judgments, and when you are dealing specially with the Judgment of 1918, there are two perfectly different branches of it. There is one branch dealt with disallowing the Dominion claim to give a license to everybody, and disallowing it upon grounds that are obviously sought by your opponents to apply in this case, namely, that the conditions of the contract are matters for Provincial legislation. The other point is arising under that rider that was put at the end where Lord Haldane did not answer exactly the question that was put, but said that the question as put meant substantially so and so and then gave his opinion. But at present you have so far confined yourself to certain observations that have been made. Have you any more of those?

MR ST. LAURENT: Yes, my Lord. I thought I had said that I would beg leave to ask to refer to the observations made on the Judgment not only by the Board but by the Supreme Court of Canada.

VISCOUNT DUNEDIN: Certainly.

MR. ST. LAURENT: The next reference on that point that I would like to give your Lordships is in the Supreme Court of Canada, Matthew v. Guardian Assurance Company, reported in 58 Supreme Court Reports, page 47. That was in 1918. In that case they discussed the Judgment of the Board in the Insurance Reference. The Supreme Court was composed at the time of Sir Louis Davies, the Chief Justice, Mr. Justice Idington, Mr. Justice Anglin, Mr. Justice Brodeur and Mr. Justice Casels. The case had to do with an injunction which had been sought to prevent a Company registered in British Columbia under a name which was substantially similar to the name of a Company which has been licensed to carry on business throughout Canada under the Federal Act. The applicant was a United States Insurance Company from the State

of Utah. Your Lordships will see this at page 48: "The main and substantial question before us is the meaning and effect of the 'Dominion Insurance Act', 1917, which came into force 20th September 1917" -- which is where the Dominion endeavoured to rewrite this statute in accordance with the Judgment which had been given in 1916 in the Insurance Reference case -- "The appeal from the trial Judge to the Court of Appeal of British Columbia was argued November, 1917, and the Act was therefore in force at that time. It should, in my judgment, have been taken judicial notice of by the Court of Appeal and, if it had been, it would have appeared, which was common ground on the argument at bar, that no foreign insurance company can carry on its activities in the business it is authorised to deal in anywhere in Canada unless and until it first obtains the license from the Dominion Minister provided for in section 4 of the statute." The obtaining of a Provincial license would not be sufficient.

VISCOUNT DUNEDIN: I am sure I must be wrong about this, but this is in 1918, and in 1916 the Privy Council had held that that provision was ineffective.

MR ST. LAURENT: It had been by the Law Officers of the Dominion construed to be ineffective as applicable to all those wishing to do insurance business, and they endeavoured to make a new statute which would apply only to those over whom they thought they had jurisdiction, namely, Canadian Companies and British Companies not Canadian subjects.

VISCOUNT DUNEDIN: Do you mean Canadian Companies, or do you mean Dominion Companies?

MR ST. LAURENT: I mean the Companies incorporated under the Dominion statutes as opposed to Provincial Companies. They rewrote the statute to apply to Dominion Companies and to

non Canadian British underwriters and to aliens, and they thought they were dealing with persons whether artificial or natural.

VISCOUNT DUNEDIN: I see that now, but it comes to this, that they assumed that the statute was good.

MR ST. LAURENT: The new statute was good.

VISCOUNT DUNEDIN: Yes; they assumed that the new statute was good.

MR ST. LAURENT: Yes, but they also discussed the decision of this Board in the Insurance Reference of 1916, and Mr. Justice Idington at page 53 had this to say: "An appeal was taken from the judgment of this Court, to the Judicial Committee of the Privy Council, which was argued in December, 1915, and judgment given there in the following February. I hardly think any one ever supposed that if the said section had been framed to deal only with foreign corporations; that there could be a question of the power of the Dominion Parliament in that regard. For my part I felt bound to so limit the effect of my answer to the second question submitted, as to avoid all appearance of questioning that power so far as regards the foreign insurance companies. The Judicial Committee, in giving an affirmative answer seemed to feel bound to express clearly its opinion that as regards foreign corporations the Dominion Parliament had the power if expressed in 'properly framed legislation'."

VISCOUNT DUNEDIN: I am bound to say that I think Mr. Justice Idington took a long leap there. He construed Lord Halsane's observation at the end of the 1916 Judgment as if it was applied to section 4, which it was not at all.

MR ST. LAURENT: The question was as to whether section 4 could apply to foreign insurers, and Lord Halsane though he had declared in its broad terms, applying to everyone attempting

to carry on Business in Canada, it would be invalid had answered affirmatively as construing it as directed by the constitutional jurisdiction of Canada, and, in fact, a similar thing respecting foreign Company.

VISCOUNT DUNEDIN: But he did not go into the question of the particular meaning of section 4.

LORD RUSSELL: The question he is answering is in regard to section 4.

VISCOUNT DUNEDIN: I can bring it to a point in a moment: in section 4 which has been discussed in 1916, the words were "unless holding a license from the Minister". There were not the words that there are in this section 4 "a license under the terms and conditions of this Act". That makes the whole difference, because the whole argument of your friends on the other ^{side} ~~wise~~ depends on the license being under the conditions of this Act. They have admitted that the pure question in this case is whether that is within the power of the Dominion. Mr. Justice Idington has not seen that distinction for one moment and I do not wonder. It is a mere casual observation. But he has absolutely ignored the distinction between section 4 and the first Act and section 4 of the second. The first is a license pure and simple, and the second is a license under the conditions of this Act, with all these things which people say rather trench upon the province of Provincial legislation.

LORD RUSSELL: Did the old Acts provide what terms the license should be under?

MR ST. LAURENT: Yes.

LORD RUSSELL: And do they include these objectionable provisions?

MR ST. LAURENT: All these provisions were in the former Act.

It was a license under the terms of the Insurance Act of 1916 which contain all the provisions which are said to be objectionable here.

LORD BLANESBURGH: Was the last part of section 11 in the 1917 Act, "under a license from the Minister granted pursuant to the Provisions of this Act", the same in the 1910 Act applicable to Companies generally, and not only to these particular Companies?

LORD ATKIN: Section 4 in the 1910 Act was "unless holding a license from the Minister."

LORD BLANESBURGH: In the corresponding section 11 were the last words the same?

MR ST. LAURENT: I will have the 1910 Act looked up, my Lord.

LORD ATKIN: In section 70 it provides that if a person not possessing a license does this, that and the other, then he commits an offence.

MR ST. LAURENT: Yes, my Lord.

LORD ATKIN: I should think there was some provision incorporating the conditions of the Act.

MR ST. LAURENT: The license was this, that it is then subject to cancellation if the provisions of the Insurance Act were not complied with.

LORD RUSSELL: Section 70 of the old Act is "or any insurance Company not possessed of a license provided for by this Act in that behalf"; was there a section in the Act saying that the license would be in such a form?

MR ST. LAURENT: No, I think not. The license is merely in very general form. It is a license to carry on insurance business pursuant to the provisions of the Canada Insurance Act.

VISCOUNT DUNEDIN: As far as I can see what I said is correct, but quite apart from that it does not matter, because it is perfectly clear that Mr. Justice Idington is not taking that distinction or thinking about it and that, therefore, his

remark: "I hardly think any one ever supposed that if the said section has been framed to deal only with foreign corporations, that there could be a question of the power of the Dominion Parliament in that regard." - is a remark that is made without any consideration of what is the whole question in this case, and, therefore, is not of much worth. I am not blaming him, because people cannot be expected always to see what is going to happen in the development of these matters.

LORD BLANESBURGH: Take section 4 of the existing Act which has been brought down to 1928: "It shall be competent to the Minister to grant to any company which shall have complied with the requirements of this Act preliminary to the granting of a license, a license authorising the company to carry on its business of insurance, or any specified part thereof, subject to the provisions of this Act and to the terms of the license." Were there any provisions corresponding with that in the Act of 1910?

MR ST. LAURENT: Yes, there were provisions having that effect. My friend Mr. Plaxton is turning them up for your Lordships -- having the effect that the granting of the license was the granting of a license to carry on business pursuant to the provisions of the Act which were substantially as they are as to the form of the license. My learned friend Mr. Tilley calls my attention to the fact that they are printed on the last pages of the book.

VISCOUNT DUNEDIN: I do not think we need worry much over it, because it is perfectly impossible to take this remark of Mr. Justice Idington as a concluded judgment of his upon the subject that is now being debated before us, and if it was a really concluded observation it would not bind us even if he had meant it -- but the poor man never meant it.

MR ST. LAURENT: We have been under an unfortunate misapprehension

as to the effect and purport of the judgment in that case.
 LORD BLANESBURGH. It is very important for you at the present juncture to make out if you can that these observations of Lord Haldane at the end of the 1916 Judgment were referable to a license similar to that which is now propounded in the existing statute.

MR ST. LAURENT: Yes, my Lord. Mr. Justice Anglin also deals with this at page 61 at the foot. "Whatever ground the decision of the Judicial Committee (see, however, *Farmer's Mutual Hall Insurance Association v. Whittaker*,) in regard to the validity of section 4 of the 'Dominion Insurance Act' 1910, chapter 32, may have given the present plaintiff to apprehend injury from the granting of a British Columbia license to the Utah Company, since the enactment of the new 'Dominion Insurance Act' of 1917 it seems abundantly clear that the granting of a provincial license (assuming the legislation providing for it to be within the ambit of provincial legislative jurisdiction as defined in *John Deere Plow Co. v. Wharton*, would not enable the Utah Company to solicit or transact any business in British Columbia until it should obtain a license from the Dominion authorities. So essential is the Dominion license that without it the transaction of any business by the Company is prohibited, and upon its being granted the right to a provincial license or payment of the prescribed fee is indisputable. The granting of the British Columbia license will, therefore, not entail the mischief to avoid which the desired injunction is sought".

LORD ATKIN: May I deal with section 10. As far as I can see you cannot carry on business without a license. The license is to be issued subject to the provisions hereafter contained. That is, as to the issue, I think it may contain such conditions and any proper limitation for conditions. Then there are

a number of sections which bind Companies who do carry on business and, therefore, carry on business under a license. Then there is a superintendent appointed, and it is the duty of the superintendent to report to the Minister any failure to comply with any of the Provisions of this Act, by persons licensed, and thereupon the Minister shall withdraw the license or refuse to renew the same, so that it has that effect in substance, has not it, namely, that it is a condition of the license that the conditions of the Act shall be complied with.

MR ST. LAURENT: Yes, my Lord, it is a condition of the continuance of a license.

LORD ATKIN: Before the license is renewed the superintendent is to report whether or not the conditions of the Act have been complied with.

MR ST. LAURENT: Yes, it was the kind of Act we have here applicable to all those attempting to do insurance business; practically the only difference between that and the one which is now before your Lordships is that the one now before your Lordships applies to Canadian Companies, to aliens, and to non Canadian subjects of His Majesty. It was with respect to that Act that Lord Haldane made the observations at the end of the 1916 Judgment. That, I submit, is clearly a finding that there is jurisdiction in the Dominion to deal with insurance business done by aliens. There is the finding by Mr. Justice Duff in the 1924 case that the jurisdiction which the Dominion has to deal with insurance business done by aliens also extends to insurance business done by Dominion Companies.

LORD BLANESBURGH: And by implication to immigrants properly so called?

MR ST. LAURENT: Yes, my Lord, properly so called. That is, I respectfully submit, supported with respect to the Dominion Companies by the finding of this Board in the John Deere Flow

Company v. Whar ton, reported in 1915 Appeal Cases.

LORD ATKIN: You have to read that Judgment as a whole, and if so you will find some phrases in it, I think, are cut down from their apparently wide aspect.

MR ST. LAURENT: It is at page 330. I do not like to reread it, because your Lordships are so familiar with it.

LORD ATKIN: There is a passage there which I thought you would probably want to read.

MR ST. LAURENT: At page 340, my Lord.

LORD ATKIN: That is the passage I had in my mind: it is continued on to page 341.

MR ST. LAURENT: In the middle of page 340 you will see: "Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee, in *Citizens Insurance Co. v Parsons*, on head 2 of section 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head must, like the expression "Property and Civil Rights in the Province", in section 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade."

LORD ATKIN: That is a very large proposition which seems almost to cover you generally. Then see how he goes on to deal with it?

MR ST. LAURENT: "Their Lordships are therefore of opinion that

the Parliament of Canada has power to enact the sections relied on in this case in the Dominion Companies Act and the Interpretation Act. They do not desire to be understood as suggesting that because the status of a Dominion Company enables it to trade in a province and thereby confers on it civil rights to some extent, the power to regulate trade and commerce can be exercised in such a way as to trench, in the case of such companies, on the exclusive jurisdiction of the provincial Legislatures over civil rights in general. No doubt this jurisdiction would conflict with that of the Province if civil rights were to be read as an expression of unlimited scope. But, as has already been pointed out, the expression must be construed consistently with various powers conferred by sections 91 and 92, which restrict its literal scope. It is enough for present purposes to say that the Province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the Province restricting the rights of the public in the Province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation."

LORD ATKIN: When you have come out of that, with what impression have you arrived? I think it is very important to construe these expressions of opinion by the Board in reference to the context, and as I understand it the context was there that the Dominion has said that no Company of any kind should carry on any business of any kind unless it was licensed by the Province, and I think it was in reference to that that Lord Haldane was saying that the status and powers were interfered with.

VISCOUNT DUNEDIN: We must also keep in mind that when Lord

Haldane came to decide the case in 1916, not only had he decided the John Deere Flow case but he quotes it in his Judgment and, therefore, there is nothing in the John Deere Flow case to cut down what was said in 1916.

MR ST. LAURENT: No, but as your Lordship has yourself pointed out the two things were said, one was that the Dominion could not take general control of insurance business as insurance business, and the other thing which was said was that the Dominion could require a foreign insurer to take out a license before he did insurance business in Canada, and the only question, I suppose, is what conditions can properly be attached to such a license. It is not to be merely an ornament for the Company; it is to be an effective license to carry on insurance business within the Dominion, and the question is what conditions can be properly attached to the granting of that license.

LORD ATKIN: I understand the condition that they attached as a condition precedent was: You shall not get your license until you establish the fact that you are a solvent responsible person or Company, and I can understand them saying: If you cease to be such it shall be withdrawn. That is a different thing to saying that you shall take a license on the terms that your insurance business shall be conducted in such and such way or that your contracts shall assume a particular form.

MR ST. LAURENT: It would be of very great value to the government of the Dominion, and I have no doubt to the government of the Province if the line can be properly drawn as to what may be controlled by Federal authority and what is meant by control by Federal authority.

Now, my Lords, the Judges who have dealt

with the case below have found that there are only four sections of the Insurance Act which can be quarrelled with ----

LORD BLANESBURGH: Before you come to that, I would like to try and find out from you what you say the meaning of Lord Haldane was in this case you have just been citing. What he certainly decided quite plainly was this, that where a Dominion Company had been incorporated by Dominion legislation, it was not permissible for the Province to impose as a condition of that Company trading in the Province that it should take out a license also from the Province. He also at the same time appears to have decided, as far as I can gather, that whatever may have been the business of that Company under Dominion legislation, if it was found when it came to trade in the Province that its business was trenching upon by the legislation of the Province that legislation might be good to stop that Company just as it would be good to stop any person who might acquire a charter having full and unlimited powers to do what he chose. In other words, a charter of incorporation of a Company by a Dominion law was not to enable it to entrench upon Provincial rights.

MR ST. LAURENT: No, my Lord. I would rather put it in this way: to trench upon the province of Provincial legislation

LORD BLANESBURGH: A company however wide its powers may be is probably less competent to do everything than an individual. The most extensive charter of a Company imposes some limitation upon it. It would have to be imposed upon a fully fledged individual of full age. Therefore, in that sense the charter is a limitation; it is their only power. It empowers the Company by incorporation to do things. Is not that what Lord Haldane has said in this case. If the Company is incorporated by Dominion legislation, no Province is entitled to say to that Company: You are a person who may come into the Province and do anything for which you may be licensed and so on, but it does not preclude the Province from saying: You shall not do in this Province things that nobody else can do.

LORD ATKIN: I understand the conditions go further than Lord Russell put to you, the conditions affecting the incorporation of a company with its original powers. You apparently incorporate an insurance company, but say that you, your particular company, is only licensed to carry on upon the footing that you do not underwrite risks at less than £200, or something of that sort, whatever it may be. That seems to be a different thing to incorporating a company with full powers, and then thereafter, at a later stage in its career, saying: You are still under parental control, and I can control your activities, though I cannot control other people's activities. In other words, a Dominion company, once incorporated with full powers, is not a puppet of the Dominion Parliament, so that it must dance to its tune whenever it chooses to play it. There is a distinction, surely.

MR ST LAURENT: The course that legislation has taken with us has been rather contrary to that view, because our companies are subject to our Dominion Companies Act, which is very frequently amended, and the amendments are looked upon as affecting the companies theretofore incorporated.

LORD ATKIN: That is true; and nobody suggests the contrary to that. You may always alter the constitution and status of a company by the law of the incorporating dominion, but that again is something quite different, is it not; to saying that you may regulate the exercise of the powers which you have fully given to them?

LORD RUSSELL: Assume two Canadian companies carrying on insurance can you, when they come to apply for the license, say to one of them "You shall only conduct a certain class of business", and to the other "You shall only conduct another class of business", distinguishing between them in that way.

MR ST. LAURENT: Yes, my Lord.

LORD RUSSELL: You do?

MR. ST LAURENT: Yes. I am bound to say "yes"; that is what the Act does. The Act says, for instance, that companies engaged in life insurance business shall not do such other business.

LORD RUSSELL: Which Act?

MR ST. LAURENT: This Insurance Act.

LORD RUSSELL: I was assuming two Canadian companies came to have a renewal of their annual licenses, and you made it a term of one company's license that their underwriting contracts should not exceed a certain amount, and imposed a totally different set of terms upon the other as the condition of the renewal of its license.

MR ST LAURENT: The Act I think does go that far.

LORD BLANESBURGH: And that with regard to a province where there was no similar restriction?

MR ST. LAURENT: I think the Act does go that far, because there is a very complete set of provisions for the inspection of a company. I think it might conceivably be stipulated that a company, because of the condition in which it was found by the superintendent upon inspection, would not incur more than so much new liabilities. It is in that respect a very complete code to inspect and control in the interests of the public contracting with the Company the exercise of the powers which are conferred upon the Company. In the Court below, all this seems to have been taken for proper legislation with the exception of that portion of the Act which has to do with conditions to be inserted in individual insurance contracts. Those sections are still in the Insurance Act, because they crept into the Insurance Act after the Royal Commission had investigated insurance matters and had reported that because of some uncertainty with respect to the jurisdiction it was wise to have uniformity of

legislation. At the time these sections which do deal with these provisions were enacted there was not uniformity of legislation between the Dominion Act and the other Provinces which did have Acts, some of them not having any. The reason for this provision in section 134 that nothing therein would be necessarily written into an insurance contract if it conflicted with provincial legislation was because when that section was being considered there were two provinces who did not like it, neither Ontario nor Quebec being one of those. We are not contending that the Dominion has the right to impose these conditions; we are merely contending that in dealing with the capacity and powers it can say to those who are within its jurisdiction: We will not let you make contracts unless you can get such terms.

LORD ATKIN: At present we have nothing to do directly with Canadian companies; we are only dealing with alien companies and British companies, and you are introducing the control over Canadian companies merely by analogy to show that there are similar powers exercised.

MR ST. LAURENT: And to answer the argument put against me by my learned friend Mr Geoffrion, that this cannot be regarded as legislation respecting aliens because it is the same legislation when it comes to be applied to Dominion companies or when it comes to be applied to persons immigrating into Canada for the purpose of doing certain specified things. With regard to the Ontario case to which my learned friend Mr Tilley made reference, the Judgment of Mr Justice Garrow, following the Judgment in the Ontario Reference, at the top of page 55 says: "In my view section 4 is invalid, not because it purports to give the Minister power to grant a license, but because it attaches to the granting of the license terms and conditions which appear to me to be not within the

competence of Parliament. I am also of opinion that sections 11 and 12 of the Act are likewise ultra vires".

LORD RUSSELL: Which Act is he considering?

MR ST. LAURENT: He is considering section 4, because section 4 is a section enabling the Minister to grant the license. That is section 4 of the present Act. Then sections 11 and 12 are the sections which say that it shall be unlawful for certain purposes to carry on without such a license. He is following in this the decision of Mr Justice Masten, who finds that the conditions which trench upon the provincial field are those of 91, 123, 134 and 135. In our view the other sections of the Act deal with this question of inspection and control of those who shall do insurance business, and the determining of that point of time when they shall be no longer empowered to do business, and also deal with their internal management, the qualification of their directors, and things of that kind. These sections are sections which got into the Insurance Act for the purpose of uniformity of legislation, and with the exception of 134 they contain no provision to make them give way expressly to provincial legislation. Unless we can succeed in maintaining the view of Mr Justice Latchford, if these would be binding not because they are imposed by virtue of the authority of the Dominion Parliament but because they are agreed to by the other party to the contract, they would trench upon provincial jurisdiction. All we can submit in that respect is that if we have the right to say how far alien and Dominion companies shall do insurance business in Canada, we are possibly entitled to say unless they can have those who take insurance contracts from them agree to such and such terms, they will not make contracts. With respect to aliens may I give your Lordships one other reference to the case of the Attorney General for

Canada v. Cain.

LORD BLANESBURGH: Just before you go to that, I have been looking at the passage in the Judgment of Mr. Justice Garrow at the top of page 55. He has on page 54 referred to the Judgment of the Board in the case of the Attorney General of Alberta in 1916 Appeal Cases, and he has referred to the observations made on behalf of the Board by Lord Haldane in that case. Nevertheless at the top of page 55 he says: "Section 4 is invalid, not because it purports to give the Minister power to grant a license, but because it attaches to the granting of the license terms and conditions which appear to me to be not within the competence of Parliament", thereby indicating that he could give that decision definitely sitting in the Courts in Ontario consistently with what was said by the Board in 1916 Appeal Cases. Must not the reason be, as Lord Dunedin has pointed out, that Lord Haldane on behalf of the Board in 1916 Appeal Cases was referring to a license which would not have the effect of the license here?

LORD RUSSELL: Putting that in other words, Mr Justice Garrow thinks that the Act is not properly framed.

MR ST. LAURENT: Yes, my Lord.

LORD BLANESBURGH: "With out further comment, my opinion is that this is bad."?

MR ST. LAURENT: Yes, my Lord, I think it must be conceded that there are in the Judgment these words "by legislation properly framed". I think we must concede that legislation which would involve trenching directly upon provincial rights would not be legislation properly framed.

LORD BLANESBURGH: That must be the point of it.

MR ST. LAURENT: Yes, my Lord. It must not be legislation which trenches directly upon property and civil rights.

VISCOUNT DUNEDIN: There was one remark you made that puzzles me

a little bit, in answer to my noble friend beside me, who rather put it to you that you were talking about aliens. I understood that our argument so far was directed to the whole question, not only to aliens, because you have a cross appeal?

MR ST. LAURENT: Yes, my Lord.

VISCOUNT DUNEDIN: You are meaning to uphold that cross appeal at the present moment, are you not?

MR ST. LAURENT: I am, my Lord. I was putting it generally, because I hope to be able to contend with success that Parliament would have the same jurisdiction with respect to non-Canadian subjects of His Majesty as it has with respect to aliens.

LORD ATKIN: I did not mean to go further than you are putting it by analogy to these powers, because the actual questions before us do not raise any question of Canadian companies, do they?

MR ST. LAURENT: No, my Lord.

LORD ATKIN: They certainly refer to foreign companies and British companies.

MR ST. LAURENT: Yes, my Lord.

LORD ATKIN: But British companies are not Canadian companies within -----

MR ST. LAURENT: The definition.

VISCOUNT DUNEDIN: And British companies are not aliens.

MR ST. LAURENT: No, my Lord.

VISCOUNT DUNEDIN: You do not profess to deal with British Companies except as immigrants?

MR ST. LAURENT: Merely as immigrants. I will come to that immediately after giving your Lordships this last reference upon the rights of the Dominion with respect to aliens.

LORD RUSSELL: It would avoid confusion if you called Canadian

companies Dominion companies.

MR ST. LAURENT: Yes, my Lord. I have perhaps tripped at times, but I endeavoured to use that expression to describe them.

LORD BLANESBURGH: Dominion companies, British companies, and foreign companies.

MR ST. LAURENT: The case of the Attorney General for Canada v. Cain is to be found in 1906 Appeal Cases at page 542, and the passage to which I would like to call your Lordships' attention is at the top of page 546: "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests". That, we submit, was the jurisdiction given to the Dominion by the subsection of 91.

VISCOUNT DUMEDIN: It is a general expression "to annex what conditions it pleases to the permission to enter it".

MR ST. LAURENT: -- "and to expel or deport from the State, at pleasure, even a friendly alien". Our submission is that that gives full jurisdiction over the alien to the Federal Parliament, and if the Federal Parliament choose to say to the alien that he shall not do insurance business -----

LORD BLANESBURGH: The power with regard to aliens given to the Federal Parliament is the power of a unitary sovereign State?

MR ST. LAURENT: Yes, my Lord; and that all things which can be done with respect to aliens by a unitary sovereign State can be done by the Dominion Parliament under federal legislation. There is nothing further that I can add on the jurisdiction asserted with respect to aliens. On the other section,

section 12, which deals with subjects of His Majesty not Canadian subjects, whether individuals or incorporated bodies -----

LORD BLANESBURGH: With respect to what you said about aliens, you are not endeavouring to suggest that there is anything in the character of alienage which, so to speak, instructs this particular restriction placed upon their activities? It is accidental, is it not, that you combine the two under this provision of the Act and say it is within the competence of the legislature to impose this restriction? Taking Lord Macmillan's illustration, which was such a good one, it would strike one as being quite in accordance with what would be perfectly right that an alien should not be allowed to carry firearms and would not be allowed to be employed in a munitions factory in time of war. You are not suggesting that restrictions with respect to insurance can be justified by any quality or character of alienage?

MR ST. LAURENT: I am suggesting that it is a part of the fiscal policy of Canada to protect its own industries and commercial organisations, and that, having the right to deal with aliens, it has the power to say that foreign companies will, if they seek to do business in Canada in competition with Canadian subjects, be required to comply with legislation prescribed by the Federal Authority.

LORD BLANESBURGH: The difficulty there is that we are dealing with resident aliens, not people outside the jurisdiction, but people who are in Canada carrying on business in Canada. They are not extra-territorial.

MR ST. LAURENT: They are carrying on business in Canada, but they are the representatives of large organisations existing outside Canada.

LORD BLANESBURGH: They may or may not be. I was wondering whether

you could find anything in the character and quality of resident alienship which justified or instructed these particular restrictions.

MR ST. LAURENT: Nothing beyond that; unless it be tied up to the fiscal policy of protection which has been adopted.

LORD RUSSELL: Is section 11 confined to aliens resident in Canada?

MR ST LAURENT: No, my Lord, it does not exclude aliens resident in Canada.

LORD RUSSELL: Within Canada refers to "solicit or accept any risks"?

MR ST LAURENT: Yes, my Lord, within Canada.

LORD BLANESBURGH: It would be just as bad for Canadian residents from that point of view.

MR ST. LAURENT: It might be as bad. It is not as dangerous, in fact, but it is a well known economic fact that there are powerful organisations existing outside of Canada which transact a large part of the insurance business done in Canada through resident agents or otherwise. I know of no other feature which could make alienage particularly a subject. Then with respect to 12 your Lordships will note that in the Act as it was before the Board in 1924 there was an attempt to extend the jurisdiction by making a definition of "immigration". That has been deleted, and if your Lordships read it now, it can merely apply when there is such an immigration as the Court would properly hold to be immigration.

LORD BLANESBURGH: If you leave out (2), is there any reference to immigration at all?

LORD RUSSELL: Yes.

MR ST. LAURENT: "To immigrate into Canada for the purpose of opening or establishing any office or agency". It must be

immigration in the proper sense of the word.

VISCOUNT DUNEDIN: Must it? I wondered about that. In the technical sense of the word "proper", cannot it be used in the simple meaning of "come"?

MR ST. LAURENT: Yes, my Lord. I suppose with respect to anyone who was not a Canadian subject entering or coming to Canada would be immigration, whether it be for the purpose of permanently establishing themselves there or remaining there only for a more or less short period.

LORD BLANESBURGH: The words are "any British subject not resident in Canada who immigrates into Canada". That would cover a Canadian who is a British subject not resident in Canada.

LORD ATKIN: I think "British subject" is defined.

LORD BLANESBURGH: Then the word "immigrant" would not include "Canadian".

MR ST. LAURENT: A British company is dealt with, not a British subject.

LORD BLANESBURGH: These words standing alone might apply to a Canadian not resident in Canada.

MR ST. LAURENT: Yes, up to the present time. I do not know that any legislation has been yet sanctioned, and perhaps using the words "Canadian subject" I was using an expression that had no legal significance, but there is a Bill before Parliament in this Session from which there may grow out a legal significance to the term "Canadian subject".

LORD ATKIN: Do you mean a Canadian Bill?

MR ST. LAURENT: Yes.

LORD ATKIN: You do not mean the so-called Statute of Westminster?

MR ST. LAURENT: No, my Lord. There is a Bill which I think was being passed in connection with the census which is being taken at the present time, and which may for certain purposes attribute a legal significance to the words "Canadian subject".

LORD RUSSELL: At present they do not occur?

MR ST. LAURENT: No, my Lord, and I should not have used them; I should have said "a subject of His Majesty not resident in Canada".

LORD BLANESBURGH: I see nothing more difficult to understand in "Canadian subjects of the King" than in "British subjects of the King"; it is the same.

LORD MACMILLAN: Is not this the result you propose to provide a definition of "immigration" in the original section for the purpose of enabling people to understand it? Having been told that the definition trenched upon forbidden ground, you then remove the definition and say: I shall not tell you what it means now, because my attempt to tell you what it means has been held to be wrong, and now I shall cut away that part; I will not tell you what it means; When I construed it last time, I was told I was on forbidden ground?

VISCOUNT DUNEDIN: Except for the purposes of subsection 2 "immigration" was a most ridiculous word to use.

LORD MACMILLAN: You had to deem it to be something intelligible; then you were told the thing you had deemed it to be would not do.

LORD ATKIN: It is an add provision, because it does not apply to persons who have been immigrants and are in Canada. The prohibition is against persons immigrating for the purpose of carrying on a particular business.

MR ST. LAURENT: Yes, my Lord.

LORD ATKIN: If in fact you were a British subject who had come in without any intention or purpose of at any rate doing anything in relation to insurance, you would not come within the Act.

MR ST. LAURENT: No, my Lord, you would not.

LORD ATKIN: He is not to immigrate for the purpose of opening

or prosecuting unless under a license. That must be part of his purpose, must it not?

MR ST. LAURENT: It must be a part of his purpose that he is coming to Canada for the purpose of transacting insurance business in Canada.

LORD ATKIN: He is not to immigrate for a purpose, unless he immigrates under a license.

LORD RUSSELL: That is what the section says.

LORD BLANESBURGH: Is not the trouble at the moment with regard to attributing all these words to a company? There is no difficulty in giving a proper meaning to the words "immigrate into Canada" by attributing them to a person who is described as a British subject not resident in Canada, but how in the world can you say that a British company immigrates into Canada, except in connection with an extended definition that has disappeared?

LORD MACMILLAN: Even a company can not come; it cannot walk into Canada; it is a notional being.

MR ST. LAURENT: Your Lordships are merely concerned with whether or not the Parliament of Canada has overstepped its legislative powers in enacting this section.

LORD RUSSELL: I do not agree with the criticism of my noble friend Lord Macmillan about the absence of the definition clause, because it is not a definition clause; it is merely saying immigration shall include certain things. It does not mean the only immigration within the meaning of the section is that.

LORD BLANESBURGH: Then I ask the question; what apart from that can be immigration of a company?

LORD MACMILLAN: I accept that criticism. I think that is quite right. It is an attempt to make a word mean something that no intelligent person would think it meant, unless Parliament had said so.

LORD RUSSELL: It is extending the natural meaning of the word "immigration", whatever that natural meaning may be.

MR. ST. LAURENT: Parliament no longer says so at the present time.

LORD BLANESBURGH: Has it said anything on this subject at the present time?

MR. ST. LAURENT: No, nothing beyond what you have there. It may be if the officials of the Insurance Department attempted to enforce this section, the Courts would be rather puzzled to find whether or not there had been immigration, but that would not make it invalid legislation.

LORD BLANESBURGH: No; I quite agree.

LORD MACMILLAN: I have no doubt a very large amount of legislation would be deemed invalid if that were so.

LORD RUSSELL: This is the truth, is it not, that a British subject already resident in Canada, who makes up his mind to carry on insurance business, is not within the section at all?

MR. ST. LAURENT: He is not within the section at all.

LORD RUSSELL: He will not require a licence?

MR. ST. LAURENT: No.

LORD ATKIN: Nor is a British subject who happens to have a registered office and was carrying on business at the date the Act came into operation?

MR. ST. LAURENT: No, my Lord. The section as drafted would not apply to the conditions described by my Lord Atkin. Whether it can have any practical application or not, the question is: Has Parliament gone beyond its powers in enacting it?

LORD BLANESBURGH: If it can have no application, it has not gone beyond its powers.

LORD MACMILLAN: My noble friend Lord Blanesburgh says you cannot conceive a company immigrating, but you can conceive a company immigrating with a purpose? How can a Company have a purpose? First of all the difficulty is: Can it immigrate at all? If it can immigrate, how can a company entertain a purpose?

It may have an object, because it has its statutory objects, or memorandum objects, but how can it have psychological intent?

LORD RUSSELL: By a resolution of the directors, or the company in general meeting.

LORD ATKIN: I think the real answer that is made to you in substance on this point is that this is not in fact, in pith and insubstance, a piece of legislation dealing with immigrants and exercising the power under section 95, but is only a colourable way of adapting your insurance scheme to persons of this description.

MR. ST. LAURENT: To that I would have no exact answer to make. Here it is in form legislation which deals with immigration in the sense in which "immigration" is used in the British North America Act.

LORD BLANESBURGH: Does this Act now, in view of the decisions which have been given with reference to it, have any application whatever except to the persons referred to in section 11?

MR. ST. LAURENT: It does in regard to others who apply for a licence.

LORD BLANESBURGH: Has it been held to be trenching upon the province with regard to everything else?

MR. ST. LAURENT: It has been held in Quebec that it did not trench.

LORD BLANESBURGH: Except with regard to these people who are brought in under section 11; therefore if section 11 is invalid itself, the Act has no operation.

MR. ST. LAURENT: If section 11 is invalid; that is the only section

LORD BLANESBURGH: The Act disappears?

MR. ST. LAURENT: The Act disappears, and with it the Department of Insurance.

LORD BLANESBURGH: It is rather an interesting result.

MR. ST. LAURENT: The Act disappears; that is the section which applies to it. It is designed to apply to three categories of

persons.

LORD BLANESBURGH: It was originally intended to apply to everybody, and you are now only left with these? --

MR. ST. LAURENT: There are three sets of persons, two of whom are dealt with by section 11 and one of whom is dealt with by 12.

LORD RUSSELL: You can only justify 12 by reference to 95, applying trade and commerce?

MR. ST. LAURENT: Yes, my Lord, just as we only justify 11 -----

LORD RUSSELL: By trade and commerce and licence?

MR. ST. LAURENT: Yes, my Lord. 95 does give both Federal and Provincial jurisdiction with respect to immigration.

LORD MACMILLAN: I think 95 might help you with regard to subjects immigrating, but I cannot see how 95 assists you with regard to the immigration of companies. It cannot have determined that companies could immigrate.

MR. ST. LAURENT: It may be the Court would hold that there could not be immigration by a company unless there was a transference of its head office to Canadian territory.

LORD MACMILLAN: We have British subjects as well here as a company, so that you may say that would apply to the subject if not to the company.

LORD BLANESBURGH: You could not transfer its head office to Canadian territory without getting incorporation in Canada.

LORD MACMILLAN: The moment it gets a licence it is deemed to be incorporated in Canada.

LORD ATKIN: It is not that you are deemed; it is.

LORD RUSSELL: We must consider the question of ultra vires upon the footing that a company can immigrate into Canada. I think we must, without admitting the fact.

MR. ST. LAURENT: No, my Lord, the statute cannot have any application to a company if a company cannot immigrate.

LORD RUSSELL: Surely I am right. For the purpose of deciding

the ultra vires question, it must be upon the assumption that it is possible for a company to immigrate into Canada.

LORD ATKIN: I am not sure that that is so. It might be said that the mere fact that you have used language of this kind and suggested something that a company cannot do, shows that Parliament was not really directing it to immigration under those powers. I think it throws some light upon the colourable point.

VISCOUNT DUNEDIN: In the small Oxford dictionary, "immigrate" is "come to settle". As I say, it is rather a high-flown expression. I have no doubt it was put there for the other reason, but it has been left there.

MR. ST. LAURENT: The company which does take out a license perhaps does immigrate in that sense; it does come and settle by becoming incorporated under the Act.

LORD BLANESBURGH: Can you incorporate without coming altogether? Can you leave half your body behind?

MR. ST. LAURENT: We have immigrants who still have their domicile outside the particular territory.

LORD MACMILLAN: A company can have double domicile, but I cannot understand a company having double incorporation.

LORD RUSSELL: For the purpose of ultra vires, "British subject" is enough.

LORD ATKIN: He is enough for that purpose. I do not see what objection there could be possibly to an Act of Parliament, for the purpose of dealing with immigrants, saying that an immigrant shall not come into Canada for the purpose of insurance work without being licensed by the Canadian Government. That seems simple enough.

MR. ST. LAURENT: It is a frequent requirement, or it was on the continent, that we should not disembark at Cherbourg without obtaining a license that we would not take work of any kind.

VISCOUNT DUNEDIN: This is the Imperial Dictionary, and it is delightful to see how these great works occasionally make little slips. Here is "immigration": "The act of immigrating the act of passing or removing into the country for the purpose of permanent residence"; and "immigrate": "To remove or pass into; to remove from a country to settle in another country"; and then it puts: "the immigration of the Arabians into Europe". It is quite clear the whole of the Arabians did not leave Asia when they migrated into Europe.

MR. ST. LAURENT: That is all I wish to say upon this branch, because this is merely for the purpose of endeavouring to show that the Dominion authorities would have the same control over those who may be classified as immigrants into Canada, for the purpose described in the Act, as they would have over Canadian companies or other aliens. The only other feature is that feature of the Special War Tax Act, which provides for a tax upon those insuring with non-licensed insurers, insuring property in Canada with non-licensed underwriters outside of Canada. The submission would be that if there can be no licences properly issued under this statute, it would apply to all non-Canadian underwriters, and there your Lordships will have to consider whether it is such a section as would not have been passed. The Special War Tax Revenue Act imposes taxes upon the business of all insurance companies, with certain exceptions. It was enacted in 1915.

LORD MACMILLAN: Is that Act still extant?

MR. ST. LAURENT: Yes, my Lord. After the war, it was found that it would have to be, for revenue purposes, enforced for a considerable period, and at that time and since then the exemptions from the operation of the Act have been gradually cut down. At present I think the only exception is with respect to marine insurance. That is because the competition between

the American ports and our ports is so keen that I assume it was felt that no additional burden could properly be put, or that it would be uneconomical to place any additional burden upon shipping to our ports. That is the only exception now, and in 1922 this tax was exacted on those who insured with companies that were not taxpayers by reason of having taken out a licence.

LORD BLANESBURGH: What I thought was put against you on this point was this. By another Act, an Income Tax Act or some Act, exemption was granted to persons who paid, and that therefore all that remained was that he was out of pocket for a month or two until he got the money back.

MR. ST. LAURENT: Within the last two or three years I think it has been the misfortune of a lot of taxpayers to find they would get no benefit from that, because it is only that they cannot get the money back if they are required otherwise to pay income tax. They may deduct it from the amount of income tax they pay; they do not get any money back, and the situation has recently become such that it may have quite substantial application in that form. In our submission a very clear case would have to be made out to your Lordships to deny that the Parliament of Canada the right to have such fiscal policy as it might see fit to have either for the purposes of revenue or for the purpose of protection.

LORD ATKIN: I should have thought nobody would dream of restricting in any way the unlimited power of the Dominion in respect of its tariffs and of taxation. I think the suggestion is that this particular legislation does not apply because it has reference to a condition which on the hypothesis does not exist.

MR. ST. LAURENT: I think that perhaps is the preferable way of putting it, because I would submit it would be difficult to make out

that taxing legislation is merely colourable legislation.

VISCOUNT DUNEDIN: For the purpose of your argument you must assume that you are wrong on the first point.

MR. ST. LAURENT: Yes, my Lord. If we are right on the first point, then it could not be challenged. They say that it is clearly within the taxing power, and that it is not for the Court unless it is clearly shown to them that it is colourable legislation.

LORD MACMILLAN: Do you support that judgement? Do you say you can be right on the second question and wrong on the first? Do you support the judgement in your favour upon that?

MR. ST. LAURENT: Yes, my Lord. I submit that it is within the jurisdiction of Parliament to require foreigners to take a licence to do insurance business. It may be that they have not succeeded in doing it by this Act.

LORD RUSSELL: Would you turn to page 66? Could you say that under this Act you could exact a tax because a person insured with a company not licenced under the invalid provisions of the Insurance Act? That is the way this statute is framed. It is said if the statute simply imposed a tax on licenced insurers there could be no objection to it.

(Adjourned till Thursday morning next at 10-30).