CASE AND COMMENT

MILITARY TRIBUNALS—RESTRAINT OF BY CIVIL COURTS—HABEAS CORPUS AND PROHIBITION.—Two recent Ontario judgments of single judges sitting in Weekly Court at Toronto appear to take a very long step in the direction of greater control and supervision of military tribunals by the superior civil courts. The two judgments referred to concern military proceedings against the same soldier. The first is a judgment of LeBel J. *In the Matter of the King* v. *George Hector Thompson* delivered on December 21st, 1945;[1] the other, a judgment of Urquhart J. in *The King* v. *George H. Thompson* delivered on January 23rd, 1946.[2]

The facts on which the first judgment was founded appear briefly to have been as follows. Corporal Thompson was taken into military custody on June 30th, 1945, on a charge of "stealing". He was held in close arrest in a detention barrack pending trial. A court of inquiry had previously been convened to inquire into the loss of certain welding equipment and, instead of having the accused appear before him upon a preliminary investigation of the charge as required by section 46 (1) of the Army Act and by the Rules of Procedure, the commanding officer of the accused read the proceedings and findings of the court of inquiry and endorsed thereon his recommendation that the accused be tried by district-court-martial. The accused was remanded in custody and a summary of evidence was ordered to be taken, a step required by R.P. 4 preliminary to an application for trial by district or general court-martial. The summary of evidence was completed on August 1st, 1945. In the meantime, a new commanding officer of the accused's unit had been appointed, who read the summary of evidence and made formal application for trial of the accused by district court-martial on a charge of "stealing" under section 18 (4) of the Army Act, with the usual alternative charge of "improper possession" under section 40. Pursuant to this application, a district court-martial was convened for the trial of the accused on September 11th, 1945. The accused, except for a short period during which he was released without prejudice to his re-arrest, had been in custody in close arrest since June 30th.

At the opening of the trial counsel for the accused objected to the jurisdiction of the court-martial to try the accused on the ground, apparently, that no investigation of the charge had been made by the commanding officer in the presence of the accused

[1] [1946] O.R. 77.
[2] [1946] O.W.N. 217.

as required by section 46 (1) of the Army Act and the Rules of Procedure. After hearing argument the court-martial ruled that it had juridsiction. Counsel for the accused then informed the court that he proposed to launch a motion in the Supreme Court of Ontario for his client's discharge and the court-martial was adjourned to October 3rd, 1945, on which day notice of motion for the release of the accused under a writ of habeas corpus was served and the court-martial proceedings were suspended pending the outcome of the motion. The motion came on for hearing on October 12th, 1945.

It is firmly established in military law that the investigation of the case by the commanding officer, in the prescribed manner, is vital to the jurisdiction of a court-martial, and convictions have more than once been quashed on review by the Judge-Advocate General of the Forces for the United Kingdom for failure of the commanding officer to make such investigation. It is not known whether any conviction by a Canadian court-martial has been quashed for the same reason but in at least one case in the Royal Canadian Air Force Overseas, in which there was an acquittal, it was pointed out, on review, that a conviction would have had to be quashed for lack of a proper preliminary investigation. It is therefore difficult to understand why, after the question was raised at the trial, the court-martial was not dissolved and new proceedings commenced. It is suggested that such new proceedings would have been valid and the custody of the accused on the new charge legal.

Throughout the reported cases, from 1786 to the present day, there appears a conflict between two principles: the protection of the fundamental rights of the subject from unlawful and undue invasion; and the desirability, on the grounds of discipline and efficiency, of leaving matters of military law and discipline exclusively to the jurisdiction of military tribunals. But whatever doubt may have been expressed from time to time in the early cases as to the right of a person subject to military law to invoke the aid of the civil courts to redress grievances arising out of his service as an officer of soldier or out of the authority exercised over him by his superiors, the decisions were re-examined in 1919 in the case of *Heddon* v. *Evans*[3] and, among other principles laid down, it was firmly established in that case, and has been recognized ever since, that if the rights asserted are fundamental common-law rights—such as immunity of person or liberty—then, except in so far as they are taken away by military law,

[3] (1919), 35 T.L.R. 642.

they may be asserted in the ordinary courts. It is not surprising, therefore, that LeBel J. ordered the release of the applicant on the ground that he had not been lawfully remanded in custody for trial by court-martial due to the failure of the commanding officer to hold the preliminary investigation and to exercise his discretion as by law he was required to do.

But the judgment of LeBel J. does not rest on that one ground alone. The learned judge bases his judgment on the additional ground that the failure of the commanding officer to hold a preliminary investigation for over two months while the applicant was held in close arrest ousted the jurisdiction of a military tribunal to deal with the alleged offence. There is authority justifying the release of an accused for unnecessary delay in bringing him to trial, *Blake's* case,[4] although release in that case was refused on the ground that the delay had been sufficiently explained. In the report of the present judgment there is nothing to indicate that the failure to hold the investigation was deliberate or other than an error in procedure by the commanding officer, which was first called to the attention of the military authorities on the assembly of the court-martial. Indeed the judge finds to the contrary and says, "I am satisfied that there was nothing deliberate or wanton on the part of anyone in connection with the applicant's detention". One might therefore disagree with his lordship as to the delay in such circumstances furnishing sufficient ground for the exercise of his discretion to order the release. It is suggested that there was sufficient explanation of the delay in the case under discussion to warrant refusal of release, if there had been no other valid ground.

But it is here that the learned judge seems to have fallen into a non-sequitur for, in speaking of the release on the ground of delay, he says:

> In reaching this conclusion I am partly influenced by the view I would entertain as to the validity of any conviction upon the said charges which might now be made by a court-martial. Since, before making the required investigation, the applicant's officers commanding have referred the charges to superior authority, and an order convening a district court-martial has followed, how can it be argued with reason, that the applicant's present officer commanding might now give consideration to the charges with such detached and unfettered mind as might justify him in summarily dismissing them.

What, it may fairly be asked, has this to do with the delay? The same reason for fearing that injustice to the accused might result could be felt in a case where a charge had been laid, the accused

[4] (1814), 2 M & S. 428.

arrested, an application forwarded and a court-martial convened to assemble within a week, but with the commanding officer having omitted in error to hold the preliminary investigation. The same language as used by LeBel J. could be applied to these circumstances. But it may be asked, with respect, why it might not be fully expected that the applicant's present commanding officer would now give consideration to the charges with a properly detached and unfettered mind. A commanding officer is human and subject to error and prejudice, but so are magistrates. A good commanding officer is always diligent to see that the rights of other ranks are protected. What reason is there for questioning the action of a military commander any more than that of a magistrate in such circumstances? There is ample authority that when, on the return to a writ of habeas corpus for failure of a magistrate to hear evidence duly tendered, the case may be remitted to him or another magistrate for a proper inquiry. Indeed there is provision in the Criminal Code, section 1120, for retaining the accused in custody pending re-hearing. A very recent example of the application of this section of the Criminal Code is the judgment of Hogg J. in *Re Mishko et al.*[5] In that case the magistrate had refused to hear relevant evidence tendered by the accused at the preliminary hearing when he was committed for trial. The committal was quashed on appeal and the accused ordered to be retained in custody pending a new preliminary inquiry.

The judgment of LeBel J. has been interpreted by Urquhart J. in the other judgment referred to as constituting, in effect, a writ of prohibition against all military tribunals to hear the charges against the accused because of the error of his commanding officer in procedure. So interpreted, this is where the judgment departs so radically from all previous decisions and indicates a tendency to exercise even more jurisdiction over military courts than over civil courts. This is a reversal of the attitude of English courts up to the present time, for the English courts have always held that, once the court-martial was found to have had jurisdiction, nothing further would be inquired into by civil courts. Thus, we have Lord Kenyon C. J. saying in *Suddis'* case,[6] "We are not now sitting as a Court of Error to review the regularity of these proceedings; nor are we to hunt after possible objections". In the same case Grose J. said, "It is enough that we find such a sentence pronounced by a court of competent jurisdiction to inquire into the offence, and with the power to inflict such a sentence; as to the rest we must presume *omnia rite acta*". In the present case

[5] [1946] O.W.N. 131.
[6] (1801), 1 East. 306.

there was nothing to take away the jurisdiction of the military courts, except the fear of the civil court that justice would not be done.

The possible effect of the judgment on this ground is startling. Suppose the arrest of a soldier on a charge under section 9 (1) of the Army Act for "disobeying in such manner as to show a wilful defiance of authority a lawful command given personally by his superior in the execution of his office". And suppose such disobediance took place in the field. And suppose further that in error, without holding the preliminary investigation, the commanding officer applied for trial by district or general court-martial and that a court-martial was convened and assembled and habeas corpus applied for. Applying the two judgments under discussion, it would follow that the accused must be released and that no other court-martial could be convened to try him, as no commanding officer could exercise fairly his discretion to send him to trial or dismiss the charge. As an offence under section 9 (1) is not a civil offence, this would mean that, through a slip in procedure by the commanding officer, the soldier could not be tried by any court, military or civil. If there is to be this inquiry by the civil courts as to the possible prejudice of military officers, it marks a distinct change in the law as previously laid down. It is interesting to note that so little have the civil courts been prepared to interfere with the military courts, where jurisdiction is established, that in England every court, short of the House of Lords, must hold that an action for false imprisonment and malicious prosecution does not lie even when malice is present.[7] In contrast to this attitude of the English courts, the two judgments here discussed appear to establish that, where a civil court has grounds to fear that an accused will not have a fair hearing before a military tribunal, the civil court will interfere to prevent the military tribunal from proceeding.

The writ of habeas corpus was returned before LeBel J. on October 12th, 1945. Judgment was reserved and delivered on December 21st. Bail does not appear to have been applied for although it was in the power of the court to grant it.[8] The accused, having already been in custody awaiting trial by the abortive court-martial for over two months, remained in close arrest and confined in the detention barrack for a further period of over three months from the time the motion for his release was launched and for a period of over two months from the date of the hearing.

[7] *Fraser* v. *Balfour* (1918), 34 T.L.R. 134; *Heddon* v. *Evans* (1919), 35 T.L.R. 642.

[8] Tremeear's Annotated Criminal Code, 5th ed., p. 1458.

The accused was released from custody in compliance with the judgment of LeBel J. ordering his release, was transferred to another regiment and immediately re-arrested on similar charges for the same alleged offence. He was duly paraded before his new commanding officer within twenty-four hours but, instead of conducting the preliminary investigation, the commanding officer released the accused from arrest without prejudice to his re-arrest and allowed him to go on five days' Christmas leave. The commanding officer continued proceedings on December 29th, when a motion was launched for a writ of prohibition. The motion came on for hearing before Urquhart J., who delivered judgment on January 23rd, 1946, granting the prohibition on the ground that the matter before him was *res judicata* by reason of the judgment of LeBel J.

It was argued by counsel for the Crown that, while LeBel J. had ordered the release of the applicant partly on the ground that no commanding officer could give consideration to the charges "with such an unfettered mind as might justify him in summarily dismissing them", this part of the judgment was *obiter*. Urquhart J. said that he had spoken to LeBel J., who told him that he regarded that part of his judgment to be an essential part of his decision and intended to decide that jurisdiction was lost by the military authorities by reason of the circumstances outlined in his judgment. Whatever objection might be urged against one judge asking another judge what was meant by a previous decision of the latter, the practice has the authority of such an eminent judge as Middleton J. in *Re Constantino* v. *Jones*.[9] However, it is difficult to see how this part of the judgment of LeBel J. can be considered as otherwise than obiter since the question of prohibition was not before him at all; the only question for determination before him was whether or not at the time of the return of the writ of habeas corpus the applicant was in legal custody.

Perhaps the most disturbing part of the judgment of Urquhart J. to military authorities is its indictment of trial by court-martial for anything but the most minor and simple offences.

Two grounds were advanced before Urquhart J. to warrant a writ of prohibition (a) bias, and (b) the commanding officer, and in fact any military court, could not approach the matter with unprejudiced minds because the accused and the public would be under a reasonable apprehension that the accused, after what had occurred, would not have a fair hearing before his com-

[9] (1912), 26 O.L.R. 411.

manding officer nor a fair trial at a court-martial. In dealing with these grounds, the learned judge said "that there does not appear to be anything in the question of actual bias in the sense of predilection or prejudice (i.e. in its sense as being something distinctly improper) in the attitude of those who would have to try the accused" and that he had confidence in the military authorities that nothing of that sort would occur. He then goes on to indicate that he feels that the commanding officer, being a disciplinarian, might regard the efforts of the accused to escape trial as a demonstration of a lack of amenability to discipline and that therefore the accused would be prejudiced by being submitted to a military trial where, in the initial stages, the commanding officer would be bound to exercise his discretion of dismissing the charge or sending the case on for trial by court-martial. His lordship expressed other reasons justifying the writ on these grounds, including:

(a) a court-martial would be unable to exclude inadmissible evidence, particularly hearsay;

(b) a statement by the accused had been made and would be tendered as an admission, and the question of its admissibility should be thoroughly tested by a judge of experience in such matters;

(c) inferences would have to be drawn and these should be the province of a jury;

(d) the evidence of two of the witnesses would have to be scrutinized with a great deal of care as they might be accomplices and a jury would be better able to size them up than would a court-martial;

(e) the case would require to be proved beyond a reasonable doubt, which would be extremely difficult if strict rules of evidence were adhered to.

For these reasons, as well as because he considered himself bound by the judgment of LeBel J., Urquhart J. held that an order of prohibition should go.

There appears to be no reported case, previous to the judgment of Urquhart J., in which a military court was prohibited on the ground of suspected bias or inability to weigh difficult evidence. Bias to the extent that it might be expected to exist in this case could be urged with equal force in a great many trials by court-martial, and military discipline would suffer a crushing burden if applications for prohibition are to be entertained by the civil courts on this ground. It is disturbing, also, if his doubt as to the ability of a court-martial to deal with the rules of evidence, and with the rule as to reasonable doubt, is well founded, because courts-martial in the recent war, as in all previous wars, have tried many serious offences involving long sentences of penal

servitude, and even of death, where the trials required all of these questions to be determined.

It may be of some comfort, however, that in all such cases, and in fact most trials of any consequence, there sits with the court a judge advocate, who is qualified and required to advise and direct the court on all matters of law. His advice and direction courts-martial are enjoined by the Rules of Procedure to follow. Further, the proceedings of all courts-martial are reviewed after trial by the Judge Advocate General.

But of even greater comfort will be the Report of the Army and Air Force Courts-Martial Committee of the United Kingdom, which was constituted by the Secretaries of State for War and Air in 1938 to "examine the existing system of trial by court-martial under the Army and Air Force Acts and matters incidental thereto, and in particular to consider whether it is desirable and practicable that a person convicted by court-martial should have the right of appeal to a civil judicial tribunal against his conviction and to make recommendations".

The Committee made a studied review of courts-martial from all over the world covering a period of twenty years, and failed to find a single case of injustice. The following is a quotation from their report:

> We concerned ourselves only to see that there was in every case proper evidence on which the Court-Martial, properly directed, could and did act. Our investigations satisfied us that when in matters of substance the tribunal had erred in law the operation of the Judge Advocate General's Department had set the matter right, and where in a few cases there had been errors in matters of procedure, these were of a character falling within Rule of Procedure 56, which provides that, where guilt has been established by proper evidence the findings and sentence of Courts-Martial shall be confirmed, notwithstanding any defect or objection, technical or other, unless it appears that any injustice has been done to the offender. (It should further be borne in mind that if any irregularity goes to the jurisdiction of a Court-Martial, such a defect at the instance of the aggrieved party can be dealt with under the existing law in a Civil Court.)

Unless and until an investigation of trials by Canadian courts-martial results in a different finding it is suggested that doubt by civil courts as to the ability of a court-martial to determine all questions legally before it should not be a ground for prohibition.

It is understood that an appeal has been launched from the judgment of Urquhart J.; the result will be awaited with great interest by those who have been concerned with trials by court-martial.

J. A. R. MASON.

Toronto.

WILLS—GIFT OVER TO CHILDREN OF DAUGHTER INCAPABLE OF HAVING CHILDREN.—The decision of Sir Joseph Chisholm, Chief Justice of Nova Scotia, in *Re Thomson*[1] is important in the construction of wills, where the question of the capability of a woman to bear children arises. In this case James T. Thomson gave the residue of his estate to trustees in trust. The income was directed to be paid to his daughter, she being his only child, for life. On her death the corpus of the residue was directed to be divided among her children or issue, and if she should die without leaving children it was to be divided among the testator's sisters, "who shall then be living".

The testator's daughter was fifty-one years of age at the time of the application to the court. She had no children and had never been married. In 1936 an operation known as supravaginal hysterectomy was performed on her in England. The surgeon who performed the operation was a member of the Royal College of Surgeons and, by affidavit, declared that as a result of the operation it would be impossible for her to bear a child. This affidavit was supported by the evidence of a Halifax physician and surgeon who had recently examined her.

All the testator's sisters had died before the application to the court was made. In his decision the Chief Justice found that it is now and will be impossible for the testator's daughter to bear a child. As a result of this finding the gift on her decease would fail. Is the daughter entitled to have the corpus of the trust fund transferred to her now? The Chief Justice decided that she was. Clearly there would be an intestacy on her death and as she was the testator's only child the fund would, in any event, flow into her estate and could be disposed of by her will.

On the argument counsel relied principally on the case of *Re Keith, Keith* v. *The Eastern Trust Company et al*,[2] In that case two women of eighty were life beneficiaries under a will. One was a widow who never had children and one was a widow whose children were all dead. None had living children or issue. The will provided, "in case of the death of any of my daughters without issue then in Trust for such uses and purposes as such daughter shall by her last will limit and appoint, and in default of such appointment to and for the use of her next-of-kin". The court held that the daughters were entitled, in the circumstances, to take their shares absolutely and were entitled to have the trustee hand over the trust property to them.

[1] [1945] 4 D.L.R. 131.
[2] [1929] 2 D.L.R. 599.

There is a similarity, and yet a great difference, between the decisions in these two cases. In the *Keith* case the ladies in question were eighty years of age, while in the *Thomson* case the lady was only fifty-one. There are many instances of women of fifty-one years of age having children and the *Thomson* case was decided on the basis of the medical evidence of her incapacity to bear children after she had become forty-two years of age, the date of the operation.

In the *Keith* case the application to the court was by Originating Summons, while in the *Thomson* case the application was made under the provisions of the Nova Scotia Judicature Act, Order 55, Rule 11. The latter procedure is the more expeditious, although seldom used.

J. W. GODFREY.

Halifax, N.S.

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CONFLICT OF LAWS — MARRIAGE OF MINOR WITHOUT PARENTAL CONSENT.—On October 9th, 1945, in *McClure* v. *McClure*[1] in the Superior Court of Quebec (District of Montreal) Bertrand J. annulled a marriage celebrated in Ontario on April 18th, 1945, in circumstances which make the case of great social interest in both provinces.

From the Quebec point of view the case is relatively simple. The husband was at the time of the marriage nineteen years of age and domiciled in Quebec. It is provided by article 119 of the Civil Code of Lower Canada[2] as follows :

> 119. Children who have not reached the age of twenty-one years must obtain the consent of their father and mother before contracting marriage; in case of disagreement, the consent of the father suffices.

The consent of neither the father nor the mother had been obtained. Neither of them expressly or tacitly approved of the marriage (article 151) and the marriage was therefore voidable at the suit of the father within certain prescribed time limits (articles 150 to 153); accordingly, within these time limits, the father brought an action for the annulment of the marriage and obtained judgment. As regards the conflict of laws, it is provided by article 6 that "an inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even

[1] [1946] R.L. (February)

[2] The code was enacted for Lower Canada by the Parliament of the Province of Canada in 1866, and consequently there was no question of legislative power such as would arise if after the coming into force of the British North America Act, 1867, it should be desired to legislate for Quebec with regard to capacity to marry and annulment of marriage.

when absent, by its laws respecting the status and capacity of persons". The marriage was therefore voidable on the ground of the incapacity of the husband, notwithstanding that it was formally valid because it complied with the formalities required by the law of the place of celebration.

From the Ontario point of view the case is not so simple. The marriage was of course formally valid in Ontario. The wife was eighteen years of age and domiciled in Ontario, and by the domestic law of Ontario both she and her husband were capable of marrying; therefore the questions remaining for discussion are whether under the rules of the conflict of laws of Ontario (a) the marriage was voidable by reason of the incapacity of the husband by the law of Quebec, and (b) the annulment of the marriage decreed in Quebec is entitled to recognition in Ontario.

The case challenges comparison with the much discussed case of *Ogden* v. *Ogden*[3]. Leon Philip, a Frenchman domiciled in France, nineteen years of age, married a woman domiciled in England, twenty-five years of age. The marriage was celebrated in England and was formally valid by English law, but was subsequently annulled by a French court, at the suit of the husband's father, on the ground of the incapacity of the husband under article 154 of the French Civil Code, a provision applicable to a son who has not attained the full age of twenty-five years, but in other respects closely resembling article 119 of the Civil Code of Lower Canada above quoted. The woman sued Philip in England for the dissolution of the marriage and for a declaration of nullity, but her suit was dismissed for want of jurisdiction. She then married Ogden in England, and ultimately he sued her in England for a declaration of nullity of their marriage on the ground that she was still married to Philip. The Court of Appeal affirmed the judgment of Bargrave Deane J. by which the Ogden marriage was declared to be bigamous and void. The result was grotesque from a social point of view.[4] The woman was Philip's wife in England, although her marriage with him had been annulled in France. She could not get a divorce in either England or France, although Philip had married another woman in France, and the refusal of the

[3] [1908] P. 46.

[4] The situation as between England and France, and the parallel situation as between Ontario and Quebec, are discussed by JOHNSON, CONFLICT OF LAWS WITH SPECIAL REFERENCE TO THE LAW OF THE PROVINCE OF QUEBEC, vol. 1 (1933) 282 *ff.*, and vol. 2 (1934) 244 *ff.*, and by me in *Conflict of Laws as to Nullity and Divorce*, [1932] 4 D.L.R. 1, at pp. 9 *ff.*, 31 *ff.*, and *Characterization in the Conflict of Laws* (1937), 53 L.Q.Rev. 235, at pp. 247 *ff.*

English court to annul her marriage to Philip or to recognize the French annulment decree deprived her of the only possible issue from the impasse. The woman in a case like this has "been caught in a complex of rules of law, each of them not unreasonable, but, when fused together, producing hardship," and "clearly a remedy is required for this situation".[5]

The reasons for judgment given by Sir Gorell Barnes on behalf of the Court of Appeal in *Ogden* v. *Ogden* were elaborate, but the judgment, while probably wrong on all grounds, was demonstrably wrong on one ground. In the later case of *Salvesen or von Lorang* v. *Administrator of Austrian Property*,[6] decided by the House of Lords on appeal from Scotland, it was held that a court in Scotland was bound to recognize the validity of a declaration of nullity made by a German court, both man and woman being domiciled in Germany at the time of the declaration of nullity. The marriage was held to be void *ab initio* on the ground of lack of essential requirements as to formalities of the law of the place of celebration (France), and each of the parties being held to have subsequently become domiciled *facto et animo* in Germany. In *Ogden* v. *Ogden* and in *McClure* v. *McClure* the marriage was voidable, not void, and therefore in each case the wife's domicile was in law identical with her husband's domicile, that is, in the former case in France, and in the latter case in Quebec. It is submitted that on the principle of the *von Lorang* case, an English court would be obliged to recognize the validity of the French annulment decree, and an Ontario court would be obliged to recognize the validity of the Quebec annulment decree. The result would avoid the grave social evil of the parties being married in England (Ontario) and not married in France (Quebec). The moral is that a person authorized to celebrate marriages in Ontario should refuse to marry parties if it appears that one or both of them may be domiciled in Quebec, and at least in the case of the man being a minor, if there is no sufficient evidence of parental consent.

The conclusion above stated, based on the *von Lorang* case, is independent of *Inverclyde* v. *Inverclyde*,[7] in which it was held that in the case of a voidable marriage only a court of the domicile has jurisdiction to make an annulment decree. It is sufficient for the present purpose to say that an annulment

[5] See especially Hughes, *Judicial Method and the Problem in Ogden* v. *Ogden* (1928), 44 L.Q.Rev. 317.
[6] [1927] A.C. 641.
[7] [1931] P. 29.

decree made by a court of the domicile of both parties is entitled to recognition elsewhere, and it is not necessary to say that the jurisdiction of a court of the domicile is exclusive. The *Inverclyde* case has been followed in Manitoba and Ontario,[8] but has been dissented from in two English cases,[9] and more ecently has been discussed by the Court of Appeal for British Columbia.[10]

The reasons for judgment of the Court of Appeal in *Ogden* v. *Ogden* also purport to base the court's decision in favour of the validity of the woman's marriage to Philip on the propositions that a requirement of parental consent to the marriage of a minor under French law should be characterized as part of the formalities of celebration, and that even capacity to marry is governed by the law of the place of celebration. In my opinion the court was wrong on both these points,[11] but it is unnecessary in the present comment to discuss these matters, inasmuch as a satisfactory solution can be reached on the basis of the obligation of an Ontario court to recognize the validity of the Quebec decree.

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PARLIAMENTARY PROCEDURE AND THE COURTS.—Mr. G. S. Rutherford's learned annotation[1] on *Rex* v. *Ross*[2] affords an opportunity to provide a note on the question as to whether the courts should take notice of any suggestion which might arise before them that the customary parliamentary procedure had not been followed in relation to a particular statute, and should be disposed, if such procedure were wanting, to consider the statute inoperative. The most illuminating statement on this matter is to be found in *Edinburgh and Dalkeith Railway Co.* v. *Wauchope*:[3]

> My Lords, I think it right to say a word or two upon the point that has been raised with regard to an Act of Parliament being held inoperative by a Court of Justice because the forms prescribed by the two Houses to be observed in the passing of a bill have not been exactly followed. There seems great reason to believe that an idea to that

[8] *W.* v. *W.* (1934), 42 Man. R. 578, [1934] 3 W.W.R. 230; *Fleming* v. *Fleming*, [1934] O.R. 588, [1934] 4 D.L.R. 90.
[9] *Easterbrook* v. *Easterbrook*, [1944] P. 10; *Hutter* v. *Hutter*, [1944] P. 95; *cf.* my comments (1944), 22 Can. Bar Rev. 464, 923.
[10] *Shaw* v. *Shaw*, [1945] 3 W.W.R. 577, [1946] 1 D.L.R. 168.
[11] See (1937), 53 L.Q.Rev. at pp. 247 *ff.*
[1] (1946), 24 Can. Bar Rev. 149.
[2] [1945] 1 W.W.R. 590.
[3] (1842), 8 Cl. & F. 710, at p. 723 (*per* Lord Campbell).

> effect has prevailed to some extent in Scotland, for it is brought forward in these papers as a substantive ground of objection to the applicability of the later Act of Parliament; the objection being, that this Act being a private Act, it is inoperative as to the pursuer because he had not proper notice of the intention to apply to Parliament to pass such an Act. This defence was entered into in the Court below, and the fact of want of notice was made the subject of inquiry, and the Lord Ordinary, in the note appended to his interlocutor, gave great weight to this objection. He said, 'he is by no means satisfied that due Parliamentary notice was given to the pursuer previous to the introduction of this last Act: undoubtedly no notice was given to him personally, nor did the public notices announce any intention to take away his existing rights. If, as the Lord Ordinary is disposed to think, these defects imply a failure to intimate the real design in view, he should be strongly inclined to hold . . . that rights previously established could not be taken away by a private Act, of which due notice was not given to the party meant to be injured. . . .' I cannot but express my surprise that such a notion should ever have prevailed. There is no foundation whatever for it. All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.

In the lower courts the argument had been raised that the statute was inoperative owing to the fact that customary parliamentary procedure had not been followed. Before the case reached the House of Lords, counsel for the respondent had abandoned this argument, and, thus, Lord Campbell's statement is technically *obiter;* but it is of interest to note that he was unequivocally supported by all the other Lords present. It remains the most important pronouncement which I have found in the law reports on this matter.

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CONSTITUTIONAL LAW—CANADA TEMPERANCE ACT REFERENCE— The "drink question", as Lord McNaughton described it in the *Manitoba Licence Holder's* case,[1] has always occupied a central position in Canadian constitutional interpretation. Now in the Canada Temperance Act Reference we have the Judicial Committee's last word on the subject.

[1] *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association*, [1902] A.C. 73.

One thing, and perhaps only one thing, is clear from the advice tendered to His Majesty by the Board in the reasons delivered by Viscount Simon. This is that *Russell* v. *The Queen*[2] has been finally rescued from the buffetings it has received at the hands of Lord Haldane. The Board declare in emphatic language that the *Russell* case was correctly decided, that it has received the express approval of the Board in many subsequent cases, that its principles applied to subsequent revisions, consolidations and re-enactments of the Canada Temperance Act, and finally that it was firmly embedded in the constitutional law of Canada.

Their Lordships, while affirming that they are not absolutely bound by previous decisions of the Board, make it quite clear that the Judicial Committee will depart from the principle of *stare decisis* only in the rarest of cases.

Unfortunately the Judicial Committee, despite or perhaps because of their emphasis on the binding effect of *Russell* v. *The Queen*, have not been explicit as to the way in which that case fits in to the provisions of sections 91 and 92 of the British North America Act. In fact their Lordships state that they had no intention, in deciding the present appeal, of embarking on a fresh disquisition as to the relations between sections 91 and 92, which, as they say, have been expounded in so many reported cases. Viscount Simon, however, does make a number of observations, which it is feared will only add to the obscurity surrounding the interpretation of these sections.

The judgment of the Board first of all discountenances the famous "comment", as it is now described, of Lord Haldane in *Toronto Electric Commissioners* v. *Snider*[3] to the effect that *Russell* v. *The Queen* could only be supported on the assumption that the evil of intemperance in Canada at the time of the decision was so great and general that it amounted to a menace to the national life, requiring intervention from the National Parliament to protect the nation from disaster. Chief Justice Anglin found it necessary to repudiate this view as one which a body so well informed as the Judicial Committee would hardly have countenanced even though some hard driven advocate had ventured to insinuate it in argument.[4]

In dealing with Lord Haldane's famous dictum, Viscount Simon remarks that the British North America Act nowhere gives power to the Dominion Parliament to legislate in matters

[2] (1882), 7 A.C. 829.
[3] [1925] A.C. 396, at 412.
[4] *The King* v. *Eastern Terminal Elevator*, [1925] S.C.R. 434, at 438.

that are properly regarded as exclusively within the competence of the provincial legislatures merely because of the existence of an emergency. Later he says that an emergency may be the occasion calling for the legislation, but that it is the nature of the legislation itself and not the existence of emergency that must determine whether it is valid or not.

He expands this in a later part of the judgment by suggesting that the Dominion Parliament has the same power to legislate for prevention as for cure, and that they have the power to re-enact provisions with the object of preventing a recurrence of a state of affairs which was deemed to necessitate the earlier statute.

These remarks seem to be quite inconsistent with the *Fort Frances* decision.[5] In that case the Judicial Committee made it very clear that the power of the Dominion Parliament to legislate in relation to matters that would normally or *ex facie* be property and civil rights does depend, not upon the nature of the legislation, but upon the existence of the emergency. Indeed the basis of the *Fort Frances* decision was that the emergency of war continued in existence even after the actual termination of hostilities and that the courts, although loath to do so, will, where there is clear evidence that the crisis had wholly passed, decide that exceptional measures of interference are *ultra vires* and no longer called for.

The proposition that the Dominion Parliament can legislate, quite apart from the existence of an emergency, to prevent its recurrence would seem, if taken at all literally, to afford an easy passage into the provincial domain, to use the words of Lord Atkin in the Employment Insurance Reference.[6]

The only test Lord Simon suggests is in the "real subject matter of the legislation" and whether or not "it goes beyond local or provincial concern or interest and must from its inherent nature be the concern of the Dominion as a whole". War and pestilence, the drink or drug traffic, and the carrying of arms are given as illustrations.

These phrases are not really very helpful as will be seen by reference to what has been described by the Judicial Committee,[7] as the *locus classicus* in respect to the interpretation of the opening clause of section 91, namely the judgment of

[5] *Fort Frances Pulp and Power Company, Limited* v. *Manitoba Free Press Company Limited*, [1923] A.C. 695.
[6] *A. G. for Canada* v. *A. G. for Ontario*, [1937] A.C. 355, at 367.
[7] *A. G. for Canada* v. *A. G. for Ontario*, [1937] A.C. 326, at 353.

Chief Justice Duff in the Supreme Court of Canada on the Reference re the Natural Products Marketing Act, 1934.[8]

In his judgment the Chief Justice points out the difficulty of such language as is used by the Judicial Committee. The question is: In what cases can the Dominion Parliament, under the introductory clause of section 91, enact legislation which would trench upon subjects committed to the exclusive competence of provincial legislatures? It has been said that it may do so because the matters are "of national concern" or "affect the body politic of the Dominion", and now because they "go beyond local or provincial concern," or "from their inherent nature are the concern of the Dominion as a whole". His Lordship points out that the evil of hoarding and high prices dealt with in the *Board of Commerce Act* case[9] had clearly attained dimensions that made it general throughout Canada, and was such as seriously to prejudice the well-being of the people of Canada as a whole. Nevertheless the Dominion legislation was not to be justified on that account. The same situation is illustrated by *Snider's* case.[10] In this case the Dominion legislation which was held to be *ultra vires* dealt with industrial disputes, which inevitably would affect people in more than one province, and the legislation was clearly for the general advantage of Canada and affected the body politic as a whole. This did not justify Dominion interference in the provincial spheres, which could only be justified in cases arising out of some extraordinary peril to the national life of Canada as a whole, such as war.

A similar view accounted for the refusal of the Judicial Committee to uphold those parts of the Bennett "New Deal legislation" that were sought to be justified on the ground that unemployment and distress, which were widespread throughout Canada, went far beyond matters of local or provincial concern and affected the Dominion as a whole, thus justifying interference by the Dominion in the fields normally within section 92.

Although their Lordships do not say so in the Canada Temperance Act Reference, there appears to be a satisfactory explanation of the apparent conflict between *Russell* v. *The Queen* and these cases. It is, of course, absurd to say that The Canada Temperance Act was based upon "an extraordinary peril to the national life of Canada". As their Lordships say, there is not the slightest indication in the judgment delivered

[8] [1936] S.C.R. 398, at 414.
[9] [1922] 1 A.C. 191.
[10] [1925] A.C. 396.

by Sir Montague Smith or the arguments of counsel in the *Russell* case that such a situation existed or was advanced as a basis for the legislation. The real explanation seems to be made clear by a passage in the judgment of Lord MacNaghten in the *Manitoba Licence Holder's* case,[11] which seems to have received too little attention in the discussion of the *Russell* case. He states that :

> a careful perusal of the judgment [in *A. G. for Ontario* v. *A. G. for the Dominion*,[12] which had held provincial liquor prohibition laws *intra vires*] leads to the conclusion that, in the opinion of the Board, the case fell under Number 16 [of section 92] rather than under Number 13. And that seems to their Lordships to be the better opinion.

The judgment then proceeds, "Indeed if the case is to be regarded as dealing with matters within the class of subjects enumerated in Number 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter". A perusal of the transcript of the argument in the *Manitoba Licence Holder's* case emphasizes the conclusion that the *Russell* decision, to the effect that the Canada Temperance Act was *intra vires* the Parliament of Canada, and the decision in the *Local Prohibition* case, that prohibitory liquor legislation of the provincial legislatures was also competent, could only be reconciled on the view that legislation passed with a view to preventing intemperance is not legislation in relation to property and civil rights, but, viewed in its local aspects, falls under head number 16 as being of "a merely local or private Nature in the Province."

The conclusion to be drawn from this is that in respect to the first fifteen heads of section 92, which deal with specific subject matters of legislation, some emergency of the type indicated in the *Fort Frances* case is necessary to justify interference by the Parliament of Canada. In respect, however, to a matter that is not within any of the first fifteen enumerated heads of section 92, but falls within the provincial sphere solely under head 16 as being of a local and private nature, Dominion legislation under the opening clause of section 91 dealing with precisely the same subject is competent where the matter is viewed "as one of national concern".

This view enables all of the cases to be reconciled. Criticisms of *Russell* v. *The Queen* have been based upon the assumption that it was authority for the proposition that legislation *ex facie* within any of the enumerated heads of section 92 could fall

[11] [1902] A.C. 73.
[12] [1896] A.C. 348.

within the competence of the Dominion Parliament if it affected the Dominion as a whole or was a matter of national concern, a proposition not justified by the decision itself.

That the Canada Temperance Act was not legislation in relation to property and civil rights was conceded in argument in *Russell* v. *The Queen.* The legislation was likened in the judgment to criminal law and, although it affected civil rights, the aspect in which the question of consumption of liquor was regarded was regulation for the sake of public order.

Indeed in view of the extension since the *Russell* case of the concept of criminal law in *Proprietary Articles Trade Association* v. *A. G. for Canada*[13] and Reference re Section 498A[14] of the Criminal Code, there would seem to be ample justification for regarding *Russell* v. *The Queen* as "Criminal Law" under section 91, head 27A, or at least as ancillary thereto.

However that may be (and the Judicial Committee did not find it necessary to discuss the suggestion), it is clear, it is submitted, that entirely different considerations apply where the field is not one which is expressly enumerated in either section 91 or section 92 than in cases in which the field is one expressly enumerated in section 92. In the latter cases some emergency is required to justify an intrusion by the Dominion Parliament under the opening clause of section 91. The "drink question" however may be regarded as something that in the "sumptuary" aspect as distinguished from the "property" aspect is not expressly enumerated in section 91 or section 92 and, viewed as a local problem, falls under section 92 (16) and, viewed as a matter of national concern, falls under the opening clause of section 91. There is in this no "overriding" of the normal distribution of powers in sections 91 and 92 because of an emergency.

To those who believe that a reinterpretation of sections 91 and 92 of the British North America Act is necessary in order to allow the federal government to legislate in matters that are clearly of national concern under modern conditions, the present decision can afford no comfort. It does not constitute "a new point of departure" or enable *Russell* v. *The Queen,* although completely rehabilitated, to be used as it was sought to be used again and again in the past, namely to justify a more "national" interpretation of our constitution. Apparently those who believe a recasting of our federal constitution to be necessary will have to rely upon amendment and not upon judicial interpretation.

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[13] [1931] A.C. 310.
[14] *A. G. for B.C.* v. *A.G. for Canada,* [1937] A.C. 368.