ANOTHER QUESTION OF DOMINION JURISDICTION EMERGES.

It is not a usual thing for the Chief Justice of Canada to enter a protest against the language of a judgment of the Judicial Committee as being "an aspersion on the fair fame of Canada." It is not usual for the Judicial Committee to reduce one of its own familiar and often quoted judgments to an absurdity. It is therefore singular that there has been so little comment in Canada on these aspects of the reasoning of Viscount Haldane in the judgment of the Judicial Committee in the *Lemieux Act case.*"[1]

The protest of Chief Justice Anglin appeared in the reasons for his dissenting judgment in the recent *Eastern Terminal Elevator case.*[2] Viscount Haldane had suggested that the Committee which decided the *Russell Case,*[3] which affirmed the jurisdiction of the Parliament of Canada to enact the Canada Temperance Act, may have proceeded in reaching their conclusion that the Canada Temperance Act was within the jurisdiction of the Parliament of Canada "on the ground of fact that at the period of the passing of the Act the circumstances of the time required it in an emergency affecting Canada as a whole."

The sentences of Viscount Haldane's judgment to which Chief Justice Anglin took exception were the following:—

"Their Lordships think that the decision in *Russell* v. *The Queen* can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell* v. *The Queen,* that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the national Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous."

A perusal of the argument of counsel before the Judicial Committee in the *Lemieux Act case* which is now available by the courtesy of the Dominion Department of Labour,[4] throws some light on Vis-

[1] (1925) A.C. 396.
[2] (1925) S.C.R. 434.
[3] (1882) 7 A.C. 829.
[4] Blue Book issued by the Canadian Department of Labour on "Judicial Proceedings respecting Constitutional Validity of the Industrial Disputes Investigation Act." (1925).

count Haldane's suggestion that drunkenness had become so great a vice in Canada at the time of the enactment of the Canada Temperance Act as to constitute a national emergency comparable to a pestilence. Of course no argument of that character was made in the *Russell case* either in the Courts of New Brunswick where the case originated, or in the Supreme Court of Canada, or before the Judicial Committee. The printed notes of the argument in the *Lemieux Act case* make it fairly clear that what Viscount Haldane had in mind in writing the judgment of the Committee was not the people of Canada, but the dilemma in which he found himself between the *Russell case* on the one side and on the other the legal fiction that the Committee cannot make a mistake, and, therefore, that though the Judicial Committee may explain, it can never reverse itself.

Gradually, but surely, for some years the Committee had built up a line of authorities that were inconsistent with the *Russell case*—always struggling in its formal judgments to distinguish and explain that case. One after another the explanations put forward for the *Russell case* had been explored in previous judgments of the Judicial Committee, and all of them had been found to be untenable. And now in the *Lemieux Act case* the Judicial Committee was fairly stumped. It must not in so many words repudiate its own judgment, even though that judgment was 43 years old, and had been given before the Judicial Committee had, so to speak, found its legs. The convention of the Judicial Committee's impeccability must be upheld. And so to protect one fiction another fiction was invented. The *Fort Frances case*[5] had recently gone off on the doctrine of a national emergency such as would justify the assumption by the Parliament of Canada of authority over fields of provincial jurisdiction quite outside of any authority conferred by the British North America Act—
—the highest law for nations as for individuals, a law that transcends written constitutions, the law of self-preservation. Viscount Haldane's new explanation was of course absurd and impossible, as everyone on this side of the Atlantic knows, and I have no doubt he put it forward rather as a *reductio ad absurdum* than as a suggestion intended to be taken seriously. It was a way of getting round the obstruction. Indeed the printed argument shows that the Judicial Committee admitted that there was no national emergency in the drink question in Canada in 1878 when the Canada Temperance Act was passed.

Let me briefly refer to enough of the history of the vicissitudes of the *Russell case* to indicate how that case stood as an accredited

[5] (1923) A.C. 695.

(or discredited) authority at the time of the argument of the *Lemieux Act case.*

The *Russell case* was decided in 1882. The next year the Committee had to deal with the *Hodge case*,[6] an appeal from Ontario involving the question of the authority of the Legislature of Ontario to enact the Ontario Liquor License Act. The Judicial Committee had reached the conclusion in 1882 that prohibition of the liquor traffic was not within the powers conferred upon provincial legislatures by Section 92 of the British North America Act. In 1883 the Committee felt bound to hold that the licensing of the liquor traffic was within the powers conferred upon the provincial legislatures by Section 92 of the British North America Act. To harmonize these inconsistent findings the Committee in the *Hodge case* invented the doctrine of the "overlapping powers," or as it is sometimes called, the "unoccupied field,"—a difficult, if not a mischievous, theory of which Viscount Haldane said in a recent case that it was "a very unintelligible doctrine."[7]

That doctrine was defined in the judgment in the *Hodge case* to be that "subjects which in one aspect and for one purpose fall within Section 92 may, in another aspect and for another purpose, fall within Section 91."

Relying on the *Russell case* and before the date of the judgment of the Judicial Committee in the *Hodge case,* the Parliament of Canada in 1883 enacted a Dominion liquor licensing law. When this Statute came before the Judicial Committee in 1885 the Committee did not attempt to apply to it the doctrine of overlapping powers. Having decided in the *Hodge case* that the provinces had power to enact liquor licensing laws, it felt bound, notwithstanding the *Russell case,* to hold that the Dominion Parliament had no such power and it accordingly advised Her Majesty that the Dominion Liquor License Law was *ultra vires* of the Parliament of Canada, but adopted the extraordinary course of giving no reasons,—and it has been always understood that the Committee gave no reasons because it felt that no reasons could have been given that would have been consistent with its reasons in the *Russell case.*

A few years later the question of the power of the Legislature of Ontario to enact a local option prohibitory law—which is just what the Canada Temperance Act is—came before the Judicial Committee.[8] The judgment was by Lord Watson, one of the greatest dialecticians and jurists of the last generation. The *Ontario Local Option*

[6] (1883) 9 A.C. 117.
[7] Canadian Companies and the Judicial Committee, Cameron (1922), p. xviii.
[8] (1896) A.C. 348.

case was the direct converse of the *Dominion Local Option case* (the *Russell case*), and if the Committee had followed the *Russell case* it would have held against the authority of the Legislature of Ontario to enact the law in question. But the judgment was in favour of the authority of the Legislature of Ontario to enact a local option prohibitory law,—and though, as Viscount Haldane afterwards said, "It is plain that Lord Watson did not believe in the judgment of the Board in *Russell* v. *The Queen*,"[9] and though his judgment was directly against the law as laid down in that case,—nothing was said by Lord Watson in direct disparagement of the *Russell case*. In short, whatever the opinions of members of the Judicial Committee respecting the *Russell case* may have been,—they have respected the tradition under which no ill is to be spoken in judgments of the Committee of a former judgment.

Following the *Ontario Local Option case* in the next year came the *Brewers' and Distillers' case*,[10] in which the Judicial Committee held that the Legislature of Ontario had jurisdiction to require brewers and distillers already licensed under the Inland Revenue Act of Canada to take out licenses from the Government of Ontario.

Then came the judgment of the Committee in 1902 on the Manitoba prohibition law,[11] which was the model upon which the present Ontario prohibition law was afterwards framed, and again the Judicial Committee, ignoring the ratio of the *Russell case*, held that the Legislatures of the Provinces had authority under Section 92 of the British North America Act to pass laws for the suppression of the traffic in intoxicating liquor.

Thus there have been five cases before the Judicial Committee since the *Russell case*, dealing with the liquor traffic, all of them inconsistent with the judgment in that case.

So much for the formal judgments. Now what about the atmosphere? What are the personal views of the members of the Committee on the question of the authority of the *Russell case*? Viscount Haldane is recognized as the greatest living authority on the interpretation of the British North America Act. It is not always quite fair to select casual observations by Judges during the course of an argument as necessarily reflecting their matured views,—but when there has been a succession of expressions on one topic covering a period of years such expressions may be taken as fairly representing a confirmed opinion. In the course of the argument of the *Insurance Reference case* in 1916, Viscount Haldane observed:—

[9] Canadian Companies and the Judicial Committee, Cameron (1922), p. xix.
[10] (1897) A.C. 231.
[11] (1902) A.C. 73.

"I have always thought that the decision in *Russell* v. *The Queen*, with all respect to it, is a case which you cannot rely upon as deciding any principle, in view of subsequent cases.[12]

And a little later on, in the course of the argument of that case, he added:

"I think Lord Watson took the validity of the Canadian Act as having been decided by the Board in *Russell* v. *The Queen*,—that he said: How or why it was decided I do not know, but it was valid and I am going to follow that."[13]

And again:—

"*Russell* v. *The Queen* is an island that stands in the midst of a vast ocean."

To which Lord Chancellor (Buckmaster) added facetiously:—

"Sir Robert (Finlay) says it is a derelict vessel which hinders the commerce and trade of the province and ought to be sunk."[14]

But though the derelict was crippled and badly water-logged it was not sunk at that time.

And Lord Parker, contrasting the judgments of the Judicial Committee in the case of the *Dominion liquor license law* and the *Russell case*:—

"I do not understand why, if regulation infringes the provincial powers, prohibition should not. It seems to me it would be *a fortiori*."[15]

Then in the *Great West Saddlery Co. case* in 1921 Viscount Haldane gave this interesting reminiscence:—

"I think I may say—I had a long experience at the Bar in these cases in those days—that it was a tacit rule, a convention between judges and counsel that *Russell* v. *The Queen* was not to be cited, and we did not cite *Russell* v. *The Queen*."[16]

Then just one of Viscount Haldane's many observations during the argument of the *Lemieux Act case* last year:—

"For a time no self-respecting counsel cited the *Russell case* before this Board; there was a gloomy silence whenever he did, but I think we have got over that now."[17]

These pronouncements against the authority of the *Russell case* were not made under a bushel. They were made in open Court and duly reported and published in the printed record of the proceedings

[12] Canadian Companies; Insurance Reference, Argument in the Privy Council, Cameron (1917), p. 37.
[13] *Ibid.* p. 43.
[14] *Ibid.* p. 166.
[15] *Ibid.* p. 165.
[16] Canadian Companies and the Judicial Committee, Cameron (1922), p. xx.
[17] Blue Book, *supra*, p. 80.

of the Judicial Committee—so that they are only less authoritative than the published reports of formal judgments of the Judicial Committee themselves. Surely no case in the history of Canadian jurisprudence, no case in the history of British jurisprudence ever suffered such a bombardment of slings and arrows from the Court of its origin. And then the indictment against the authority of the *Russell case is* completed by the *reductio ad absurdum* of Viscount Haldane in the formal judgment of the Judicial Committee in the *Lemieux Act case,* that the only possible foundation for the *Russell case* must have been in the presence of a national emergency—a condition of drunkenness among the inhabitants of Canada in 1878 so terrible as to be comparable only to the emergency of a State of War, or a national pestilence. Was Viscount Haldane dismissing the *Russell case* with a rather grim jest ? Whether he was joking or not, this at all events is now clear—the *Russell case* has been dismissed out of Court and can never again be cited as supporting any principle of constitutional law. It will remain simply as a pedestal for the Canada Temperance Act, as that Act stood in 1882—only that and nothing more.

Then what are the consequences of the reversal of the ratio of the *Russell case,* in so far as that case lays down a canon of construction of the British North America Act inconsistent with subsequent cases ? The provisions of the Dominion Inland Revenue Act governing the manufacture of intoxicating liquor appear to have no other foundation than the argument of Sir Montague Smith in his judgment in the *Russell case* that the prohibition of the liquor traffic does not come within any of the subjects of legislation assigned by Section 92 of the British North America Act to the provinces. That argument being now obsolete and the jurisdiction of the provincial legislatures over both the regulation of the sale, and the prohibition of the sale of intoxicating liquor being now thoroughly well settled, the question that is exigent is this:—If the regulation of the sale of intoxicating liquor and the prohibition of its sale come within Section 92 of the British North America Act, why not the regulation and the prohibition of manufacture ? And if the manufacture is within Section 92 then according to the consistent line of cases since the *Russell case,* and especially those decided within the past ten years,[18] it is clear that that subject cannot also be within the jurisdiction of the Dominion Parliament. And if that is the correct view, then the

[18] *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), 1 A.C. 588; *In re Board of Commerce Act* (1922), 1 A.C. 191; *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (*supra*); *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), A.C. 323; *Toronto Electric Commissioners* v. *Snider* (*Lemieux Act case*) (*supra*).

Dominion Inland Revenue Law, in so far as it licenses and regulates breweries and distilleries, goes by the board,—the Dominion right to tax would of course remain,—and both the Parliament of Canada and the nine provincial legislatures will have to revise their laws to meet a new situation.

For more than a generation the view has been generally but loosely held by Canadian lawyers that the Parliament of Canada has jurisdiction over the manufacture, and therefore over the prohibition of the manufacture, of intoxicating liquor. The final destruction of the authority of the *Russell case* would appear to have removed the basis of that view.[19]

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[19] I have not overlooked what Lord Watson said about manufacture in the case of the Ontario Liquor License Act (1896), A.C. 348, but as has been pointed out in the Judicial Committee more than once since then, Lord Watson was in that case still struggling with the "unintelligible doctrine" laid down in the *Hodge case* to explain the *Russell case*, and he himself stipulated that his answer to the question as to manufacture must not be taken as judicial. Nor am I overlooking the fact that in that case in the Supreme Court of Canada (24 S.C.R. 17) all the judges were at that time (1895) of the opinion that a provincial legislature had no power to prohibit the manufacture of intoxicating liquors. But, not only did that view not have even the academic concurrence of the Judicial Committee, but all the Judges in the Supreme Court were also of the opinion that the provinces had no jurisdiction to prohibit the wholesale sale, and a majority of them thought the provinces had no jurisdiction at all to prohibit sale. The fact of course is that at that time the *Russell case* was an authority more in point on the question of prohibition than the *Hodge case* and the Supreme Court was more under the shadow of the *Russell case* than the Judicial Committee itself.