DID JUDAH P. BENJAMIN PLANT THE "STATES' RIGHTS" DOCTRINE IN THE INTERPRETATION OF THE BRITISH NORTH AMERICA ACT?

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The Constitution of Canada, in all its essential parts, was devised and drafted by Canadian statesmen and adopted by the British Parliament as the British North America Act.[1] Like the Constitution of the United States it has been subject to considerable judicial interpretation, and, until 1949, its final interpreter was the Judicial Committee of the Privy Council, the august Board which heard appeals from Canada and other parts of the Empire and Commonwealth. It gave its decisions in the form of recommendations to the reigning Sovereign, who invariably adopted them. Just a year before the passage of the British North America Act, Judah Philip Benjamin, formerly Secretary of State of the defeated Confederate States of America, was called to the British Bar. A leading barrister during the decade when the first cases requiring interpretation of the British North America Act were appealed to the Judicial Committee, Benjamin appeared as counsel in nearly all of them. After Benjamin's retirement (there was little evidence of it before), the Committee developed a strong disposition to decide in favour of the provinces' claims to power, as against what appeared to many authorities the better claims of the Dominion Government, and certainly contrary to the intentions of the Fathers of the Canadian Constitution.

Did the ablest lawyer of the Southern Confederacy persuade their Lordships of the Judicial Committee to incorporate Southern states' rights doctrine into their interpretation of the Britsh North America Act? No authority on the Canadian Constitution presses that claim, but it appears that some of them think the claim has

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[1] (1867), 30 & 31 Vict., c.3.

validity. The idea is well stated by Professor A. R. M. Lower, who says:[2]

> It is probable that through him [Benjamin] can be traced the stream of "states' rights" arguments flowing through the London bar and Privy Council into the interpretation of the Canadian Constitution, for he was a most influential advocate, and he no doubt had his disciples; at any rate, later judges such as Watson and Haldane took the provincial side vigorously.

Before presenting the evidence on the question of Benjamin's influence with the Privy Council in its interpretation of the British North America Act it is entirely appropriate to offer a little evidence on Benjamin himself, a most unusual man. He was a Sephardic Jew, of the aristocratic stock which is supposed to have included the ancestors of Benjamin Disraeli.[3] Having resided in Spain for several centuries, some of the forebears of Judah P. Benjamin went to Holland, and later to England, where Judah's parents, Philip and Rebecca, were married. Desiring to improve their economic condition, they went to the New World, and they resided for a few years on Saint Croix, one of the Virgin Islands. Here on August 11th, 1811, Judah uttered his first cry. This accident of having been born on British territory proved to have been an advantage when, more than fifty years later, he escaped as a rebel from the United States, settled in Britain and sought admission to the bar. Presently the Benjamins moved to North Carolina, and shortly thereafter, to South Carolina. Judah's father was never financially successful, but a more fortunate uncle saw that the Benjamin children had a start toward their education in an excellent academy. Judah showed remarkable progress, attracted the attention of the Hebrew Orphan Society in Charleston, and it is said that the Society gave him financial aid for the completion of his course in an academy in that cultural center of the Old South. At the age of fourteen he was admitted to Yale. There he was a very successful student for three years, but for reasons that were never fully explained, except that they had no relation to his academic performance, he left without graduating.

In 1828 Judah went to New Orleans, then in a period of very

[2] Theories of Canadian Federalism—Yesterday and Today, in Lower and Others, Evolving Canadian Federalism (1958), p. 29.

[3] Robert Douthat Meade, Judah P. Benjamin: Confederate Statesman (1943), p. 3. This is the best biography of Benjamin and it is the one upon which I have principally relied for this summary. Pierce Butler, Judah P. Benjamin (1906), is less critical but quite good. See also Arthur L. Goodhart, Five Jewish Lawyers of the Common Law (1949); Dictionary of American Biography; Dictionary of National Biography; and the Jewish Encyclopedia.

rapid development. He found employment with a commercial firm, did some tutoring and read law. Ambitious, studious, alert, and brilliant, he was admitted to the bar at the age of twenty-one. During the final stages of his preparation for the law, and while a yellow fever epidemic raged, carrying away a sixth of the population, he ardently courted a sixteen-year-old girl of the Creole type, Natalie St. Martin, one of the young belles whom he had tutored in English. They were married shortly after he was admitted to the bar.[4]

Within a decade he became one of the most successful advocates in Louisiana, and, following the custom of prosperous professional Southerners of his day, he purchased, and with considerable imagination developed, a sugar plantation. The lawyer and planter naturally became active in state politics, working with the Whig party. In 1853 he declined a nomination as Associate Justice of the Supreme Court, because he preferred an active political career which he could combine with his lucrative law practice. Indeed, shortly before the President tendered the appointment to the Supreme Court, Benjamin had been elected United States Senator by the Louisiana Legislature. He was re-elected in 1859, this time as a Democrat, for like nearly all the other Southern Whigs, he had shifted his allegiance to the Democratic Party, seeing in it the only hope for the South. Although not in any sense a fire-eater, in several notable Senate speeches he defended the right of the slave states to secede from the Union. Incidentally, there is no evidence whatever to indicate that slavery ever

[4] Although the marriage was a love match, it did not develop as a happy one. Natalie had little education, was selfish and extravagant, and loved the gay social life of New Orleans. Judah was well educated, was something of an intellectual, loved his profession, and he eagerly looked forward to having a family. A delightful conversationalist who enjoyed relaxing over good food, wine, and cigars, he regarded these things as incidental to life, not as life itself. In a few years Natalie went to Paris, where she had been born, and there she remained. Judah supported her well throughout his life, visited her almost annually in Paris, where their only child, a daughter, was born. Even during the seventeen years following the Civil War that Judah was a barrister in London, Natalie and her daughter continued to reside in Paris, where Judah frequently visited them. His domestic disappointments he met with great courage and forbearance, seldom mentioning them to relatives and friends. Almost invariably he appeared to be in the best of spirits, exuding cheerfulness and gaiety. But he was probably not a happy man. When he was quite ill and shortly before his death, he wrote a letter to his friend Francis Lawley, who had been the Richmond correspondent for the London Times during the Civil War, in which he complained of the bitterly cold winds of that particular Paris April, and his concluding comment may have epitomized his inner life. "What I require", he said, "is warmth—will it never come?", Meade, *op. cit., ibid.*, p. 379. In two weeks he was dead.

troubled the conscience of Benjamin, a very conservative man.

He served the Southern Confederacy successively as Attorney General, Secretary of War, and Secretary of State. He managed well enough in the first of these places, but as Secretary of War he was not very successful, partly because sufficient supplies and materials were not to be had and partly because he undiplomatically offended some of the South's best (and probably most sensitive) generals. As Secretary of State from March, 1862 to the end of the war, he probably performed a hopeless task as well as any other individual could have. An exotic figure, a *bon vivant,* who occasionally visited some of the many gambling establishments in Richmond in a capacity other than as spectator, this almost perpetually gay man gave many Southerners the impression that, as John S. Wise put it, he cared no more for the Confederacy than he did for "a last year's bird's nest".[5] Surely, this conclusion was wrong, for Benjamin's fortune was tied up with that cause. Yet he was denounced and hated as was no other Confederate public man. President Davis was often roundly condemned for continuing him in office, but the President always gave him his complete confidence, presumably agreeing with Lincoln that Benjamin was the smartest of the rebel lot. Davis later said that Benjamin was his "chief reliance among men".[6] With the collapse of the Confederacy, Benjamin's second, and shortest, career came to an end, but it was characteristic of the man that his cheerfulness did not leave him. In the company of Davis and the members of his cabinet, fugitives after the fall of Richmond, he could yet make jokes and quote poetry. There is no doubt that he still had high hopes for his personal future.

Escaping from the United States, despite an almost unbelievable series of near captures, he arrived in England late in the summer of 1865. Here he was received as a distinguished person and often with great kindness. One who befriended him was Sir Frederick Pollock, Lord Chief Baron of the Court of Exchequer, who induced his barrister son, Charles, to take Benjamin in his office in order to give him an opportunity to familiarize himself with English court procedures and to meet British lawyers. On January 13th, 1866, he became a student at Lincoln's Inn, but because of his experience and reputation the three years of legal apprenticeship were waived for him and he was called to the bar

[5] Meade, *op cit.,* footnote 3, p. 277.
[6] Goodhart, *op. cit.,* footnote 3, p.10.

on June 6th, 1866. For him the Civil War was a thing of the past; the Confederacy was now indeed "a last year's bird's nest". At fifty-five he was physically, emotionally, and professionally ready for a new career. He never returned to the United States.

During his first two years at the English bar, when he was not overrun with clients, Benjamin prepared *A Treatise on the Law of Sale of Personal Property, with Reference to the American Decisions, to the French Code and Civil Law.* Published in August, 1868, this volume, commonly called "Benjamin on Sales", was recognized at once as a legal classic, and after a hundred years and a number of editions it still has high standing. It was perhaps the most significant factor in assuring its author a distinguished and financially successful career as a barrister. In 1870 he was made Queen's Counsel for Lancashire County only and, two years later, he received a patent of precedence, which gave him rank over all future Queen's Counsel. Within a few years he practically gave up practice in the lower courts, reserving his talents for the House of Lords, the Judicial Committee of the Privy Council, and the Court of Appeal, before which tribunals he was at his best. His early mentor and always his warm friend, Sir Charles Pollock, testifies to the knowledge of the civil law which Benjamin had gained from his long practice in Louisiana and which "gave him a distinct position superior to his brother advocates when arguing, before our Judicial Committee of the Privy Council, Appeals from those of the English Colonies of French origin which were ceded to England before the Code [Napoleon]".[7]

Upon Benjamin's retirement in 1883 (because of rapidly failing health), he was showered with letters of regret and appreciation and laudatory articles and editorials. *The Times* stated that he had been "almost the leader of the British Bar in all heavy appeal cases," and in mercantile law "an equal authority with a standard textbook".[8]

On June 30th the Bar of England gave him a dinner, an honour no American lawyer had ever before received from that bar. In the chair was the Attorney General, Sir Henry James, and present were such notables as the Lord Chancellor, the Lord Chief Justice, the Solicitor General, the Lord Advocate for Scotland, and the Attorney General for Ireland. "[W]ho is the man save this one", asked the Chairman, "of whom it can be said that he held

[7] Reminiscences of Judah Philip Benjamin, in fortnightly Review, March, 1898, p. 354.

[8] February 9th and 10th. Quoted in Meade, *op. cit.*, footnote 3, p. 377.

conspicuous leadership of two countries . . . . The years are few since Mr. Benjamin was a stranger to us all, and in those few years he had[s] accomplished more than most can ever hope in a life time to achieve".[9]

There is no doubt that Benjamin was a learned lawyer and a skillful, resourceful, and, on occasion, an impassionted advocate. But that leaves us with the question: to what extent did he share responsibility with the Judicial Committee of the Privy Council for the preference it came to show for provincial power over Dominion Power? That is the question with which this article deals. During Benjamin's seventeen years as a barrister he argued several hundred cases before the Court of Appeal, the House of Lords, and the Privy Council. Of the ten Canadian cases that were appealed to the Council in that period he was of counsel in eight. One of these cases, *Bell* v. *Quebec*,[10] did not arise under the British North America Act, which leaves him with seven cases under the Act. In two of them he was on the Dominion side and in five on the provincial side. One might guess (but it is certainly no more than a guess) that he was asked to take the greater number of briefs for the provinces because of his states' rights record in America. He won but a single case, *Dow* v. *Black*,[11] one of the cases in which his argument rested on provincial power.

It is proposed to review each of the seven cases to determine, if possible, what influence he had with the Privy Council. Unfortunately, the only case for which the transcribed arguments of counsel are available is *Russell* v. *The Queen*,[12] the last case in which Benjamin appeared. Otherwise I have had to rely upon the summaries of arguments of counsel which are produced in the reported cases and upon comments on these arguments in the Privy Council's opinions.

The first British North America Act case in which Benjamin appeared was *L'Union St. Jacques de Montréal* v. *Belisle*.[13] The question raised was of the validity, under the British North America Act, of an Act[14] of the Legislature of Quebec, which authorized L'Union, then in financial straits, to reduce the benefit payments to certain widows, but provided that it should pay them the amount originally agreed upon if it should later accumulate sufficient assets. The Quebec Court of Queen's Bench held the statute invalid as an exercise of the power to legislate on bank-

[9] Meade, *op cit., ibid.*, p. 378.
[10] (1879), 5 App. Cas. 84.
[11] (1875), L. R. 6 P.C. 272.
[12] (1882), 7 App. Cas 829.
[13] (1874), L.R. 6 P.C. 31.
[14] (1870), 33 Vict., c.58.

ruptcy and insolvency, which was reserved to the Parliament of Canada by sub-section 21 of section 91 of the British North America Act.

L'Union appealed to the Privy Council, before which the respondent widows were represented by Benjamin, who was thus in the position of arguing against provincial power in his first appearance in a British North America Act proceeding. The reported case does not even include a summary of his argument, but the Privy Council, speaking through Lord Selborne, referred to the hypothesis suggested by Mr. Benjamin,

> . . . who certainly argued this case with his usual ingenuity and force, of a law having been previously passed by the Dominion legislature [Parliament], to the effect that any association of this particular kind throughout the Dominion, on certain specified conditions assumed to be exactly those which appear upon the face of this statute, should thereupon, *ipso facto*, fall under the legal administration in bankruptcy and insolvency.[15]

In other words, Benjamin argued that the provincial Act encroached upon the exclusive authority of the Dominion Parliament to legislate on bankruptcy and insolvency. "Their Lordships", continued Lord Selborne,

> . . . are by no means prepared to say that if any such law as that [suggested by counsel for the Respondent] had been passed by the Dominion Legislature, it would have been beyond their competency; nor that, if it had been so passed, it would have been within the competency of the provincial legislature afterwards to take a particular association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency. But no such law has ever been passed; and to suggest the possibility of such a law as a reason why the power of the provincial legislature over this local and private association should be in abeyance or altogether taken away, is to make a suggestion which, if followed up to its consequences, would go very far to destroy that power in all cases.[16]

Their Lordships reasoned that the provincial legislature enacted that statute under its exclusive power to make laws on "all matters of a merely local or private nature in the Province".[17] Clearly this matter is private; clearly it is local," declared Lord Selborne.[18] Nor does the exclusive power of the Dominion Parliament over bankruptcy stand in the way of the Act of the provincial legislature, because it is not a bankruptcy statute. L'Union being,

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[15] *Supra*, footnote 13, at p. 36.
[16] *Ibid.*, at pp. 36-37.
[17] B.N.A. Act., *supra*, footnote 1, s. 92 (16).
[18] *Supra*, footnote 13, at p. 35.

> . . . in such a financial condition that, unless relieved by legislation, it might have been likely to come to ruin does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category . . . . The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity, and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be reinstated.[19]

The next year Benjamin appeared as counsel for the Province of New Brunswick in *Dow* v. *Black*,[20] the only British North America Act case he won. An Act of the Legislature of New Brunswick[21] empowered the majority of the electors of a parish to raise by taxation a subsidy, designed to promote the construction of a railway extending beyond the limits of the parish into the State of Maine. Benjamin cited sub-section 10 of section 92 of the British North America Act, which gives the provincial legislatures exclusive powers over local works and undertakings other than such as are of the following classes:

> a. Lines of steam or other ships, railways, . . . connecting the province with any other or others of the provinces, or extending beyond the limits of the province:
> b. Lines of steam ships between the province and any British or foreign country: . . .

The exceptions listed in paragraph "a" would appear to defeat provincial authorization for the subsidy for a railway line running into Maine, but Benjamin seized upon paragraph "b", which excepted provincial control *only* from steam ship lines extending into a foreign country. The Privy Council did not consider it necessary to deal with the question under section 92, sub-section 10, upon which Benjamin relied, but it was rather governed by Acts of the New Brunswick Legislature of June 10th and 17th, 1867, which, prior to the effective date of the British North America Act, authorized the railway subsidy. As for the later Act,[22] the validity of which was being contested in the case, the Privy Council held that it provided only for the details of putting the earlier legislation into effect.

One of the arguments offered in opposition to the New Brunswick legislation was that, since under section 92, sub-section 2 of the British North America Act the provinces are empowered to

[19] *Ibid.*, at pp. 37-38.
[20] *Supra*, footnote 11.
[21] (1870), 33 Vict., c.47.
[22] *Ibid.*

impose "direct taxation . . . for provincial purposes", the tax here was invalid because it was for a purely local (parish) purpose. The record does not show how Benjamin met that argument, but their Lordships could "see no ground for giving so limited a construction to this clause" of the Act. "They think it must be taken to enable the provincial legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province".[23]

The case of *Quebec* v. *Queen Insurance Company*[24] raised the question of the authority of the Legislature of Quebec to enact a statute imposing a tax on certain policies of insurance.[25] It was called a license tax, but it was to be paid by the individual purchasers of insurance policies, the evidence of such payments to consist of stamps affixed to each policy. Benjamin, counsel for the Province of Quebec, cited as authorization for the Act section 92, sub-sections 2 and 9 of the British North America Act. They are as follows:[26]

> 2. Direct taxation within the province in order to the raising of a revenue for provincial purposes:
> 9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes.

As summarized in the report of the case, Benjamin's argument was, in part, that:[27]

> The general power of taxation, *i.e.*, the power of raising money for Dominion purposes belongs to the Dominion Parliament. But special powers of taxation were also given to the provincial Legislature, and may co-exist with the more general powers of a similar class conferred on the Dominion Parliament. Those special powers when examined in detail show the purpose of the Legislature. There is an express grant to the provincial Legislature of a power to make laws relating to licenses [citing sect. 92, sub-sect. 9].
> But even if this is not a license tax within sect. 92, sub-sect. 9, . . . it was direct taxation under sub-sect. 2 of sect. 92. It is impossible to classify scientifically direct and indirect taxes. It depends in each case upon the surrounding circumstances whether an apparent direct tax turns out to be indirect in its operation or *vice versa*.

In short, Benjamin argued that the tax was valid either as a license tax or as a direct tax. The Judicial Committee was not impressed. Speaking through Sir J. Jessel, it declared that the tax was not a license tax but simply a stamp tax paid not by the

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[23] *Supra*, footnote 11, at p. 282.
[24] (1878), 3 App. Cas. 1090.
[25] (1876), 39 Vict., c.7.
[26] *Supra*, footnote 1.
[27] *Supra*, footnote 24, at pp. 1095-1096.

licensee but by each purchaser of a policy. Nor were such stamp taxes direct taxation. "The political economists", he said,[28]

> . . . are all agreed. There is not a single instance produced on the other side . . . . If one could have been found in favor of the appellants, it was the duty of the appellants to call their Lordships' attention to it. No such cases have been found. Their Lordships, therefore, think they are warranted in assuming that no such case exists . . . . All English and American decisions cited are all one way. They all treat stamps either as indirect taxation, or as not being direct taxation. Again, no authority on the other side has been cited on the part of the appellant. [Two cyclopaedias produced show that popular and technical use of the term "direct taxation" are the same]. And, here again, there is an utter deficiency on the part of the appellant in producing a single instance to the contrary.

Valin v. *Langlois*[29] presented the rather technical question of the validity of a provision of the Dominion Controverted Elections Act[30] which conferred jurisdiction on existing provincial courts to try election petitions (covering cases of disputed elections to the House of Commons). In the instant case Valin had made certain preliminary objections to an election petition filed against him by Langlois praying that Valin's election to the House of Commons be declared null and void because he had practised bribery. The Chief Justice of the Superior Court of Quebec dismissed Valin's objections and the Supreme Court of Canada affirmed. Supporting Valin's petition for special leave to appeal to the Privy Council, Benjamin did not question the authority of the Dominion Parliament under section 41 of the British North America Act to provide fully for the settlement of controverted elections. Rather he contended that in conferring such jurisdiction upon existing provincial courts it was violating sub-section 14 of section 92 of the Act, which gives the provincial legislatures exclusive power to legislate on:[31]

> . . . the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.

Lord Selborne, speaking for the Privy Council, complimented Benjamin upon his presentation of the case, venturing,

> . . . to say for their Lordships generally that they very much doubt whether, if there had been an appeal and counsel present on both sides, the grounds on which an appeal would have been supported, or might

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[28] *Ibid.*, at pp. 1100-1101.
[29] (1879), 5 App. Cas. 115.
[30] (1874), 37 Vict., c.10.
[31] *Supra*, footnote 1.

have been supported, could have been better presented to their Lordships than they have upon the present occasion by Mr. Benjamin.[32]

But in commenting upon the difficulty of finding any ground upon which the competency of the Parliament of Canada to enact the statute could be questioned, his Lordship qualified his praise of the distinguished counsel, in these words:[33]

> . . . the ground which is suggested by [Mr. Benjamin] is this, that it has seemed fit to the Parliament of Canada to confer the jurisdiction necessary for the trial of election petitions upon courts of ordinary jurisdiction in the provinces, and it is said that although the Parliament of Canada might have provided in any other manner for those trials, and might have created any new courts for this purpose, it could not commit the exercise of such new jurisdiction to any existing Provincial Court. After all their Lordships have heard Mr. Benjamin, they are at a loss to follow that argument.

Two leading cases, *Citizens Insurance Company* v. *Parsons* and *Queen Insurance Company* v. *Parsons*, decided jointly and commonly cited jointly as the *Parsons* case,[34] tested the validity of the Ontario Fire Insurance Policy Act[35] which required that certain conditions be stipulated in fire insurance policies by all insurers in Ontario, including corporations and companies, of whatever origin, and whether or not such insurers held a license from foreign, Dominion, or provincial authority.

Appearing with Benjamin as counsel for the appellant insurance companies was the Solicitor-General, Sir F. Herschell. Their argument, no doubt chiefly Benjamin's, was centered on the point that the Ontario statute encroached upon Dominion power. Sub-section 2 of section 91 of the British North America Act gives the Parliament of Canada exclusive power over "the regulation of trade and commerce". Sub-section 13 of section 92 confers upon the provincial legislatures the power to legislate exclusively on "property and civil rights" in the provinces. In section 91, they argued:[36]

> . . . "regulation of trade and commerce" means within the whole Dominion. They are the most general words which can be used, and include every kind of business which can be possibly carried on . . . . But in this case the Ontario statute purports to regulate the whole conduct of insurance business within the province . . . .
> Further, the Dominion Act (38 Vict. c. 20), has imposed certain conditions upon companies of this kind upon the performance of which the right to carry on business results, which cannot afterwards be hampered

[32] *Supra* footnote 29, at p. 117.
[33] *Ibid.*, at p. 119.
[34] (1881), 7 App. Cas. 96.
[35] (1876), 39 Vict., c.24.
[36] *Supra*, footnote 34, at pp. 100-101.

> or restricted, however locally, by a provincial legislature. The scheme of the B. N. A. Act is that the Dominion Parliament has all legislative power except that which is exclusively given to the provincial legislatures. The true mode of construction is to see if the subject is exclusively given to the provincial parliament, if not it belongs to the Dominion Parliament. The true meaning of sect. 92, No. 13, is that the provincial parliament has the exclusive right to create within the province rights of property and such civil rights as flow from the operation of law; which it can exercise without infringing the Dominion control over contracts and the rights resulting therefrom . . . .

Sir Montague Smith, speaking for the Judicial Committee, dealt first with the vexing question of how the courts and other authorities should determine cases in which there appeared conflicts between the authority of the Parliament of Canada and that of the provincial legislatures under sections 91 and 92 of the British North America Act.

> . . . the two sections must be read together, [he said], and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them . . . .
> The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and no other question would then arise . . .[37].

His Lordship then turned to the opposing contentions of the parties respecting the meaning of sub-section 13 of section 92—"property and civil rights in the province". He noted that the Ontario Act,

> . . . deals with policies of insurance . . . and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising under them [the respondent] argued, come legitimately within the class of subject, "property and civil rights". The appellants, on the other hand, contended that civil rights meant only such rights as flow from the law, and gave as an instance the status of persons. Their Lordships . . . find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words "civil rights." The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contracts, and such rights are not included in express terms in any of the enumerated classes of subjects in section 91.[38]

As for the appellants' argument on the inclusiveness of the

[37] *Ibid.*, at p. 109.

[38] *Ibid.*, at pp. 109-110.

power of the Dominion Parliament to regulate trade and commerce, Sir Montague stated that it did not,

> . . . comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of section 92.[39]

The appellants had further argued that the Ontario statute was beyond the competence of the provincial legislature in that it imposed conditions for fire insurance companies doing business in the province which had obtained licenses to conduct business throughout the Dominion, as the appellant companies had, in compliance with an Act of the Parliament of Canada.[40] To this contention Sir Montague replied that the Dominion statute relied upon,

> . . . in no way interferes with the authority of the legislature of the Province of Ontario to legislate in relation to the contracts which corporations may enter into in that province. [Besides, the Dominion Act] clearly recognizes the right of the provincial legislature to incorporate insurance companies for carrying on business within the province itself.[41]

Here, then, is a case in which the Judicial Committee took a long stride toward upholding provincial power and in which Benjamin contended for Dominion power.

Shortly after this insurance case was decided Benjamin was back before the Privy Council advocating a provincial claim of power. This was in the case of *Dobie* v. *Temporalities Board*.[42] Back in 1858 the pre-confederation Parliament of Canada had created a corporation[43] to handle certain funds to which ministers of the Presbyterian church in Quebec and Ontario were given rights. A few years after confederation the Legislature of Quebec made a number of changes in the administration of the fund.[44] The question raised by the *Dobie* case was whether Quebec, or that province and Ontario acting concurrently, had the authority under the British North America Act to alter or repeal the pre-confederation statute.

Mr. Benjamin argued that the later Quebec legislation establishing the Temporalities Board and making other changes in the administration of the fund was authorized by sub-sections 7, 11,

[39] *Ibid.*, at p. 113.
[40] (1875), 38 Vict., c.20.
[41] *Supra*, footnote 34, at pp. 114-115.
[42] (1882), 7 App. Cas 136.
[43] (1858), 22 Vict., c.66.
[44] (1875), 38 Vict., c.64.

and 13 of section 92 of the British North America Act, which give the provincial legislatures exclusive power to legislate on,

> 7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the provinces . . .
> 11. The incorporation of companies with provincial objects.
> 13. Property and civil rights in the province.

The subject of the Act in question is provincial, he said, because the domicile of the Board is in Montreal, and the funds are invested in the Province of Quebec. Furthermore, he maintained, if the provincial legislature of either Quebec or Ontario is singly incompetent to amend or repeal the pre-confederation Act of 1858,[45] the conjoint operation of both legislatures would be valid.

Lord Watson, a relatively new member of the Judicial Committee, who, in the opinion of some Canadian scholars, was strongly influenced by Benjamin's "'states' rights" reasoning, delivered the opinion of the Committee:[46]

> The most plausible argument for the respondents, [he said], was founded upon the terms of Class (13), but it has failed to satisfy their Lordships that the statute impeached by the appellants is a law in relation to property and civil rights within the Province of Quebec . . . .
> The Quebec Act (38 Vict., c. 64), does not profess to repeal and amend the Act of 1858, only in so far as its provisions may apply to or be operative within the province of Quebec, and its enactment is apparently not framed with a view to any such limitation. The reason is obvious, and it is a reason which appears to their Lordships to be fatal to the validity of the Act. The corporation and the corporate trust, the matters to which its provisions relate, are in reality not divisible according to the limits of provincial authority, [for they concern both Quebec and Ontario].

As for counsel's argument that Quebec was empowered to pass the Act of 1875 because the domicil and principal office of the Temporalities Board were in Montreal and its funds all invested in Quebec, his Lordship replied in this language:[47]

> These facts are admitted on record by the appellant, but they do not affect the question of legislative power. The domicil of the corporation is merely forensic, and cannot alter its statutory constitution as a board in and for the provinces of Upper Canada and Lower Canada. Neither can the accident of its funds being invested in Quebec give the Legislature of that province the authority to change the constitution of a corporation with which it would otherwise have no right to interfere.

Nor did Benjamin's suggestion that if the Legislature of Quebec was incompetent to pass the Act of 1875, Quebec and

[45] *Supra*, footnote 43.
[46] *Supra*, footnote 42, at p. 150.
[47] *Ibid.*, at p. 151.

Ontario were competent, by conjoint action, to accomplish that end. Said his Lordship, disposing of that reasoning:[48]

> If the Legislatures of Ontario and Quebec were allowed jointly to abolish the Board of 1858, which is one corporation in and for both provinces, they could only create in its room two corporations, one of which would exist in and for Ontario and be a foreign corporation in Quebec, and the other of which would be foreign to Ontario but a domestic institution in Quebec. Then the funds of the Ontario corporation could not be legitimately settled upon objects in the province of Quebec, and as little could the funds of the Quebec corporation be devoted to Ontario, whereas the Temporalities Fund fails to be applied either in the province of Quebec or in that of Ontario, and that in such amounts or proportions as the needs of the Presbyterian Church of Canada, in connection with the Church of Scotland, and of its ministers and congregations, may from time to time require.

It would thus appear that the argument of the learned counsel was singularly ineffective with Lord Watson and his associates. Yet, when the facts of the controversy are considered, it seems fair to say that Benjamin had practically a hopeless case and that probably no other barrister could have presented it better.

The last and most famous case under the British North America Act in which Benjamin appeared before the Judicial Committee was that of *Russell* v. *The Queen*.[49] The Parliament of Canada, with the object of promoting temperance, passed the Temperance Act of 1878.[50] The Act provided that the problem should be handled by the local option system, under which any county or city in the Dominion could elect to prohibit the retail sale of intoxicating liquors. The City of Fredericton, New Brunswick adopted prohibition under the terms of the Act, and in that city Russell was convicted for an illegal sale of liquor. Following an earlier decision of the Supreme Court of Canada[51] sustaining the Temperance Act as within the power of the Dominion Parliament to regulate trade and commerce, the Supreme Court of New Brunswick sustained the Act in *Russell's* case.[52] It was on this issue of the authority of Parliament to enact the statute that Russell appealed to the Judicial Committee.

Mr. Benjamin was the leading counsel for the appellant, although the argument was opened by his associate, Mr. Reginald

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[48] *Ibid.*, at p. 152.

[49] *Supra*, footnote 12. Not many months after he argued this case Benjamin was seriously injured in an accident in Paris. A little later he had a severe heart attack and was forced to retire from practice.

[50] (1878), 41 Vict., c.16.

[51] *City of Fredericton* v. *The Queen* (1880), 3 S.C.R. 505.

[52] *Supra*, footnote 12, at p. 833.

Brown, for Benjamin was at the time completing an argument before the House of Lords. Counsel for the appellant based their argument[53] largely on the proposition that the Parliament of Canada in passing the Act had contravened sub-section 9, 13, and 16, of section 92 of the British North America Act, which reserved to the provincial legislatures the exclusive power to legislate in relation to,[54]

> 9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes.
> 13. Property and civil rights in the province.
> 16. Generally all matters of a merely local or private nature . . . .

Noting the wide sweep of the powers of the Dominion Parliament under section 91 to "make laws for the peace, order, and good government of Canada", regulate trade and commerce, and to enact criminal law, appellant's counsel cited the opinion of the Judicial Committee in the *Parsons* case,[55] decided less than a year before, in which, in response to Benjamin's strong argument for Dominion power, the Committee explained that apparently conflicting provisions of sections 91 and 92, if read together, could be so construed as to give a reasonable and practical construction to both sections. Following this guide, counsel argued, for example, that although the Dominion Parliament's power to regulate trade and commerce might be interpreted to extend to practically every type of transaction, it surely could be interpreted so as to yield somewhat to the exclusive power of a province to legislate on such a local matter as the retail sale of liquor.[56]

Since this article relates especially to Mr. Benjamin, more particular attention should be given to his argument. Without referring directly to the experience of the United States, he rather obviously made an analogy between the American States giving up powers in 1787-1789 to form the Union and the Canadian Provinces doing the same in 1867 to establish the Confederation.[57] The analogy of the approach to the federalism in the two countries was somewhat inept, as was pointed out by Mr. Maclaren, leading counsel for the Dominion,[58] but the historical correction

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[53] *Russell* v. *The Queen*: Argument in Privy Council (May 2nd-3rd, 1882). This pamphlet, long out of print, but available in the Library of the Supreme Court of Canada and some other Canadian law libraries, contains the complete printed arguments of counsel as transcribed from the short-hand notes of the court reporters. In the discussion of the arguments to follow page references are to this pamphlet.

[54] *Supra*, footnote 1.

[55] *Supra*, footnote 34.

[56] *Op. cit.*, footnote 53, pp. 24, 41-42.

[57] *Ibid.*, p. 41.

[58] *Ibid.*, p. 58.

did not spoil Benjamin's argument that the British North America Act left to the provinces whatever was private, . . . whatever was Home Rule".[59]

The Parliament of Canada, according to Benjamin, has no direct authority to regulate the local trade in liquor. It may strike it indirectly, as with a tariff law, but touch it directly, it must not. And he vividly maintained that the statute contested before the Privy Council does strike directly.

> There are sections of this law, expressly pointing to licenses, he said. *Now you have a right to pass a general law to regulate trade and commerce, but the Provincial Legislature has the exclusive right to make laws in relation to licenses.* And if the General Government makes a law in relation to licenses, it is doing *that which in words is expressly granted* to the Provincial Legislature. Then I am told, but we have a right to regulate trade and commerce. *Regulate trade and commerce as much as you please, but do not touch licenses, that is what you must not do.* You may regulate trade and commerce, and therefore if your regulation was, that there shall be no liquors imported or manufactured in the Dominion in that way, of course indirectly, the provinces would be deprived of the revenue derived from licenses. But it is not that. They say you may bring spirits into the Kingdom; you may sell them; you may sell them in certain quantities; but we know that there are licenses which you have a right to grant and we say your licenses shall be of no authority.[60]

If the "trade and commerce" clause fails to contain authority for the Temperance Act, may it not be found in the "peace, order and good government" clause? No, said Benjamin, for the Parliament of Canada is under precisely the same limitation here as in its exercise of the trade and commerce power. It must not act in relation to matters which are assigned exclusively to the legislature of the province.[61]

"Supposing", suggested Sir Montague E. Smith, P.C., "a license to a horse dealer to sell horses, and the Dominion were to say we will not allow horses to be sold because we may want them in time of war . . . . That would interfere with the horse dealer's sale if they said, notwithstanding any license to the contrary."

Mr. Benjamin: "The defense of the country may, for the time being, require that horses should be at the disposal of the General Government."

Sir Montague: ". . . supposing the Dominion Government says there is a poison, which shall not be sold."

Mr. Benjamin: "Then I say that it is not contravening the 9th

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[59] *Ibid.*, p. 41. [60] *Ibid.*, p. 43. [61] *Ibid.*, p. 47.

sub-section of section 92 of the B. N. A. Act which concerns the retail of liquors in taverns, not of poisons."

Sir Barnes Peacock, P.C., then followed the same line of suggestions concerning a possible Dominion statute regulating the sale of dynamite. At that point Benjamin displayed a little weariness, and remarked: "I know how difficult it is for those who are bred under a legislation, where the Imperial Parliament is Sovereign, to realize . . . a state of things in a country where there is no such thing".[62]

Mr. Benjamin based a part of his argument on the proposition that it deprived the provinces of their revenue from tavern licenses as authorized by sub-section 9 of section 92 of the British North America Act:[63]

> You take away the income derived from tavern licenses, [he said] . . . . What are you going to put in its place? We all know how very large source of income that is. We all know what the excise on liquor and the licenses for the selling of liquors produce in the way of revenue in this country, and we know that that is a subject which cannot be touched without a Chancellor of the Exchequer rising instantly up in arms and saying: "You are cutting off my revenue".

He argued also against the Local Option provision, maintaining that the Dominion Parliament had no authority to delegate power in that manner. Suppose Parliament had made the Temperance Act applicable to this City of Fredericton alone. "Could anybody have said that that was within their power . . . ? I think nobody will suggest that they could." But they accomplish the same purpose by permitting the electors of the city "to vote that a particular Act should be law . . .". The Dominion Parliament says this, in effect in this case. "In the City of Fredericton there shall be no retail sale of liquors substantially, provided the inhabitants of Fredericton wish that there shall be no retail of liquors there . . . ." What is that but legislative discretion?[64]

Perhaps Benjamin placed his greatest emphasis upon his point that the legislation in question was local and within the exclusive power of the provinces under sub-section 16 of section 92:[65]

> . . . the sole question here upon which a great deal of passion, I am told, is excited in the Dominion—it seems to me unnecessarily—is this: whether from the very nature of the thing the selling of liquor in dram shops or taverns, or grog shops, or whatever approbious name one chooses to call them by, is a home matter—is something domestic—is something which in its very nature ought to be, and is supposed to be

[62] *Ibid.*, pp. 47-48.
[63] *Ibid.*, p. 43.
[64] *Ibid.*, pp. 49-50.
[65] *Ibid.*, p. 49.

> proper for Home Rule, as by the very face of this Act it is made, because the Dominion Parliament will not undertake to legislate upon this as a home matter without having some sanction for it. It is so local that the Dominion Parliament exercising what at best, is certainly a very doubtful power, declines to exercise it without local sanction as being a home local domestic matter, and it cannot at all affect an inhabitant on the Pacific in British Columbia, whether or not there are drunkards in Fredericton . . . . It is a matter which by the Act itself is considered to be so far local, that the provisions in relation to the sellers, do not extend between the province where these licenses are granted and any other province, but the next province, and in that province only if it has adopted part two of the Act. So that the provisions which relate to the dealing in intoxicating liquors in Fredericton apply to those liquors, if they are to be exported to the next province, and if that province has also adopted the law; but does (sic) not apply if they are going to Newfoundland, Ontario or to British Columbia. It is perfectly plain therefore, by the scheme of legislation, that what is sought to be done in any particular locality is not something affecting the whole of Canada, but something affecting that locality.

This was the substance of Benjamin's last argument on the meaning of the British North America Act. It was clear, informal, down to earth, if somewhat repetitious. It was often interrupted by the Councilors' comments, suggestions, questions, and criticisms, a practice which in common law countries, at least, keeps counsel alert, gives an informality to the proceedings without depriving them of dignity, and often clarifies the points under discussion.

The argument of counsel for the Dominion was, at the request of the Committee, limited primarily to the question of the validity of the Temperance Act when considered in relation to the exclusive power of the provincial legislatures to regulate matters of a "merely local or private nature". Counsel maintained that intemperance was a national problem in Canada, and that the Act in question fixed a national policy for combatting it, despite the provision in the Act for local option. They argued also that the legislation came within the power of the Dominion Parliament to regulate trade and commerce and to enact criminal law.[66]

Sir Montague E. Smith, speaking for the Privy Council in *Russell* v. *The Queen*, directed his attention largely to considering and rejecting Benjamin's arguments for the appellant. As for the argument that the Parliament of Canada had illegally delegated its power in the local option provision, Sir Montague said that the:[67]

> . . . Act does not delegate any legislative power whatever. It contains

[66] *Ibid.*, at p. 54 *et seq.*

[67] *Supra*, footnote 12, at p. 835.

within itself the whole legislation on the matter with which it deals. The provision that certain parts of the Act shall come into operation only on petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the conditions and everything which is to follow upon the condition being fulfilled.

Appelant's counsel had questioned the validity of the Act because in authorizing local communities to prohibit the retail sale of liquors it would stop the flow of revenue from tavern licenses, a source of funds reserved exclusively for the provinces to tap for their own and local and municipal purposes.

But, [countered Sir Montague], supposing the effect of the Act to be prejudicial to the revenue derived by the municipality from licenses, it does not follow that the Dominion Parliament might not pass it by virtue of its general authority to make laws for the peace, order and good government of Canada.[68]

Does the Temperance Act[69] invalidly interfere with the power of the provinces to legislate on property and civil rights, as Appellant's counsel maintained? No, replies the Privy Council. For the Act,[70]

. . . has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things, as well as intoxicating liquors, can, of course be held as property, but a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offense punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section [of the B.N.A. Act].

And, finally, on Mr. Benjamin's impassioned argument that the Temperance Act dealt with a matter which was local and thus exclusively reserved to the legislative authority of the provinces, Sir Montague had this to say:

The declared object of Parliament in passing this Act is that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors, with a view to promote temperance in the Dominion.[71] The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion, and the local option, as it is called, no more localizes the subject and scope of the Act than a provision in the Act for the prevention of contagious diseases in cattle that a public officer should proclaim in what districts it should become in effect would make that statute a mere local law for each of these districts.[72]

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[68] *Ibid.*, at p. 837. In short, the power of a province to tax does not remove the matter taxed from the appropriate authority of the Dominion.
[69] *Supra*, footnote 50.
[70] *Supra*, footnote 12, at p. 858.
[71] *Ibid.*, at p. 841.
[72] *Ibid.*, at p. 842.

Thus did the former Secretary of State of the Confederate States of America, the skillful and very highly respected advocate, lose his last argument for provincial power before the Judicial Committee of the Privy Council. It is readily conceded that his argument was excellent, particularly his point that the Temperance Act dealt with local matters. The Committee might well have decided the case for his client, but the significant fact for our purposes is that he failed to convince the Committee.

We must now take a general view of Benjamin's presentations of British North America Act cases before the Judicial Committee of the Privy Council. The first point of emphasis is that, although he had been a lawyer, planter, politician, and statesman in the United States, he gave all of his time and talent to the law in Britain. Nothing diverted him. In it he found his greatest satisfaction and mental stimulation, the highest professional honours, and a lucrative income. In his professional capacity he commonly accepted briefs from those who sought his services. If the majority of his Canadian cases placed him in the position of advocating provincial power, it may have meant that his clients whose cases rested on the existence of such power considered that, with his knowledge of and experience with federalism in the United States and his states' rights background, he would have a better understanding and a stronger interest in their cases. Benjamin probably cared little about which side he represented for cases on constitutional law, particularly in its formative period, commonly involve policy no less than law and it is an unusual case that does not offer wide opportunities to counsel on either side.

Benjamin vigorously and ably supported the exclusive power of the Parliament of Canada to legislate on insolvency and bankruptcy in *L'Union* case[73] and in arguing for its power to legislate on trade and commerce in the *Parsons* case[74] he appeared to be as concerned as the American Chief Justice John Marshall in maintaining national power. He lost both cases. In the five cases in which he was counsel for parties whose cases rested on provincial power, he was successful in only one, the *Dow* case,[75] but he did not win on the point he had stressed before the Judicial Committee. On the basis of the Committee's opinions it would appear that he had practically no influence with it, whether he argued the Dominion or the provincial side. Yet the Privy Council was always pleased to hear his arguments, and in several cases it indirectly

[73] *Supra*, footnote 13. [74] *Supra*, footnote 34. [75] *Supra*, footnote 11.

conceded their weight by giving considerable space to refuting them.

Benjamin's career as barrister ended in 1882. This was before the Judicial Committee had made any serious inroads on the power of the Parliament of Canada. Lord William Watson, who has been sometimes suspected of having been particularly lacking in immunity to Benjamin's arguments for the powers of the provinces, actually, as Privy Councillor, heard only one of them, his presentation in *Dobie* v. *Temporalities Board*,[76] and his Lordship spoke for the Council in refutation of his contentions.

If Benjamin found practically nothing from his arguments supported in the opinions of the Judicial Committee, is there, nevertheless, ground for maintaining that, after his retirement and death, his influence with the Committee became stronger than it had been when he stood before it in the flesh? Surely it is practically impossible to answer that question. It is not enough to say that the ex-Confederate ably advocated provincial rights and that during the decade following his death, his arguments must have caught fire with the Committee, because it became a stalwart guardian of the rights of the provinces. What evidence is there that Benjamin's arguments of the 1870's and early 1880's influenced the Privy Council in the late 1880's and 1890's? The writer, with great caution, suggests a few fragments.

In *Hodge* v. *The Queen*,[77] decided in 1883, the Judicial Committee was called upon to pass upon the constitutionality of the Ontario Liquor License Act of 1877.[78] That statute established a board with broad powers to fix the qualifications for persons obtaining licenses to keep taverns, to limit the number of such licenses, and in general to regulate the retail grade in liquor. The Committee reaffirmed *Russell* v. *The Queen*,[79] declaring the Canada Temperance Act of 1878[80] valid as a *prohibitory* statute under the "peace, order and good government" clause; but it held that the Ontario statute was a valid *regulatory* statute under the authority of the provinces to legislate exclusively on matters of a "merely local or private nature". It said also that a provincial legislature had "authority as plenary and as ample within the limits prescribed by sect. 92 [of the B.N.A. Act] as the Imperial Parliament in the plenitude of its power possessed . . .".[81] This was essentially what Benjamin had argued in the *Russell* case, when he claimed that

[76] *Supra*, footnote 42.
[77] (1883), 9 App. Cas. 117.
[78] R.S.O., 1877, c.181.
[79] *Supra*, footnote 12.
[80] *Supra*, footnote 50.
[81] *Supra*, footnote 76, at p. 132.

the national Temperance Act was an encroachment upon this "plenary and ample" provincial power.[82]

It is possible that Benjamin's emphasis on the appropriate spheres and powers of the Dominion and provincial governments in the *Parsons*[83] and *Russell*[84] cases may have later served as something of a guide to the Judicial Committee. Thirteen years after the *Hodge*[85] case was decided, in *A. G. for Ont.* v. *A. G. for Can.*[86] the Committee, speaking through Lord Watson, held that the Province of Ontario could authorize the prohibition by local option of the retail sale of liquor in cities and towns, provided the provincial Act would not be available to communities which had adopted, or might later adopt, prohibition under the Canada Temperance Act. His Lordship cited as an authority for the Ontario law sub-section 13 or 16, of section 92 of the British North America Act, which sub-sections confer the power to legislate on property and civil rights and on matters of merely a local or private nature, respectively. These were among the grants of provincial powers upon which Benjamin had relied in vain in his presentation of the *Russell* case.

Leaving the liquor cases, we turn back to 1892 and to *Maritime Bank* v. *Receiver-General of N.B.*[87] There the question was—Is a provincial government entitled, as a depositor in a bank in receivership, to payment in full over the other depositors and simple contract creditors? The Judicial Committee's answer was Yes: that government property and revenues in Canada, as in Britain, are vested in the Sovereign, and that the prerogatives of the Queen are the same in the exercise of provincial powers as in the exercise of those of the Dominion. The object of the British North America Act, said Lord Watson for the Privy Council.[88]

> . . . was neither to wield the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal

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[82] In 1883, the Parliament of Canada passed the federal Liquor License (McCarthy) Act, 46 Vict., c.30, a measure applicable to the whole Dominion and very similar to the Ontario Act which was upheld in the *Hodge* case, *supra*, footnote 76. In an advisory opinion, and after considerable aid from counsel, the Supreme Court of Canada, following what appeared to be the logic of the *Hodge* case, declared the law unconstitutional. The Privy Council, without giving reasons, sustained the Supreme Court, Cassels, Digest of Supreme Court Decisions (1875-1893), p. 509. See discussion of this leading case in Alexander Smith, The Commerce Power in Canada and the United States (1963), pp. 49-57.

[83] *Supra*, footnote 34.

[84] *Supra*, footnote 12.

[85] *Supra*, footnote 76.

[86] [1896] A.C. 348.

[87] [1892] A.C. 437.

[88] *Ibid.*, at pp. 441-442.

> government in which they could all be represented . . . each province retaining its independence and autonomy.

The Act provides that the Dominion should have its necessary powers, the opinion continues, and that "the remainder should be retained by the provinces for the purposes of provincial government". In the exercise of its powers under section 92 each province is "as supreme as it was before the passage of the Act".[89] As we Americans say of our federal system, both state and national governments are supreme in the exercise of their respective constitutional powers. His Lordship clearly showed an understanding of federalism, and one has some reason to believe that Benjamin's arguments, although made a decade before the *Maritime Bank* case was decided, may have contributed to that end.

If Benjamin helped the Judicial Committee to a fuller appreciation of the problem of interpreting the powers of the component units of government in the Canadian federal system, it does not follow that he persuaded the Committee to be overzealous in discovering and maintaining the powers of the provinces. The Committee, with a growing awareness of the duality of federalism and the knowledge that the Canadian Constitution, literally interpreted, gave the Dominion Government nearly all of the power, may well have become increasingly conscious of an obligation to guard the rights of the provinces. In any event, Benjamin had argued for Dominion and provinces with equal zeal and ability.

It is, of course, hardly possible to prove that Benjamin did not sow the seed of provincial rights in the Privy Council. But the burden of the proof should fall on those who intimate that he did sow the seed. Those who hold the suspicion should produce the evidence.[90] It is possible that exhaustive research in London and elsewhere might produce it, but on the basis of the present study the writer is of the opinion that the Benjamin influence is largely a myth based upon two facts and a hunch. The facts are that he was a states' rights man in America and that he was an outstanding advocate and the hunch is that, considering his background and skill he must have effectively argued states' (provincial) rights before the Privy Council.

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[89] *Ibid.*, at p. 442.

[90] The writer's efforts to obtain from authorities on Canadian history and government leads which might uncover such evidence were singularly unproductive.