Our admiration for the great Judges who have adorned the Bench in the motherland for more than a century, and the immaculate purity of the robe, which has always been worn there, by the blind-fold goddess of justice, stops the voice of criticism even where criticism might be useful. Perhaps nowhere is this more apparent than in matters pertaining to the administration of justice by the highest Courts of appeal—the House of Lords and the Judicial Committee. At the Imperial Conference in 1911 a strong effort was made by the representative from Australia to have an Imperial Court of Appeal established which should be substituted for these tribunals. The Lord Chancellor, Lord Loreburn, expressed his sympathy with this suggestion, but thought the same end could be obtained by adding to the number of the Lords of Appeal so that practically the same Judges would constitute the Bench in the House of Lords and Judicial Committee, although the old forms were retained. This result was essentially English; modifying but still clinging to antiquated forms in preference to establishing a new tribunal of justice. The objectionable features of the old system still obtain.

Mr. Justice Anglin has pointed out in the first number of this Review how it operates in matters of stare decisis. The Judicial Committee not being a court of law, does not accept that doctrine to the same extent as the House of Lords; so that the same Judges sitting in different tribunals are free to take opposite positions with respect to this doctrine. Again, although the personnel of the two tribunals may be identical, yet the judgment of the Judicial Committee is not bind-
ing upon English Courts of Justice, whereas the same judgment if pronounced by the House of Lords would have that effect.

It is interesting in this connection to consider some further anomalies in the practice and procedure of these two great appellate tribunals. Until 1876, there was no provision in English law which required that some law lords must be present in the House of Lords at the hearing and determination of appeals. All the assurance the public had that members of the House of Lords who had some knowledge of law, would decide their cases, was in the language of Blackstone—

"because the law reposed entire confidence in the honour and conscience of the noble persons who composed this important assembly, that they will make themselves masters of these questions upon which they undertake to decide. Since upon their decision all property must finally depend."

To-day, technically, there is nothing to prevent the views of the law lords at any time being swamped by the members of the Upper Chamber who have had no legal training. Again we have, what to us, is an extraordinary situation. The Lord Chancellor presides as the highest judicial officer of the Crown in appeals to the House of Lords and the Judicial Committee, and on the same day presides in the House of Lords in session as a legislative chamber of Parliament, while between times as a Cabinet Minister he takes part as a member of the executive branch of the Government and he may wind up the day by addressing the electorate at a public meeting where he will cross swords with some political antagonist.

This union in one person of judicial, legislative and executive power is almost inconceivable to us. We are so accustomed to look upon the separation of these high functions as fundamental in any proper system of government.

We are, however, more interested in the Judicial Committee. Without referring to the antecedent his-
tory of this ancient tribunal, it is sufficient to say that in 1833 by 3 & 4 Will. IV., sec. 41, Lord Brougham had Parliament pass substantially as we have it at present, legislation which provides that the Lord Chancellor and certain other Judges should constitute the Judicial Committee of the Privy Council. In 1871, the Act was amended to provide that four paid members of the Judicial Committee might be appointed who must be either Judges of one of His Majesty’s Superior Courts or a Chief Justice of the High Courts of Bengal, Madras or Bombay, and pursuant to this legislation Sir Montague Smith, a Judge of the Court of Common Pleas in England, and Sir Robert Collier, at that time not a judge, and two East Indies Judges were appointed, and from that time forward for 15 years these two English Judges with the East Indies Judges, Sir James Colville, Sir Robert Couch, Sir Barnes Peacock and Sir Arthur Hobhouse with ordinarily one English Judge of standing formed the Committee which amongst other things established the basis of interpretation for the Canadian Constitution. I have dealt with this more fully in another place.¹

In the course of the discussion at the meeting of the Bar Association in Vancouver last summer, I took occasion to point out the complicated machinery which must still be used, to obtain a reversal of a judgment by the Privy Council, and which necessarily introduced opportunities for mistakes or errors, in conveying the judgment of the Judicial Committee to the Court below. To show that this criticism was not wholly academic, I instanced the reported judgment in Attorney-General of Ontario v. Attorney-General for Canada (1896), A. C. 348. Many of the judgments of the Judicial Committee which have dealt with the constitutional limitations of the Dominion on the one hand and the provinces on the other, have been pronounced in appeals or references arising out of legislation designed to prohibit the sale and use of intoxicating liquor. Of these

probably the most important is the reference to the Supreme Court in 1893, which ultimately reached the Privy Council, and which is reported as Attorney-General of Ontario v. Attorney-General for Canada. Seven questions were submitted. The fourth was:

"Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province?"

The answer to this question appears on page 371 of the above reports, as follows:

"Answer to question 4. Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed, would probably trench upon the executive authority of the Dominion Parliament."

I find, however, that this answer of their Lordships does not accord with the answer to the question as certified to the Registrar of the Supreme Court by the Clerk of the Privy Council, and where there is a conflict between the Report as it appears in the Appeal Cases and this certificate, it is clear that the certificate must govern. The language of the statute establishing the Judicial Committee, 3-4 Will. IV, ch. 41, provides sec. III. that the "appeals . . . shall be heard by the said Judicial Committee and the report or recommendation thereon shall be made to His Majesty in Council for his decision thereon," and by sec. XVI. it is further provided: that "the order or decree of His Majesty in Council made in pursuance of any recommendation of the said Judicial Committee, in any matter of appeal . . . shall be enrolled, etc.," and XXT. "the order or decree of His Majesty in Council on any appeal, etc. . . . shall be carried into effect in such manner and subject to such limitations and conditions as His Majesty in Council shall on the recommendation of the said Judicial Committee direct."
The certificate of the King’s Privy Council as received from his clerk gives the following answer to the fourth question:—

"In answer to the 4th question. No useful answer can be given to this question in the absence of a precise statement of the facts to which it is intended to apply. There may be some circumstances in which a provincial legislature will and others in which it will not have such jurisdiction."

The certificate in full is appended to this article. It will be perceived that the categorical negative with which the answer opens in the report, is not to be found in the actual judgment of the Privy Council. The accurate answer is that which appears in the King’s Order and not what we find in the Reports. It may be asked how can an error of that kind be explained. The answer, I think, may be easily conjectured when we consider the procedure which obtains in the Judicial Committee. The practice is to have one member of the Board prepare the draft judgment. This is distributed to the other members of the Board and printed, and when judgment is pronounced, copies are available for those who wish them, and a number are sent, as in this case, to the Registrar of the Court below. After judgment is pronounced, as provided for in the above recited statute, a report is prepared by the Judicial Committee and sent to the Clerk of the Privy Council, who after it has been adopted by the Lords of the Privy Council enrolls it and forwards a certified copy to the Registrar of the Supreme Court. In the present case apparently after Lord Watson’s judgment was printed, his answer to the fourth question was altered by the Board, and as so altered was certified to the Clerk of the Privy Council, but for some reason or other this alteration was not made in the copies which were given to the Reporters and distributed. Here again we have another instance of inefficient machinery.
In an address delivered to the American Bar Association 20 years ago by the Right Honourable Sir Frederick Pollock—at that time and to-day editor of the English Law Reports, he pointed out that the English Law Reports have always been unofficial; that the Council of Law Reporting is not a Government or official institution; it has no legal privileges and does not claim any monopolies. He also pointed out that the manuscript of the Privy Council reports does not pass through the hands of the Editor of the Reports (see Law Quarterly Review, XIX., p. 452), and says that the reason for this and other diversities in reporting were partly local, personal and otherwise accidental and partly unknown to himself.

In conclusion I think we can heartily endorse what was said by the Australian representative at the Imperial Conference in 1911. Australia had presented the following resolution:—

"It is desirable that the judicial functions in regard to the Dominions and exercised by the Judicial Committee of the Privy Council, should be vested in an Imperial Appeal Court, which should also be the final Court of Appeal for Great Britain and Ireland."

Lord Haldane had said that the Lord Chancellor’s proposition was really to make one Court, but to keep the old forms. The Australian resolution was then withdrawn, but the representative said:

"They looked forward to one Court of Appeal for the Empire. The two divisions seem to be a practical arrangement for the time being, but it ought to be understood that the proposal was merely for the time being."

(Certificate of the judgment of the Queen’s Privy Council upon the appeal from the Supreme Court of Canada in a certain Reference respecting Prohibitory Liquor Laws and reported as Attorney-General of Ontario vs. Attorney-General for the Dominion (1896) A. C. 348).
Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 9th May, 1896, in the words following, viz.:—

"Your Majesty having been pleased by Your General Order in Council of the 20th November, 1894, to refer unto this Committee the matter of an Appeal from the Supreme Court of Canada between the Attorney-General for the Province of Ontario Appellant, and (1) The Attorney-General for the Dominion of Canada and (2) The Distillers and Brewers' Association of Ontario (Respondents), and likewise a humble Petition of the said Appellant setting forth that by an Order-in-Council dated the 26th October, 1893, and passed pursuant to the provisions of the Revised Statutes of Canada, Chapter 135 and intituled "The Supreme and Exchequer Courts Act" as amended by sec. 4 of the Act passed in the 54th and 55th years of Her Majesty's reign Chapter 25 His Excellency the Governor-General-in-Council referred to the Supreme Court of Canada for hearing and consideration the following questions namely:—

(1) Has a provincial legislature jurisdiction to prohibit the sale within the province of spirituous, fermented or other intoxicating liquors?

(2) Or has the Legislature such jurisdiction regarding such portions of the province as to which the Canada Temperance Act is not in operation?

(3) Has a Provincial Legislature jurisdiction to prohibit the manufacture of such liquors within the province?

(4) Has a Provincial Legislature jurisdiction to prohibit the importation of such liquors into the province?

(5) If a Provincial Legislature has not jurisdiction to prohibit sales of such liquors irrespective of quantity, has such Legislature jurisdiction to prohibit the sale by retail according to the definition of a sale by retail either in statutes in force in the province at the time of Confederation or any other definition thereof?
(6) If a Provincial Legislature has a limited jurisdiction only as regards the prohibition of sales, has the Legislature jurisdiction to prohibit sales subject to the limits provided by the several subsections of the 99th section of "The Canada Temperance Act" or any of them (Revised Statutes of Canada, Chapter 106, sec. 99)?

(7) Had the Ontario Legislature jurisdiction to enact the 18th Section of the Act passed by the Legislature of Ontario in the 53rd year of Her Majesty's reign and intituled "An Act to improve the Liquor License Acts," as said section is explained by the Act passed by the said Legislature in the 54th year of Her Majesty's reign and intituled "An Act respecting Local Option in the matter of liquor selling?"

that in accordance with subsections (3) and (4) of sec. 37 of the said Canadian Act, 51-55 Victoria Cap. 25, the Supreme Court thereupon directed that the Attorneys-General of the various provinces of Canada should be notified of the hearing of the said questions and also gave leave to the Distillers and Brewers' Association of Ontario to appear at the hearing of the said questions: That the said questions came on for hearing before the Supreme Court of Canada on the 1st, 2nd and 4th days of May, 1894, and on the 15th January, 1895, the said Court by a majority gave judgment answering all the said questions in the negative; that the appellant feeling himself aggrieved by the said judgment of the Supreme Court presented his petition to Your Majesty in Council praying for special leave to appeal therefrom to Your Majesty in Council and by Your Majesty's Order in Council of the 29th June, 1895, such leave was accordingly granted and humbly praying that Your Majesty in Council will be pleased to take his appeal into consideration, and that the judgment of the Supreme Court of Canada of the 15th January, 1895, may be reversed or altered or for other relief in the premises.

"The Lords of the Committee in obedience to Your Majesty's said General Order of Reference have taken the said humble Petition and Appeal into consideration and having heard Counsel on behalf of the Appellant and on behalf of each of the Respondents their Lordships do this day agree humbly to report to Your Majesty as their opinion that the judgment of the Supreme Court of Canada dated the 15th January, 1895, ought to be discharged and that in lieu thereof there ought to be substituted the following answers to the said seven questions hereinbefore set forth, that is to say:—
1. In answer to the first question:—That a Provincial Legislature has jurisdiction to restrict the sale within the province of intoxicating liquors so long as its legislation does not conflict with any legislative provisions which may be competently made by the Parliament of Canada and which may be in force within the province or any district thereof.

2. In answer to the second question:—That in those portions of the province as to which the Canada Temperance Act, 1886, is not in operation the Provincial Legislature has such jurisdiction as is indicated in the answer to the first question.

3. In answer to the third question:—That in the absence of conflicting legislation by the Parliament of Canada, a Provincial Legislature has jurisdiction to prohibit the manufacture of intoxicating liquors within the province if such manufacture be carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province.

4. In answer to the fourth question:—No useful answer can be given to this question in the absence of a precise statement of the facts to which it is intended to apply. There may be some circumstances in which a Provincial Legislature will and others in which it will not have such jurisdiction.

5 and 6. In answer to the 5th and 6th questions:—The replies falling to be made to these questions are sufficiently indicated in the answers to the 1st and 7th questions.

7. In answer to the seventh question:—That the Legislature of Ontario had jurisdiction to enact section 18 of the Act 53 Victoria cap. 56, as explained by sec. 1 of the Act 54 Victoria cap. 46, but that the said enactments are operative only insofar as they are not in conflict with any statutory provision competently made by the Parliament of Canada and being in force within the province or any district thereof.

"And in case Your Majesty should be pleased to approve of this report then their Lordships direct that the parties do bear their own costs of this appeal."

"Her Majesty having taken the said report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the recommendations and directions therein contained be punctually observed and carried into effect in each and every particular. Whereof the Governor-General of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly."

(Signed) C. B. Peel.