THE AERONAUTICS CASE.

It is a pleasure to turn even for a moment from persistent and, as I think, justifiable criticism of the decisions of the Judicial Committee of the Privy Council in constitutional cases, and to be able to congratulate the Board upon a valuable contribution to the national interpretation of the B.N.A. Act.

A convention to which the British Empire was a party, dated 13th October, 1919, effected international agreement upon aeronautics, inclusive, as the Committee has said, of "almost every conceivable matter relating to aerial navigation." A statute of Canada (1919, now R.S. Canada 1927) made provision for the regulation and control, in a general and comprehensive way, of the subject. And, in pursuance of the statute, the Governor-General in Council issued certain regulations.

Of four questions submitted to the Supreme Court of Canada, the Board did not deal with the second. The other three were as follows:

1. Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any Province thereof, under the Convention entitled "Convention relating to the Regulation of Aerial Navigation"?

3. Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of section 4 of the Aeronautics Act, chapter 3, Revised Statutes of Canada 1927?

4. Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting:—

(a) The granting of certificates or licences authorising persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences;

(b) The regulation, identification, inspection, certification, and licensing of all aircraft; and

(c) The licensing, inspection and regulation of all aerodromes and air stations?

The answers of the Supreme Court, as stated in the judgment of the Judicial Committee, were as follows:

To Question 1 as framed (note the words "as framed"), the Court unanimously answered "No." The Chief Justice, in his judgment, says: "I agree with the view of my brother Smith that if the question is to be answered in the affirmative the word "paramount" must be substituted for "exclusive." It might also be better to insert the words "as part of the British Empire, towards foreign countries" immediately after the word "thereof," so as defin-

itely to limit the question and answer to the very matter dealt with by s. 132."

To Question 2 the answer of the majority of the Court was: "Construing the word 'generally' in the question as equivalent to 'in every respect,' the answer is 'No.'"

To Question 3 the answer of the majority of the Court was "Construing the question as meaning, 'is the section mentioned, as it stands, validly enacted?' the answer is 'No'; but if the question requires the Court to consider the matters in the enumerated subheads of s. 4 of the Statute as severable fields of legislative jurisdiction, then the answers are to be ascertained from the individual opinions or reasons certified by the Judges."

To Question 4 the answers are to be ascertained from the individual opinions or reasons certified by the Judges.

The Dominion statute provides that:

When any such reference is made to the Court it shall be the duty of the Court to hear and consider it, and to answer each question so referred; and the Court shall certify to the Governor-in-Council, for his information, its opinion upon each such question with the reasons for each such answer.

It will be observed that, taking one view of question 3, the court made no answer. "The answers are to be ascertained," the court said, "from the individual opinions or reasons certified by the judges." A similar search for answers is invited with reference to question 4.

We have, therefore, three unhelpful and dubious negatives; two puzzling uncertainties; and an indivisible subject divided among ten independent legislative jurisdictions. Truly, a sad, sad mess.

Upon appeal to the Judicial Committee, the answers were as follows:

To Question 1, and retaining the word "exclusive," the Board's answer is "Yes."

To Question 3, their answer is also "Yes."

To Question 4, their answer is again "Yes."

The authority of the Parliament of Canada, with respect to the obligations contained in the convention, might possibly have rested solely upon section 132 of the B.N.A. Act, which is as follows:

The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

But the Committee brought to the aid of that section, consideration of—

the fact that further legislative powers in relation to aerial navigation resides in the Parliament of Canada by virtue of section 91 (2), (5), and (7).[1]

[1] These sub-sections relate to the regulation of trade and commerce; postal services; militia, military and naval services and defence.

The Committee said further that they

do not think that aeronautics can be brought within the subject of Navigation and Shipping, although undoubtedly to a large extent, and in some respects, it might be brought under the Regulation of Trade and Commerce, or the Postal Services. On the other hand, the respondents contended that aeronautics as a class of subject came within item 13 of section 92 (Property and Civil Rights in the Provinces) or item 16 (Generally all matters of a merely local and private nature in the Provinces). Their Lordships do not think that aeronautics is a class of subject within Property and Civil Rights in the Provinces, although here again, ingenious arguments may show that some small part of it might be so included.

In their Lordships' view, transport as a subject is dealt with in certain branches both of section 91 and of section 92, but neither of those sections deals specially with that branch of transport which is concerned with aeronautics.

To their findings in all these respects the Board added:

There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion; but neither is it vested by specific words in the Provinces. As to such small portion, it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under section 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

The decision is of great importance. It has saved Canada from many perplexing complications. In itself, as in its implications as a precedent, it is probably the best of the deliverances of the Committee in the record of its constitutional decisions. It takes us a long way from the annoying subtleties of Lord Haldane. Its correctness of direction, its statesman's-like grasp and appreciation of actualities, and the clarity of its reasoning constitute a combination of qualities that force memory of the great American federalist, John Marshall. Curious that his spirit should have (at length) manifested itself in London rather than at Ottawa.

It is most unfortunate that the Committee should have spoiled its success by unnecessarily tacking to it the absurd, for the absolutely erroneous statement that the B.N.A. Act is, or is the result of, a contract between the provinces. Upon that point the Committee said as follows:

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the

years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of sections 91 and 92 should impose a new and different contract upon the federating bodies.

Having recently dealt with this subject in an address before *The Canadian Political Science Association,* I may be excused for repeating some of the language which I used on that occasion: To prove the existence of a contract it is not sufficient to affix that character to the Quebec resolutions. It is essential to add that the British North America Act is a reproduction of these resolutions, or, at least, is a mere drafting expansion of them. Such is not the fact. The differences between the two documents are both numerous and important. Take this in the first place: There were 72 clauses in the resolutions. At London, the first draft of the bill contained 68; the second 44; the third 83; the fourth 129; the fifth 142. The statute itself has 147—that is more than double the number in the resolutions.

The records make very clear, moreover, that not only were the resolutions not submitted to the legislature of Nova Scotia, but that they were actually withheld from that body because of the certainty that they would be repudiated. In a letter (May 10, 1865) from Mr. Charles Tupper, then Prime Minister of Nova Scotia, to the Lieutenant-Governor of that Province, Mr. Tupper said as follows:

> When our Legislature met it was at once ascertained that it was impossible to obtain a decision in favour of the scheme on account of the feeling of alarm which had been excited throughout the country. It certainly would not have promoted the object in view had we recorded a hostile vote to Confederation in our Assembly, either before or after the New Brunswick election; and there can be no doubt that an appeal to the people here on this question, under existing circumstances, would have resulted, as it has, in that Province, in placing the opponents of Confederation in power, and affording them the means of obstructing that great measure, which they do not now possess.[2]

It is also beyond doubt that John A. Macdonald deliberately refrained from allowing the people of Canada to know his intentions with reference to parts of the proposed constitution. In a letter (October 8, 1866) to Mr. Leonard Tilley, then Prime Minister of New Brunswick, Macdonald said as follows:

> Canada is bound by the address to the Queen praying her to submit a measure to Parliament based on the Quebec resolutions. Nova Scotia and New Brunswick require modifications of that scheme. How are we to arrive at a satisfactory solution of the difficulty? Only, I think, through Lord Monck . . . Again, it appears to us to be important that the Bill should

[2] Sir Joseph Pope, *Memoirs of Sir John Macdonald,* Vol. I., pp. 359-60.

not be finally settled until just before the meeting of the British Parliament. The measure must be carried *per saltum*, and no echo of it must reverberate through the British provinces until it becomes law. If the delegation had been complete in England, and they had prepared the measure in August last, it would have been impossible to keep its provisions secret until next January. There will be few important clauses in the measure that will not offend some interest or individual, and its publication would excite a new and fierce agitation on this side of the Atlantic. Even Canada, which has hitherto been nearly a unit on the subject of Confederation, would be stirred to its depths if any material alterations were made. The Act once passed and beyond remedy, the people would soon learn to be reconciled to it.[3]

A statute arranged, not in Canada but in England; by delegates from Canada who, although bound by the Quebec resolutions, departed widely from them; by delegates from Nova Scotia, who were known not to represent Nova Scotia's wishes; by delegates who purposely kept secret their intentions from the electorate, who might, by "reverberation" of them, be "stirred to its depths" in opposition, can hardly be regarded as a contract.

Very evidently one striking success in the handling of our constitution by the Judicial Committee is no guarantee that it will not be followed, perhaps immediately, by striking and bothersome failure.

In another decision of the same date the Committee administered a well-merited rebuke to the Dominion parliament for its attempts, by tricky legislation, to filch from the Provinces some of their exclusive jurisdiction (as held, perhaps wrongly held, by the Committee) with reference to insurance companies—"under the guise" the Committee said "of legislation as to aliens, they seek to intermeddle with the conduct of insurance business."

Ottawa. JOHN S. EWART.

[3] *Ibid.*, pp. 307-8.