"THE O'CONNOR REPORT" ON THE BRITISH NORTH AMERICA ACT, 1867

Mr. W. F. O'Connor, K.C., as Parliamentary Counsel to the Senate of Canada, has done a very important and valuable work of research in constitutional law, presented in a Report to the Honourable the Speaker of the Senate, just now printed and distributed. The Report has attracted such public interest that the supply of the first printing is already exhausted.

The investigation and Report are made as directed by a Resolution of the Senate dated June 30th, 1938, of which the main instructions are: To examine the pre-confederation records in order to ascertain as truly as possible the " intended legislative powers of that precise central or general union which was presented to and accepted by the three original provinces of Canada; to compare the text of Part VI of The British North America Act, 1867, headed "Distribution of Legislative Powers", with (a) such pre-confederation records, and, (b) the pronouncements of the Judicial Committee of the Privy Council which define or disclose the legislative powers of the Parliament of Canada at the present time; thereupon, to report any material differences thus disclosed and also in what respects, if at all, the B.N.A. Act must be amended to produce consonance of the pre-confederation intention with the present effective result, so far as distribution of legislative powers between Dominion and Provinces is concerned.

One's first impression is that the commission thus delivered is of fascinating piquancy; it joins to law the romance of history; it unites speculation with logic and gives the legalist leave to plunge into that intoxicating stratosphere, the region of "it might have been". And this impression persists while one reads 708 printed pages of the return to the commission. The author has done all those interesting things— and some others— in excellent style. He has devoted unsparing diligence to investigation of original sources of information too long neglected. He has brought to light and notice forgotten facts, many of them no doubt well known to earlier generations of Canadian lawyers, thus repairing the erosion of time on our field of constitutional knowledge. He has put in form and place convenient for reference copies of, or notes upon, records not readily available to many lawyers. This labour will inevitably revive the interest in and stimulate reference to such original records.

Before we discuss the controversial subject-matter and conclusions of the Report, we ought to summarize or describe its contents. The author's main thesis (summarized in the first fourteen pages of the Report) is, that the framers of the Confederation statute intended to have a union of colonies, in form of an autonomous state and constituent provinces, in which legislative authority would reside, as to local and municipal matters, with the provincial legislatures, and as to all else (the remainder of the whole field of peace, welfare and good government), with the Dominion Parliament. Further, he says, these framers not only *intended* Canada to have such a union, but they did *expressly provide*, by appropriate words in the statute, for just such a union; that for a period of more than twenty years, the law recognized and maintained such a union fully consonant with the intention of the framers; then came distortion, caused (a) by an immaterial error to be found in a dictum of the Privy Council in the *Parsons' Case* of 1881, (b), which led to an error of statement in the reasons for judgment in the case of *Tennant* v. *Union Bank* of 1894, and (c), a major mistake in decision of the *Prohibition Case* of 1896. The false step taken in this judgment was never retraced; it was succeeded by confirmatory decisions extending the error and leading to deviation of judicial interpretation from the text of the statute and from the declared intention of the framers of the Act. The present state of error and confusion is demonstrated in false rules of construction of the statute, (which may be found conveniently stated in the 1929 Fisheries Reference, Case No. 52), and the necessarily consequent overthrow of the Dominion legislation of 1934, and other important Dominion legislative enterprise. The author reports that the course of decision in the Privy Council (judgments binding all Canadian Courts) has been to establish a union in which almost sovereign provincial legislatures have a field of jurisdiction so greatly magnified in scope and importance, and the Dominion a field correspondingly so diminished, by judicial interpretation as almost to destroy effectiveness of the Confederation plan.

The practical consequences are stated by the author at page 41, in the following words:

> The involved and unnatural scheme of distribution of legislative powers invented by and substituted by the Judicial Committee has caused an undeniable partial breakdown of the general scheme of Confederation. Unanticipated powers and duties have been assigned to the provinces for which the financial scheme of Confederation does not collaterally provide either expense monies or means of attainment

thereof. National services—meaning services which the Dominion only can properly or at all perform—remain, by reason of judicial ban upon Dominion execution of them, unperformed. Although the Dominion be willing to pay for them its legal right to do so is denied. Meanwhile the provinces are rich in legislative jurisdiction but poor in the means of sustaining it. Such partial indemnity as the Dominion grants them is granted necessarily by the indirect and legally doubtful percentage device or as special aid. The provinces, consistently devoid of income to sustain their state of legislative grandeur, must needs from time to time knock as mendicants at the door of the Dominion Treasury. The makers of Confederation did not intend anything like that.

The error in construction of the text of the statute, which the author holds responsible for these formidable consequences, relates to the opening words of section 91 and in the concluding words of the same section. These are as follows:

POWERS OF THE PARLIAMENT

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons to make Laws for the Peace, Order and Good Government of Canada in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say:—

then follow 29 enumerated subjects of legislative authority, and thereafter:

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of local or Private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The author finds that the Privy Council has wrongly applied the concluding words of the section 91, above-quoted, to all sixteen of the enumerated subject-matters mentioned in section 92, as exclusive powers of provincial legislatures, instead of to Number 16 of such enumerated items only, i.e.:—"Generally all matters of a merely local or private nature in the Province." This mistake occurred when the Board was endeavouring to define the paramountcy of the Dominion legislative authority. It's result was to limit the extent of the predominance of Dominion authority instead of limiting provincial interference with Dominion authority.

The error of construction in the opening words of section 91 is the treatment of the two parts of the opening sentence (separated by the semi-colon), as independent enacting clauses, capable of separate application, when, upon its true construction, the second part of the sentence is merely "partial statutory interpretation of the scope of the preceding words of the section", by way of particular example of the application of the enacting words already contained in the first part of the sentence.

The substantial result of these errors in construction is the principle now prevailing that Dominion legislation is paramount only when enacted in relation to the twenty-nine enumerated subject-matters in section 91 and to local and private matters necessarily incidental to legislation in relation to these enumerated headings, instead of the true principle which would give paramount authority to all Dominion legislation lawfully enacted under the general opening words of section 91 to the same degree as in the case of the enumerated headings.

Departure by judicial decision from the intention of the framers of the confederation plan is found by comparison of the present constitutional position with the resolutions of the pre-confederation London Conference of 1866 and by reference to the pre-confederation records of the negotiations and reports of proceedings leading up to the resolutions. The author regards those resolutions as the authoritative statement of the intention of the representatives of the three constituting provinces, at the point of time when the London Conference called in Lord Carnarvon to preside over its further proceedings and when these representatives, being at that moment in agreement, submitted their proposals to Imperial authorities for embodiment in statutory form and due enactment thereof. (These resolutions are sometimes referred to as the "Westminster Palace Hotel (London) Resolutions of December 4, 1866".) The author would admit these resolutions in evidence (in any Court) to resolve any ambiguity or obscurity in the B.N.A. Act.

The author then offers, first,—as the remedy for the distortion of judicial interpretation, and, secondly,—as the answer to the Canadian national problem of how our constitution should be made workable and effective, this single suggestion: that the Dominion Parliament, by address to the Imperial Parliament, should request the enactment of a declaratory statute in words selected from early decisions of the Privy Council, which will restore to the B.N.A. Act of 1867 its true meaning and intention as ascertained and explained in the Report. Such

a restoration would, in the opinion of the author, secure all that is needful to make the Confederation plan effective in modern times and circumstances to meet all present constitutional needs, without further or other amendment insofar as the distribution of legislative powers is concerned. These "present constitutional needs" are (if we correctly understand the author) to be found in the various Dominion statutes heretofore enacted, which have been declared "ultra vires" by the Privy Council in its later decisions.

The main thesis and suggestion are supported in the Report by five Annexes, which contain a digest or summary of 71 decisions of the Privy Council on questions affecting the B.N.A. Act, abstracts from the journals and debates of the pre-confederation provinces of Nova Scotia, New Brunswick and Canada for the period 1864 to 1868, abstracts from various constitutional statutes and documents, (including the capitulations of Quebec and Montreal, the Treaty of Paris and debates on the B.N.A. Act, 1867, in the House of Lords and in Canada), together with many additional notes and memoranda on relevant documents and proceedings, and, finally, abstracts from reports of the Imperial Conferences of 1929 and 1930 and the text of and notes on the Statute of Westminster. The Report also includes a complete reprinting of the B.N.A. Act, 1867, and various memoranda of comparison of the resolutions of the Quebec and London Conferences with the statute, and certain previously published memoranda on the "treaty" or "compact" theory with relation to confederation of the original provinces.

Before we undertake any criticism of the argument or conclusions, there are some things which can be said regarding the Report without fear of successful contradiction.

The Report is a careful study of much useful and important material relating to the subject; this material is presented in a very convenient and readable form. The Report is certain to become useful and used as a reference hand-book. It is very well printed and arranged. There has been careful attention to detail which induces confidence in the accuracy of the data. The style of the many and various memoranda written by Mr. O'Connor is admirable; it makes reading easy and the meaning plain. The logic is meticulous. The Report is the presentation of a competent advocate who desires to convince his reader of the soundness of his thesis. For this purpose, the author patently values reiteration.

On the other hand, a critic should call attention to the necessity for consulting the complete documents and records referred to in the Report, of which it was obviously necessary that the author should make only such abstracts as he thought the purposes of the Report required. It would have been impractical for the author to do otherwise. The selection of material for reference is, of course, the personal responsibility of the author. No doubt the author expects, as he has a right to do, that the reader will not be content with the abstracts from the judgments of the Privy Council quoted in the Report, but will read the full report of the decisions. In this connection, it would have been practical and very useful to include in his notes on the judgments, a concise statement of the facts of the particular cases to which the observations of the judgments were written to apply. Indeed this omission seriously detracts from the value of the notes on the judgments and may entirely mislead the reader, as we believe it has in some cases misled the author. The late E. R. Cameron's book on *The Canadian Constitution and the Privy Council* seems a much more convenient, complete and reliable book of reference for these decisions. One should not invite consideration of statements contained in a judgment without submitting the precise facts with which the judges were dealing when they uttered or wrote the observations, and this rule is such a commonplace of legal argument that one feels surprised by its violation.

At the risk of over-emphasis, we question the soundness of the author's method of analysis of the decisions as presented; indeed, it seems to us to account in part at least for some wrong conclusions which the Report presents. Few, if any, judgments will admit of the microscopic investigation of word and phrase to which the author submits those he has selected for reference and analysis; his examination of the judgments is like the process of construing a statute. We do not think words of a judgment have such significance. By this process, one might miss entirely what was decided by the case. We think the author's treatment of Case No. 41 (*Canadian Pacific Wine Co.* v. *Tulley*, [1921] A.C. 417) is an example of the misleading results of the method. The author directs his whole attention in this case to a sentence of the judgment which seems consistent with his own argument without any regard for what was decided by the case.

But the main thesis is the matter of importance, and, notwithstanding all that has been said in the Report and its merit in form and method, we are not convinced by the

author's argument that his conclusion is right or his remedy either sound or practicable.

The author presents clearly, and, no doubt, accurately, the rule which limits the reference to extraneous material for the interpretation of a statute in constitutional cases. This has been discussed elsewhere much more completely, (vide, CANADIAN BAR REVIEW, (February, 1939) *Constitutional Interpretation and Extrinsic Evidence* by Dean Vincent C. MacDonald, K.C.,—DIRECTIONS : To be thoroughly sifted before using, and taken *cum grano salis*), but at page 24 of Annex I, the author says,—

> The process of interpretation may be aided by consideration of such relevant facts and circumstances, existing when the statute was enacted, as may be judicially noticed by the court, for example, statute law *in pari materia;* but this right of resort is intended and permitted as an aid to proper understanding of the words of the statute as expressed, and not as an invitation or licence to tamper with words of which the meaning remains plain after such right of resort has been exercised, for it is not what Parliament may be assumed to have intended to say that rules, but what it actually has said.

The author argues that the courts may, within this rule, refer to the London resolutions, at the point of time above-mentioned, for assistance in interpreting sections 91 and 92 of the B.N.A. Act. Even if the author were able to make good this argument for admissibility (which we venture to doubt), the validity of his choice of material seems open to question. He rejects the resolutions of the Quebec Conference, (very rightly, we think) as material which was never authoritatively adopted by the three provinces which entered the union and he promotes the London resolutions to the position of authority (unjustifiably, we think), because these were transmitted to the Imperial authorities as the embodiment of the agreement of the duly appointed delegates. But at the same time, he admits that the drafting, redrafting and revising of these London resolutions in statutory form in the subsequent proceedings of the London Conference, under the Chairmanship of Lord Carnarvon, and with the assistance of the parliamentary draftsman, is no less the work of the London Conference and no less authoritative than the form of the resolutions on which he relies. (The enacting Bill was not amended in Parliament.) He declares that the London resolutions and the text of the B.N.A. Act 1867 are identical in meaning and does not disclose how reference to the London resolutions only would alter materially decisions depending on the construction of the statute. We can find no ground

in his argument upon which it could be said that the final draft of the statute, as enacted, is not the *only* record of agreed action to which we can look for interpretation of the intention of the delegates to the London Conference. The rule which excludes preliminary drafts of a contract and conversations relating thereto should apply by analogy with equal authority to the proceedings by which the London Conference produced the final form of the statute; it seems to us fallacious to choose an intermediate point, as the author has done in his Report, as being a time of any authoritative finality. We may not have understood fully the author's meaning, because the material he draws upon for his conclusions is far wider than the London resolutions; but because so much has been said and written about this matter of the intention of the framers of the confederation statute, we venture to submit some further comment and question on this point.

Upon the author's statement, a large part of the Quebec resolutions were embodied in the final draft of the statute without change. If the door of admissibility is to be opened to the London resolutions, in interpreting the statute, is there any reason why the preliminary discussions or decisions producing such resolutions should not be as valuable as the resolutions themselves? Our view is that all such material is illusory and inconclusive. It is not merely because a rigid rule of legal procedure binds our courts that we reject such material, but because as a matter of common sense we know that any other method of enquiry is unreliable, being speculative rather than logical and adding to uncertainty instead of resolving it. To give an example: four of the decisions noted in the Report have to do with the respective claims of Dominion and Provinces to jurisdiction in relation to insurance, i.e., the cases of 1881 (No. 5), 1916 (No. 36), 1924 (No. 45) and 1932 (No. 58). This much litigated question, (which has not yet reached the end of the controversy, notwithstanding the latest expressions by the Judicial Committee of the hope that the decision in No. 58 might be, "the last of the series of litigations between the Dominion and the Provinces with regard to insurance"), was the subject of discussion in the pre-confederation conferences. In the proceedings at Quebec on Tuesday, October 25th, 1864, it was moved by the Honourable Mr. Mowat, and duly seconded, that it should be competent for the general legislature to pass laws respecting. . ."3. For the regulation and incorporation of fire and life insurance companies". (See Pope's Confederation Documents, page 30); but in the course of the discussion, it was

agreed to strike out of the resolution moved by the Honourable Mr. Mowat, the words,—"3. For the regulation and incorporation of fire and life insurance companies" (Pope, page 88). This was the final decision in relation to the subject (not altered in London) and the item does not appear in the enumeration of subject-matters either in section 91 or 92. It could, therefore, be said that the London Conference concurred in the decision of the Quebec Conference in regard to this matter; but after that fact and the resolutions were discovered or admitted, what bearing should the fact and resolutions have upon the opinion of the Judicial Committee as to the intention of the framers of the statute with regard to legislative jurisdiction upon this subject-matter of insurance? Obviously, speculation as to intention of the Conference or the significance of the resolutions based upon such material would be futile and vain.

Then consider further what useful result could be attained from consideration of the contemporary statements of parliamentary statesmen respecting the confederation plan. In 1868, in the First Parliament of Canada, a Bill relating to insurance was introduced by the Minister of Finance of the Dominion Parliament. Upon discussion of the Bill, it was repeatedly urged by the opposition that the regulation of insurance was a matter within the exclusive control of the provincial legislatures. When the measure came to a vote, Mr. Alexander MacKenzie, Leader of the Opposition, seconded by his chief lieutenant, Mr. Edward Blake, moved an amendment: "That it be resolved, that in the opinion of this House the regulation of insurance companies is a subject properly within the jurisdiction of the provincial legislatures." Upon the question being put the House divided on party lines, all members of the Opposition voting for the amendment and Government followers (in the majority, of course), voting against the amendment. Again we say such material is obviously not useful as an aid to interpretation of the meaning of the B.N.A. Act, 1867, in litigation respecting such subject-matters. Now in regard to this item, there is more information in the report of conference proceedings than is to be found in relation to many other important subjects of litigation as to legislative authority. But, in the light of such examples, it seems to us fallacious, as well as reckless, for the author to suggest that seventy years after Confederation he can assist us by such contemporary records to say that those who framed the confederation Act intended to do other than what they embodied in the words of the statute.

Indeed the matter goes deeper than that; what they are seeking to discover who speak of the pre-confederation intention of the framers of confederation or of the constituent provinces has no real existence. The search is pursuit of a "will-o-wisp"; when once you leave the natural light afforded by the text of the B.N.A. Act, you are in a realm of unreality. If the Government supporters in the first Parliament say the intention of the Act is "so and so" and the opposition says the contrary, can you settle the truth of a question of fact or law by a vote? And if John A. Macdonald was at London in 1866 and Edward Blake was not, does it make the slightest difference to the Canadian people in 1939 what either one believed about the meaning and intention of the B.N.A. Act 1867? Certainly Oliver Mowat did not think so when he came to power in 1872. Why can we not get down to some naturalness and reality of understanding of what occurred ! ! The delegates to London had delegates' authority to negotiate and settle things which the people generally had never heard discussed. No one was bound by what the delegates settled until the Imperial statute as passed in 1867 was ratified; the only thing ratified was the Act as passed. Then what is all this pother about the "intention of the framers of Confederation" — sound and fury signifying nothing ! ! !

It appears that the author's proposed use of the London resolutions as an aid to interpretation is merely for the purpose of making his predetermined point that the general residuary legislative authority of the Dominion Parliament supersedes any provincial legislative authority in relation to a designated subject-matter. We found no example of any other point upon which he thinks reference to the resolutions would be useful. Nothing in the Report persuades us to the author's view that the Judicial Committee has not acted on principles of sound common sense as well as good law in confining its consideration of material for judgment to the words of the statute as enacted. The author's principle of referring to intermediate drafts or resolutions would, we think, lead to intolerable confusion.

Then as to the interpretation of the text : Mr. O'Connor makes a good case for his construction of the concluding words of section 91 as applicable only to enumerated heading Number 16 in section 92, indicated by the singular form of the word "class", rather than to all sixteen of the enumerated headings of section 92, which, if intended, should have been indicated by the plural form of the word "classes". But if one admits so much, it seems that the result of all the decided cases would not have been changed in the least thereby. We cannot agree

with what the author says at page 45, that the decision of the *Prohibition Case* could not have been written unless it had been founded on the misinterpretation of these concluding words of section 91 in the Act. (See the quotation at page 46 of Annex I.) The inclusion in this quotation of the words "notwithstanding anything in this Act" (which must have unintentionally omitted), would have given only an *a fortiori* result; and the reference to the concluding paragraph of section 91 is only to say that the "exception" does not apply to the case in hand, with which conclusion the author, on his own interpretation of the meaning of this paragraph, must also agree— if he accepts the decision that The Canada Temperance Act, to which the statement is directed, was not comprised in the enumerated items of either section 91 or 92. The borderland of jurisdiction comprehended by the "necessarily incidental" powers of any legislature, merely reserves to the Court a discretion to say in any particular case whether or not any concomitant of the main purpose may be justified in the circumstances of the case. Therefore, unless the author succeeds on his main point as to the construction of the introductory words of section 91, his success upon the concluding paragraph of the section would be of no value to his thesis.

Indeed, the real difficulty confronting the Privy Council in deciding the *Prohibition Case* of 1896 was the previous decision in *Russell* v. *The Queen* (a case in which the author tells us neither the Province nor the Dominion was represented), followed by *Hodge* v. *The Queen* and the McCarthy Act decision of 1885; it was not a textual difficulty. It had been decided in *Russell* v. *The Queen* in 1882 that The Canada Temperance Act of 1878 was *intra vires* the Dominion. It had been decided in 1883 that the Ontario Liquor License Act was valid, and in 1885 that the Dominion License Act (McCarthy Act) was *ultra vires* the Dominion. In 1896, the Board had to deal with The Canada Temperance Act (substantially the same in its 1886 revision as in 1878) which had already been held valid and (inter alia) with section 18 of The Ontario Liquor License Act; these two statutes were in competition although not actually in force in the same local areas; both enactments were local option prohibition statutes; no wonder the reasoning of the decision which had to find its way through these apparent inconsistencies is difficult and confusing. In saying that, notwithstanding the persistence and skill of Mr. O'Connor's argument, we are still of opinion that the Judicial Committee does not depart from the true construction of these opening words

of section 91, we are only asserting what the Privy Council has said again and again and what the great majority of Canadian constitutional lawyers believe or admit. On this occasion we support the majority with good heart.

There are at least two approaches to the question of textual interpretation both of which seem to us to lead to the same answer. The first of these comprehends the practical proceedings by which the framers of the confederation plan reached their goal. It is clear, from the records which the author invokes in his argument, that the delegates proceeded by enumerating subject-matters, in relation to which jurisdiction should be confined exclusively to the provinces and the Dominion, respectively, always having in mind that the general residum of authority to legislate for the peace, welfare and good government of Canada should be with the Dominion Parliament. (See Quebec Conference Resolutions, 1864, pages 51 and 55 and London Resolutions, 1866, at pages 60 and 62.) Antecedent to these resolutions, one may safely infer, (indeed, Pope's record of confederation documents shows) that the conferences prepared two lists of items, of general and local jurisdiction respectively, and the discussions as to distribution consisted principally in the enumeration and allocation of items to one or other of these lists and the shifting of items from one list to the other, rather than in any serious attempt to define the scope of the enumerated items or their possible overlapping. We can agree with the author that the problem of overlapping jurisdiction did not present itself to the delegates in all its later seriousness, and that consciously or unconsciously the "aspect" theory of distribution, so clearly and repeatedly asserted in the subsequent Privy Council decisions, prepossessed the minds of the delegates. Indeed, it seems that it was only in the very last stage of statute-drafting that the introductory words to section 91 in their final form were framed and included.

The argument of the author adopts a different process or sequence in the negotiations. His argument for the London resolutions and his re-interpretation of the Act seems to us to envisage a process whereby only the enumerations in section 92 were important, the enumerations in section 91 being mere adjuncts or examples of the general residuary powers of the Dominion Parliament. We cannot accept this as a probable approach or process on the part of the delegates. What the author calls the "primacy" of the enumerated headings of section 91 was a natural evolution or a basic assumption in the

process of formulating the federal plan. Paramountcy was freely conceded to the central legislature in respect of the enumerated headings. But reading the records which the author puts forward suggests just as convincingly that "primacy" of enumerated headings in section 92 over the general residuum of Dominion powers was what the delegates expected to achieve and did assert. (See the concluding enumerated headings in the lists for general Parliament and local legislatures in both Quebec and London resolutions.) If our understanding of the author's conclusion is correct, it would seem that the same result as in his proposed reading of the present words might have been attained by deleting the first fifteen enumerations of section 92, (leaving only Number 16) and deleting all of section 91, except the opening words, ending with the first semi-colon.

Looked at, therefore, with the eye of the practical draftsman, and considering how statutory forms are commonly produced, one finds nothing unnatural or unintentional in the arrangement, by which the rules of construction of sections 91 and 92, as enunciated in the 1929 *Fisheries Case* (Case No. 52) were established; indeed, our conviction that this was the true intention of the framers of the Confederation plan is strengthened by the author's research and not overset by it.

Resolution No. 45 of the Quebec Conference,—"in regard to all subjects over which jurisdiction belongs to both the general and local legislatures", declared Dominion law should control and supersede provincial law in relation to the same matters; this resolution may no doubt be taken as referring to items of concurrent jurisdiction mentioned in both Resolutions Numbers 29 and 43, which included, at that time, "agriculture", "immigration" and "sea coast and inland fisheries". Resolution Number 44 of the London Conference has similar import and finds its final form in section 95 of the Act, having to do with "agriculture" and "immigration". It seems that these were the only subject-matters in which overlapping or competition was anticipated by the negotiators. Therefore, the disjunction of the other Dominion and provincial legislative powers in the London resolutions is to be found only in the opening words of Resolutions Numbers 28 and 41 and in the final enumeration of each Resolution, i.e., (36) and (18) respectively. It is difficult to see how the author establishes by reference to these words and enumerations the paramountcy of Dominion residual authority in any encroachment of a Dominion statute on provincial

subject-matters. On the contrary, it appears that at this stage of the Conference the delegates believed the enumerations to be mutually exclusive or disparate. It must have been in the drafting subsequent to the London resolutions that this question of overlapping jurisdiction (raised perhaps by the draftsman, *ex proprio motu*) was seriously considered and provided for by the general words of sections 91 and 92. To sum up our comment on this approach; it seems that this whole approach to the question of textual interpretation through the preliminary negotiations is unsatisfactory and that it never does reach the finality of any "Q.E.D."; therefore, this approach leads only to the words of the statute themselves as the true basis of decision. That is the point of departure of the second approach to the problem of interpretation; the words of the statute and the decisions thereon.

We confess that we cannot construe the language of the first clause of section 91 (ending with the semi-colon) in the way the author wishes to read it. Let us agree with him that the words—"Peace, order and good government of Canada"—comprise the whole field of legislative jurisdiction of an autonomous but not independent state. From this total is subtracted all matters "coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces". The author suggests that the subtracted part is merely the jurisdiction of *each* of the provinces and not the aggregate of *all* the provinces; but we find no authority in the words of the text for this view nor does the idea itself seem reasonable or consonant with any known federal system. As the author has himself said many times, it is not "area" or "field" of law which is being divided; it is "kinds of enactment" which are being distributed. Section 92 deals with the subtracted part and declares the "exclusive" legislative authority of each province in relation thereto. What conclusion will the "bald text" require as to paramountcy of authority of such laws? The obvious answer is that paramountcy in the subtracted part rests with the provinces, superseding the residual authority of the Dominion in all aspects necessarily incidental to the power conferred. The very word residual carries the idea. "The generality of the foregoing terms of this section", is not restricted by deciding that the enumerated headings of section 92 give paramount authority to the provinces in relation to such subject-matters or by deciding that the Dominion may not, in the exercise of the general residual powers thus conferred, encroach upon subject-matters enumerated in section 92.

Then comes the "non-obstante" clause which does give the first paramountcy to Dominion legislative authority. "For greater certainty": these very words suggest that the simple formula of the preceding words is inadequate; another formula is to be superimposed, not substituted. "Notwithstanding anything in this Act": these words anticipate and override the provisions of section 92, but only for the purpose of the words, "it is hereby declared that . . . . . the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say :—". The words "notwithstanding anything in this Act" cannot, by any decent syntax, hurdle backwards the semi-colon which separates them from the introductory clause. The verb "extends" is not materially different from "shall extend" when it follows the words,—"It is hereby declared that . . . . . .", and certainly we cannot think the use of this present indicative form has the effect which the author argues, that it makes the clause not an "enacting clause" but a mere exemplar of a previous general assertion, plainly inconsistent with the particular examples. Here then are "propositions", Numbers 1, 2 and 3, as reported by the author at page 20 of Annex I., supported verbally by the text of the statute, except the concluding words of Proposition Number 2,—"unless these matters have attained such dimensions as to affect the body politic of the Dominion". The concluding words of section 91 are not needed to confirm these propositions, as suggested by the author, though they are consistent with them, whether construed as the Privy Council construes then in the *Prohibition Case* or as the author construes them in his Report. Such matters "as are unquestionably of national interest and importance", but are not enumerated in section 91, have (as explained by the Privy Council) paramountcy as matters of Dominion authority because they cannot be comprised within the enumerations of section 92 and therefore are not at all subjects of provincial legislative authority. This completes the textual demonstration of "Proposition" Number 2.

Now let us look at the discussion of some of the decisions of the Privy Council with which the author deals. The words of judgment in the *Parsons Case* (No. 5) quoted on page 30 of Annex I., are plain and accurate if one construes the words of section 91 as hereinbefore suggested. The difficulty of "slip" and "error" found here by the author seem to be created only by the author himself and not by the judgment.

> The scheme of this legislation as expressed in the first branch of Section 91, is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature. If the 91st section had stopped here, and if the classes of subjects enumerated in Section 92 had been altogether distinct and different from those in Section 91 no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them and the Dominion Parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in Section 91.

There is no "slip" here apparent to us. On the stated hypothesis, there was as yet no enumeration of Dominion powers in the section; but in the minds of the draftsmen, as contemplated by the writer of the judgment (and, in fact, in the subsequent words of the statute, postponed for consideration by the Judge) there was a clear intention to reserve paramount authority to the Dominion in relation to the subject-matters actually enumerated in the subsequent clauses. What the Judge is saying is just what we have said above, that the bare formula of the introductory clause of section 91, preceding the semi-colon, was not sufficient because,—"it must have been foreseen that this sharp and definite distinction had not been and could not be attained", i.e., by giving the Dominion authority over everything except the enumerated provincial powers. Why? Because such provincial powers would manifestly encroach upon fields of jurisdiction which the draftsmen had already decided must be reserved for the general Parliament. This "slip" of the Judge seems to us merely misunderstanding of the author. Then follows the further quotation :—

> Hence an endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section, 'for greater certainty, but not so as to restrict the generality of the foregoing terms of this section' that (notwithstanding anything in the Act) the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of section 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to Number 16 of Section 92.

We do not find here the "error" found by the author. He agrees that the concluding paragraph of section 91 applies in its grammatical construction only to Number 16 of section 92, and, upon this construction, he should also agree that the words have "the same object", as the earlier words of the section, i.e., "to provide for cases of apparent conflict". We cannot agree with the author that "the Board failed to notice the true office of the declaratory part of Section 91", because we think the author misconstrues that office. It is not the exclusiveness of the residuum of Dominion powers with which the declaratory part has to deal—it is the exclusiveness of the Provincial powers which the declaratory words of section 91 are designed to cut down. The author notes that neither Dominion nor Provinces were parties to this litigation, but this seems less important when we hear, on the authority of Mr. C. R. W. Biggar, that Oliver Mowat was in London for the hearing, that he attended preliminary conferences of counsel and was present in Downing Street for the argument.

Then, of course, the author must rest his argument as to the Privy Council decisions preponderantly upon the judgment in *Russell* v. *The Queen* (No. 6), notwithstanding the doubt or discredit heaped upon this decision by repeated disclaimers of the Board in subsequent decisions. Unquestionably Viscount Haldane did labour long and diligently to bury that decision in law's deepest grave, overlaid by disapproval or explanations which he confidently hoped would prevent any resurrection. (See Cases Numbers 36, 42, 45 and 47.) As counsel for Ontario, he had been instructed to do this very thing in his early retainers and obviously his confidence in the rightness of his instructions never failed him in later years when he had to deal with these same questions as a Judge. But the author has not only dug up the skeleton and dusted it off; he would breathe the breath of life upon the dry bones. We think he attempted more than he can perform. Why does the author's narrative not mention the *Dominion Liquor Case* of 1885? The decision is a fact to be reckoned with and it is frequently mentioned by the courts (see Cases Numbers 47 and 63), and is explained elsewhere. (See Biggar's *Oliver Mowat* at page 359 and Cameron's *Canadian Constitution* at page 67.) It is directly in the face of the author's thesis. That decision dealt with a general Dominion law (The McCarthy Act) relating to the local licensing of the liquor business in its "national" aspect. It was an attempt of Dominion authority to consolidate its gain of jurisdiction in the *Russell Case*. But

the Privy Council rejected the Dominion contention and declared the statute *ultra vires*, thus affirming the judgment of the Supreme Court of Canada as to the result on the main question and rejecting the exception reserved to Dominion authority by that judgment. The decision of 1885 materially shortens the period during which the author says a different rule of construction prevailed in the Privy Council.

Although reasons for judgment in the customary form of the Supreme Court of Canada are not to be found in the Law Reports, (possibly because the question was on a reference by Imperial Order-in-Council, on petition of the Governor-General in Council, and not in the usual form of appeal from the Supreme Court of Canada), there is a great deal of available information regarding the question and the decision collected by careful students of former days, such as Mr. Cartwright, Mr. Biggar and Mr. Cameron (far too much to have been overlooked by the author). There are also other records available. We are told by Mr. Cameron that the argument of counsel in the Privy Council was published in full. In reporting its opinion to Her Majesty, the Judicial Committee of the Privy Council went farther than (but in the same direction as) the majority judgment of the Supreme Court of Canada; the Privy Council followed the opinion of Mr. Justice Henry who had declared that the whole Act was *ultra vires* and that any part, which might otherwise have been good, was not severable from the main fault of the statute.

The Board consisted of the Lord Chancellor (Halsbury), Lord Fitzgerald, Lord Monkswell, Lord Hobhouse, Sir Barnes Peacock, Sir Montague Smith and Sir Richard Couch. Burbidge, Q.C., Deputy Minister of Justice of Canada, appeared with Sir Farrer Herschell (Solicitor General of England) of counsel for the Dominion of Canada. Mr. Horace Davey and Mr. Haldane (a junior not then in silk) appeared for the Provinces of Ontario and Quebec, Nova Scotia and New Brunswick. Additional counsel were present but not heard for British Columbia, Quebec and Ontario. Regarding the personnel above-mentioned, it is important to note that Lord Watson was not in the Board, that Mr. Haldane's part was a junior one and that Sir Barnes Peacock, Sir Montague Smith and Sir Richard Couch, all of whom had been in the Board in previous Canadian constitutional cases, were present. The leading counsel of the Dominion Government in this case was a member of the Judicial Committee in 1896 (having been Lord Chancellor of England in the

meanwhile), as was also Lord Davey from the ranks of provincial counsel. (We hope Professor Scott, as well as the learned author, will note this circumstance.)

In the following summary of the argument, abstracted from the London Times Report, it seems to us to be established that all material points which the author now raises and the very principles of interpretation for which he contends, were plainly and specifically put to the Judicial Committee in argument by Sir Farrer Herschell, and negatived by the formal report of the Board to Her Majesty in the year 1885. We quote only so much from the available records as we think sufficient to establish this observation.

Sir Farrer Herschell for the Dominion submitted the Acts in question were within the legislative competence of the Dominion upon a true construction of the British North America Act especially sections 91 and 92 thereof. It was perfectly within their power to :

> pass Acts for the regulation of a particular trade, having for their object the peace, order and good government of the country, and that such Acts would apply to the whole Dominion. The provisions of the Acts in question regulating the liquor traffic, it was submitted, fell within the designation,—'The regulation of trade and commerce' and the designation 'laws respecting the peace, order and good government of Canada' or one or other of such designations in the British North America Act. Moreover, it was argued, power was not given by the British North America Act to the provincial legislatures to enact such provisions as were contained in the Acts here in question Further it was contended that the reasons given in a judgment of the Judicial Committee in the case of *Russell* v. *The Queen* applied to the present case and also that to hold that the provisions of the Acts in question were *ultra vires* of the Parliament of Canada would be incompatible with the decision given in cases on appeal to Her Majesty in Council from Canada and with the judgments of the Judicial Committee in such cases.

Mr. Burbidge, Q.C., said he had nothing to add. Mr. Horace Davey argued the case on the part of the different provinces and submitted the Act was altogether *ultra vires;* and,

> while he supported the opinion of the Court below (the Supreme Court of Canada), he contended that the Act was also *ultra vires* in points which they held were within the power of the Dominion Parliament, namely, as to vessel and wholesale licenses. The whole question turned on the construction of the 91st and 92nd sections of the British North America Act. The 91st section gave power to the Queen to make laws for the peace, order and good government of Canada in relation to matters not coming within the class of subjects not assigned exclusively to the provinces. If he could show that the Act in question

was among the class of subjects assigned exclusively to the provinces—that was to say, if it came within section 92 of the British North America Act — then the Dominion Parliament could not under its general laws for peace, order and good government make a law in respect to that matter. He submitted that the enumerated matters in section 91 were subject to the words 'matters not coming within the class of subjects not assigned exclusively to the Provinces'. These classified subjects were inserted for greater certainty and governed the whole of the section. For example, they might make regulations as to trade and commerce, but such regulations must not infringe upon the exclusive power of legislation, over matters mentioned in section 92, and regulations made under section 91 must be such as would not interfere with the exclusive jurisdiction given to the legislatures of the provinces. The learned counsel, in a lengthy argument (in which he cited *Hodge* v. *The Queen*) submitted the Acts were *ultra vires* in toto, because their provisions related either exclusively to matters of a local nature, exclusively to property and civil rights, or exclusively to municipal institutions in the above-mentioned provinces. He also argued that the provisions of the Acts related entirely to matters falling within section 92 and not within section 91 of the British North America Act, and for these and other reasons, the Acts in question were not within the legislative power of the Parliament of Canada to enact.

Mr. Haldane followed upon the same side, and drew their Lordships' attention to decisions in different cases, which he contended materially supported the contention on the part of the Provinces.

Sir Farrer Herschell, in reply, contended that because a law operated locally and its benefits were felt locally, it did not show that it was an act merely of a local nature. Because power was given to municipal institutions to make regulations it did not prevent the Dominion Parliament having the power to legislate for the whole country. The real test was whether it was a Dominion purpose. It was competent for the Dominion Parliament to make laws for the general welfare of the country, notwithstanding that municipal institutions had the power to make certain regulations. It was competent for the Dominion Parliament to make regulations in respect of trade and commerce for the peace, order and good government of the whole of Canada. The learned counsel cited *Russell* v. *The Queen* in support of his arguments and submitted the Acts in question were within the legislative power of the Dominion Parliament and that the true construction of the British North America Act, especially sections 91 and 92, showed that the Acts in question were within the legislative power of the Dominion Parliament as regulating a particular traffic, the object being for the peace, order and good government of Canada.

Upon conclusion of the argument, the Lord Chancellor intimated that their Lordships would consider the matter and would report thereon to Her Majesty.

We are informed by *Cartwright's Cases on the B.N.A. Act*, Volume IV, page 342, that the subsequent report of opinion of the Committee was dated the 21st November, 1885, and approved

by the King's Order of December 12th, 1885, in which the following quotation from the report is to be found :—

> . . . . . and having heard counsel thereon for the Dominion of Canada and likewise for the Lieutenant-Governors of the respective Provinces of Ontario, Quebec, Nova Scotia and New Brunswick and having been attended by the agents for the Province of British Columbia, their Lordships do this day agree humbly to report to Your Majesty as their opinion in reply to the two questions which have been referred to them by Your Majesty that the Liquor Licence Act 1883 and the Act of 1884 amending the same are not within the legislative authority of the Parliament of Canada. The provisions relating to adulteration, if separated in their operation from the rest of the Acts, would be within the authority of the Parliament, but as in their Lordships' opinion, they cannot be so separated, their Lordships are not prepared to report to Your Majesty that any part of these Acts is within such authority.

Upon the above records we submit that what the learned author of the Report now contends for in general result, as well as the particular rules of interpretation now proposed, was negatived by the Judicial Committee in 1885 in the above cited decision, a decision confirming the main principle already decided by the Supreme Court of Canada and upon an argument in which every Province of Canada, except Prince Edward Island, contested the Dominion's claim to jurisdiction. The learned author's thesis which seeks to fix in the *Prohibition Case* of 1896, and on the personal responsibility of Lord Watson, the trend of decision in the early days of constitutional litigation which he so much regrets, is nothing but "humpty-dumpty" fallen from the wall.

The limitation put in 1896 upon the applicability of the principle of *Russell* v. *The Queen* was certainly dictated by consideration of the text of section 91 as well as by previous decisions of the Board. It is not judicial legislation to hold, as the Board did in the 1896 case (No. 13), that :

> If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion in relation to matters which, in each province, are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in Section 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

This is merely a judicial interpretation of the opening words of section 91 previously quoted (which, as a matter of law, must be "reasonable" as well as textual), the enumerated powers of the provinces being the "substracted" part, in which provincial

legislative authority is exclusive. The above quotation defends that part, in the manner contemplated by the statute, from invasion by Dominion authority under the claim that its residuum may encroach upon subject-matters enumerated in section 92.

This may be the place to complain of the omission from the cases noted in the Report of other great cases belonging to the period 1878 to 1896. Of course the author had to stop somewhere, but when, as the matter appears to us, he is resting his main argument on the incorrectness of the decisions of this period, and the unwarranted aggrandisement of Provincial jursidiction, we think he should have included the *"Escheats" Case*, the *"Queen's Counsel" Case*, the *"Rivers and Streams" Case*, as well as the *"Liquor License" Case* of 1885. We think the author's thesis would have been still more difficult to demonstrate if these additional references had been included.

This merely seems to reveal what we think is a fundamental error in the author's thesis, namely, that a mechanical rule of construction of the text is the root and branch of our constitutional difficulties. It seems to us that after Mr. O'Connor's new rule had been adopted, the results of judicial interpretation might still be substantially the same in decisions regarding the meaning and scope of the words to designate the enumerated headings of jurisdiction. Mr. O'Connor still leaves us, as guiding principles for decision, the rules of "pith and substance" or "nature and purpose" of the impugned legislation, and the "aspect" doctrine of *Hodge* v. *The Queen*. When these methods are applied to distinguish "property and civil rights in the province" from "the regulation of trade and commerce", we are bound to think that Mr. O'Connor's new rule of approach would not greatly affect the result or the *ratio decidendi* of most of the litigated cases. Nevertheless, the author has done a very useful and satisfactory piece of work in investigating the earlier use and meaning of these words—"regulation of trade and commerce" and "property and civil rights". We think such investigation contributes to sound understanding of the headings in sections 91 and 92. But it will be the scope of the enumerated headings of the sections and not the author's rule of textual construction which will finally determine the line of our constitutional progress in interpretation.

But this comment must not rival in length, when it cannot hope to rival in thoroughness, cogency and lucidity, the argument of the learned author whose Report is the subject of comment. It is manifestly impossible in this review to follow

the author's treatise through its many subject-matters and exhaustive analysis of seventy years of jurisprudence. Again, we pay tribute to the extent of his investigation and the comprehensiveness of his Report. We hope we have been guilty of no disrespect in venturing this comment after a study of the Report so limited in time and extent.

We must turn now to the suggested remedy: a declaratory statute giving exclusive and unlimited authority to the general powers of the Dominion for the "peace, order and good government of Canada" in the "national" aspect of Dominion law, or, as it is put in the words of Case No. 13, to give the Parliament of Canada, "authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest upon the assumption that these matters also concern the peace, order and good government of the Dominion".

Our first observation is that such an alteration would destroy the Confederation plan more completely and effectively than anything heretofore complained of. Neither the minority rights guaranteed by the Treaty of Paris nor any other minority or provincial interest would be secure from majority encroachment thereon through Dominion enactment. Local and private matters would be local and private no longer when the Parliament of Canada had enacted a law of general application to deal with the same subject for some national purpose. Provincial autonomy would be a thing of the past and a new and strange form of government, no longer a federal system, would come into being. We are not perhaps beyond consideration and fair discussion of constitutional change but we will not come to peaceful change by any such indirection as the author suggests; in that way lies civil strife and revolution. Not by such means can unity or uniformity be achieved in Canada. Of course the proposal passes all bounds of practical politics, as it surpasses all political expediency. We feel sure no Canadian Parliament would attempt such a course and, if it did, that the Imperial Parliament would refuse the request. Such a proposal seriously considered would rend Confederation completely. We could match Ulster in the obstinacy of resistance to such a proposal. To what an inglorious and impractical conclusion the fine-spun legal argument of the author has led.

This does not mean that constitutional changes are not long over-due. Much new wisdom founded on experience, leavened with new thought, is ours to apply to new problems.

"Other times, other means, other manners." We will not be thought affected only by reactionary dogma if we refer to Professor Harold J. Laski's article in the current number of *The New Republic* (May 3, 1939) where, writing under the title: "The Obsolescence of Federalism", he closes his article on this note :

> Men who are deprived of faith by inability to attain results they greatly desire, do not long remain content with the institutions under which they live. The price of democracy is the power to satisfy living demands. . . No political system has the privilege of immortality; and there is no moment so fitting for the consideration of its remaking as that which permits of reconstruction with the prospect of a new era of creative achievement.

Constitutional change often comes by way of revolution, but the Confederation plan of 1867 was the work of men of good-will. Why should not its revision be worthy of its initiation and carried through in the same spirit. The author's Report does not advance this prospect nor offer any practicable suggestion.

It is interesting to note that the author defines "present constitutional needs" by reference to statutes actually enacted by the Dominion Parliament irrespective of adjudged validity or invalidity. That might have been expected from the "Commons" side of the buildings; that it appears on the "Senate" side indicates the contagion of the spirit of self-aggrandisement. Was there ever a legislative or governmental authority that did not seek to enlarge or extend its own jurisdiction? To one disinterested in the matter at issue, the means to such ends seem sometimes of questionable morality, but observation suggests that the apparent dishonesty has a psychological explanation consistent with sincerity of purpose. There is an all-pervasive atmosphere of government which induces confidence in the infallibility of one's own judgment as to what constitutes "public interest", and permits the victim to think the increment of his own authority is the unerring servant of that interest. "Public interest" of course justifies to such minds, means of attaining its purposes which would be very wrong in private undertakings.

At the present time, there are perhaps many who think that the delay or defeat of new federal legislative enterprises, by limitation of constitutional authority, proves, *ipso facto*, the limitation is wrong: others — and their number is greater than is commonly supposed — think this limitation may be a

most fortunate obstacle to ill-advised and ill-considered political enterprise. We shall not decide the merits of those viewpoints. But we can say that usurpation of constitutional authority aggravates resistance and often encompasses the final defeat of the legislative enterprise, even if otherwise meritorious. We happened upon evidence of how this spirit in Canadian legislative enterprise affects a disinterested observer in Mr. Street's valuable treatise on the doctrine of *Ultra Vires* (1930 edition) where he says, at page 447 :

> In the case of legislatures the camouflaging of "ultra vires" statutes has, particularly in Canada, become an art, and special reference to the general principle (the substance is more important than the form) must be made in dealing with them.

There are some very strange creatures of the determination of draftsmen and law-makers to ignore constitutional limitations of any kind and of their ingenuity in doing so; provincialists vie with federalists for "primacy" in this field of endeavour. The past record of legislative encroachment has already breached public confidence in centralization of authority.

Does the author really believe that after seventy years of experience with Confederation, the minorities of Canada represented in the Provincial Legislatures will submit their destinies to the uncontrolled authority of a central legislature or government controlled by the majority: we think only when force majeure compels submission. Such force cannot be generated in a normal democracy, nor even in what Sir William Holdsworth refers to as "the curious mixture of bureaucracy and democracy which now controls the State". It must find its instrument in a dictatorship which overrules and suppresses opposition.

In conclusion, let us venture beyond our assignment to say what previous constitutional studies published in Canada in recent years have heretofore suggested. It is time the chief "indoor sport" of constitutional lawyers in "lambasting" the Privy Council and cavilling at decisions of that body was discontinued. The "sport" never had any merit or excuse and it violates "good form"—an essential element of all "sport". All this talk about distortion of the framework of Confederation and defeat of our national purposes by judicial authority is silly and puerile. If there is distortion, we Canadians all must take the responsibility for the distortion. If there is defeat of national purposes, let us do something worthy of our autonomy rather than continue to accept and complain of the defeat.

Our constitution is what our forefathers made it and as we have applied it—not what British judges gave us. If we do not like the constitution as it is, we have always had leave to change it; let us change it — now — in an open, forthright and well-considered manner. We cannot evade the practical issues or the duty of deciding something by legal subtleties, nor by the pseudo-legal method of a "declaratory" statute to be obtained by unilateral action of the Dominion: "compact" or "no-compact". Neither should we continue the pretension of the author that by a miracle of understanding and foresight, the Canadian Fathers of Confederation provided in 1867 a constitution suitable to any future.

Let us take merely one example to illustrate : the appeal in the 1896 *Prohibition Case* was taken at the instance of the Province of Ontario, whose Premier and Attorney-General was Mr. Oliver Mowat. Mr. Mowat had been a delegate to the Confederation Conferences at Quebec and Vice-Chancellor of Ontario for eight years before he became Premier. He retained and instructed Haldane, Q.C. of counsel for the appellant; success was attained. The result was what the Government of Ontario for the time being sought and approved. Now, as in retrospect the author marks that occasion as the "parting of the ways" from the pathway of true constitutional principle and sound public policy, does it behoove us as Canadians to join in this chorus of criticism of the tribunal which decided—as its duty was—the questions submitted? If the result was all wrong, where does the responsibility rest in relation to the Canadian people — surely upon our own representatives who pursued the litigation to establish that result. And, when we recall that the citizens of Ontario with bands and bunting, bonfires and banquets and throngs of cheering citizens welcomed home the "little tyrant" victorious in momentous constitutional conflicts with the Dominion, does it now lie in the mouths of the descendants of these same Ontarians, to whom "Provincial Rights" was a religion as well as a slogan, to complain of the stupidity and ineptness of the tribunal that adjudged him victorious? The most tumultuous and extensive of these mass demonstrations occurred in September, 1884 when, according to Mr. C. R. W. Biggar, writing in 1905 his biography of Sir Oliver Mowat, upon Mowat's return from arguing the Manitoba-Ontario boundary case in the Privy Council, "he received an ovation unparalleled in the history of any Ontario public man". Mr. Edward Blake, K.C., used the occasion to

refer to the victories won by the Premier for provincial rights in the Insurance cases, the Escheats case, the Liquor Licence case and the Rivers and Streams Bill. A few months earlier, the Ontario Government had put into the speech from the Throne which opened the Ontario Legislative Assembly session of 1884, a reference to the favorable decision of *Hodge* v. *The Queen* (Case No. 7) followed by these words:—"The judgments in this case and in the Insurance cases and the decision that lands escheating to the Crown for want of heirs are the property of the province, taken in connection with the observations made by the learned Judges in disposing of these cases have had a re-assuring effect on the public mind by showing that the federal principle embodied in the B.N.A. Act and the autonomy which it was intended thereby to secure for the individual provinces are likely to be safe in the hands of the Court of final resort in constitutional questions." Mr. Biggar follows the above quotation at page 358, with these words: "additional point was afterwards given to these remarks by the decision of the Judicial Committee in the case of the McCarthy Act", the history of which he tells in some detail at page 359.

The author of the Report is not the only writer who offends our sense of Canadian dignity and good sportsmanship — not to mention our regard for accuracy of fact and sound principles of law—by repeating this popular jingle, "the Privy Council did thus and so to our constitution". Professor F. R. Scott of McGill University in the new edition of his book entitled *Canada To-day*, and particularly in the chapter on "Constitutional Problems" blames the Privy Council for a "judicial revolution" and "divergence between constitutional law and national development" and fixes responsibility principally upon two Judges, Lord Watson and Lord Haldane. Dean Vincent MacDonald of Dalhousie University seems to sing in the same chorus, and the latest outbreak comes from no less a conspicuous Canadian than the Rt. Hon. R. B. Bennett, writing from England in the Special Canada number of the *London Times* on May 15, 1939 — who must have borrowed freely from the O'Connor Report for the material found in his statement. We recommend to these friends a further examination of Canadian political and constitutional history of the period 1878 to 1896 for verification of our submission that not Lord Watson and not Lord Haldane, but Canadian statesmen and lawyers, the Fathers of Confederation themselves, supported by the voting majority in Ontario and other Provinces, initiated the demand

for and approved the victories of "Provincial Rights" in all the litigation of this period. Fortunately, it has never been left to our sister province of the civil law to fight this battle alone against the forces of centralization and we think it never will be; neither did Ontario stand alone.

As to the merit of the Privy Council in constitutional cases, can we imagine what result our Canadian courts would have achieved in the past seventy years in the interpretation of the B.N.A. Act without the help of the great lawyers of the Privy Council? Look at the Canadian judgments appealed to the Privy Council and see what confusion of thought we would have had under those decisions. In early days the Ontario Court of Appeal was frequently at odds with the Supreme Court of Canada in constitutional cases. In England, however, we have had the assistance of men like Watson, Davey, Benjamin, Herschell, Macnaghten, Haldane and Finlay at the Bar or in the Judicial Committee. There is much to be said for the view that without this assistance of the Bench and Bar of England, we might have been still more discontented with our constitutional jurisprudence.

And let the Bar of Canada look to its own qualifications in this great subject of litigation. There is good reason to be proud of the record of earlier generations of Canadian counsel. A review of the principal Canadian counsel engaged in constitutional cases recalls the names of many eminent and distinguished advocates. Is it only because they have passed from our sight that their merit shines so brightly?—Edward Blake, Dalton McCarthy, Oliver Mowat, Christopher Robinson, John S. Ewart, Z. A. Lash, Eugene Lafleur and Wallace Nesbitt, (to mention only a few of the illustrious Canadian lawyers not now living). These are great names and the impress of these personalities and their advocacy is found in the Canadian Constitution as we have it to-day. However great the influence of Lord Watson and Viscount Haldane may have been as suggested by Professor Scott, and other writers, it is gross exaggeration and distortion of fact to ignore the participation of these great Canadian lawyers in the arguments upon which the decisions of the Privy Council are founded. In our generation, a change has come over the advocacy in England in Canadian constitutional cases. The use of English counsel in Canadian constitutional cases is much reduced in recent years; indeed, the "old guard" is no longer available. The practice of Canadian counsel in such cases is more general. Perhaps in later years stars now in

ascendant will be more plainly visible in comparative brilliance than they appear at present, even as we now look back with admiration for those whose names we have mentioned. But if the comment of present-day writers indicates any general discontent with the judicial aspects of constitutional law, surely it is to our own advocacy in constitutional cases that we should look first for improvement. In our law schools, we have competent teachers of the subject who are allowed to exercise their knowledge and their influence only on undergraduate students and articled clerks. A wider use could be made of their erudition to assist our courts and our counsel in constitutional cases. In the Department of Justice and the Departments of Provincial Attorneys-General, only rarely has some first-class ability like Newcombe's and Bayley's been found to cope with these great and important problems which require, not only knowledge of what books will teach, but experience with the applied science of government. These Departments should take special care to develop and keep first-class lawyers trained in the jurisprudence of our constitution. Less complaint of others: more self-examination and reform—that is the most important determination one can form from the publication of the O'Connor Report.

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