THE CANADIAN BAR REVIEW

VOL. XVIII MAY, 1940 No. 5

"PROPERTY AND CIVIL RIGHTS IN THE PROVINCE"

(SEC. 92, CLASS 13, B.N.A. ACT)

This effort requires a preface of a personal character.

Near the end of the 1938 session of the Dominion Parliament the Senate committed to me the enticing task of reporting from all available records all facts relevant to the making of the Canadian confederation and of advising whether, in my opinion, based upon those facts, the text of Part VI of the British North America Act, 1867, expresses in law the desire as to the distribution of legislative authority within the confederacy of the three confederating provinces, Canada, Nova Scotia and New Brunswick. I was required to interpret the Act anew, as of July 1st, 1867, for a legislative body which had in mind its own needs and purposes and not, primarily, those of courts or lawyers,[1] and to refuse to be impressed by any subsequently decided case which seemed to be in conflict with the text that it purported to interpret and expound.

Anyone who has read the report without knowledge and appreciation of the foregoing will have misunderstood it. Such considerations as the admissibility of particular records as evidence *in court* would be, to the Senate, quite immaterial. It was not contemplating any proceedings in court. Being one of the branches of that Parliament which will soon have to decide whether or not, and the manner in which, if at all, the British North America Act, 1867, must be amended, it had asked the advice of counsel, for its purposes, *principally concerning history*. Even the law cited in the report is cited, in the main, as history relevant to the question whether Part VI of the Act should be amended, and in what respects, if at all. The

[1] "We felt we should have very particular need of the work (*viz.* the counsel's report) here, because, it was only too clear, we were on the eve of discussions of moment as respects our constitution—discussions which will become very imminent when the report of the royal commission on the subject is brought down."—Per Rt. Hon. Senator Meighen, Senate Debates, 1939, p. 318.

Senate had asked its counsel to discover and report what scheme of distribution of legislative authority the three confederating provinces (Canada, Nova Scotia and New Brunswick) had expected in 1867, whether they got it, and, if they had, whether, since, it had become impaired in part, and, if so, how.

The report (one of over 700 printed pages) was presented to the Senate on March 28th, 1939. The printed issue turned out to be too small to supply the demand of lawyers and law schools. In the circumstances, at the request of the Editor, I consented to rewrite for publication in the CANADIAN BAR REVIEW one of the nine submissions of which Annex 1 of the report consists, and to wrap around it, so to speak, some selections from other submissions of the same Annex. I have selected for the purpose the submission which, in the report, is headed as above. It is now republished unchanged except to the extent necessary to enable it (with the aid of this preface and an addition at the end) to stand alone.

I shall, for reasons to appear, discuss the history and meaning of the words "property and civil rights in the province", as head No. 13 of section 92 of the B.N.A. Act, from the standpoint of Quebec and Ontario before considering the same from the standpoint of the provinces of the Dominion, generally.

QUEBEC AND ONTARIO

At the Capitulation of Montreal Demand No. 42 by the Marquis de Vaudreuil, on behalf of the conquered Canadians was that—

> The French and Canadians shall continue to be governed according to *the Custon of Paris and the laws and usages established for this country*. . . .

The answer of General Amherst, the British Commander in Chief was—

"They become subjects of the King."

The answer implied that such a matter — one involving the future government of the country — *must be left to what the law of the conqueror should provide*. It was not fitting that a military commander should undertake decision upon such a demand. The King or his Parliament would rule as to the future laws of the conquered territory.

Governor Murray, on June 5th, 1762, communicated to the Imperial government a general, and not particularly informative,

statement of what "the Custom of Paris and the laws and usages established" for Canada had been under the ancient regime. Murray wrote that—

> The only Laws were the King's Edicts or the Arrets of his Council of State register'd at the Council Superieur, and the Intendant's ordonnances. In matters of property they follow'd the Custom of Paris, but in marriage settlements they were at liberty to follow the custom of any other province in that Kingdom.

The laws of England — the laws applicable to British subjects —which laws General Amherst's answer to demand No. 42 of de Vaudreuil implied must apply to his sovereign's new subjects as such, provided (whether Amherst knew it or not) for the case. These laws embraced all the then generally recognized rules of international law — the law that prevails as between state and state, as distinguished from those public or private national laws which in all countries prevail, as to public law, between state and subject and, as to private law, between subject and subject.

Upon the conquest of Canada such of the inhabitants as elected to remain under the new sovereignty became British subjects, and, as such, they came under what is, for convenience, called the public law of the conqueror, although as to the private law — that applicable as between subject and subject— their ancient laws remained in force unless and until altered or abrogated by the conqueror.

In *Ruding* v. *Smith* (1821), 2 Hagg. Cons. at p. 382, Lord Stowell observed, as to the effects of the conquest of Cape Colony, that he was perfectly aware that it is laid down generally in the authorities that the laws of a conquered country remain till altered by the new authority. "But," he added—

> Even with respect to the ancient inhabitants no small portion of the ancient law is unavoidably superseded by the revolution of government that has taken place. The allegiance of the subjects, and all the law that relates to it—the administration of the law in the sovereign and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority must undergo alterations adapted to the change.

I have termed the laws governing matters such as those mentioned by Lord Stowell public laws. As new British subjects the conquered Canadians became entitled to the benefits, as well as subject to the burdens, of those public laws — for example, Magna Charta and the right of appeal to the sovereign on the

one hand, and jury duty and military service laws on the other. From the mere fact of conquest and cession, followed, as it was, by submission, the whole Crown law, with all that is involved in the fact of transfer of allegiance, immediately and *ipso facto* applied. Likewise as to the criminal law of the conqueror—that of England—wherein the sovereign is the complainant. It applied at once, as of course. Also as to the constitutional law of the conqueror's country and his mode of applying justice. The first became in force *ipso facto;* the second became subject to change at once. The old courts became devoid of all power unless and until recommissioned; that is, the judicial structure and the method of proof — the courts, the judges and the rules of evidence — became subject to immediate reconstitution. The property rights of the conquered inhabitants, however, and the decision of such of their personal rights against each other as had been enforceable in the courts, continued to come under their ancient laws until the conqueror should disturb them, which, in practice, he ought not unreasonably to do. The applicable principles of international law were fairly well settled in 1760. They account not only for much that was done in Canada between that year and 1774, but, as well, for considerable of the phraseology of the laws relating to Canada written during the same period and since.[2] International law, under the English legal system, is treated as a branch of the common law. The French legal system, doubtless, accorded it equivalent respect. Accordingly, after the conquest and before the Quebec Act, we find the new French speaking British subjects asking —not for the retention of the whole of their ancient legal system—not even for retention of the civil portion of it—but for security in the enjoyment of their property and their civil rights, and that, in the courts — not that all their ancient laws shall rule — but that when their causes concerning their property and their civil rights are being decided the *rule of decision* shall be that which is provided by their ancient laws, and not that which is provided by the law of England. In my opinion such of their property rights and their private rights, as against each other, of all kinds, as were enforceable at law, were what they termed their civil rights.

The Treaty of Paris (1763) whereby France ceded Canada to Great Britain, provided, pursuant to the Capitulation of Montreal, for liberty of religious worship to the Canadians, but it said nothing as to their enjoyment of their ancient

[2] Notably, the expression "property and civil rights."

customs, usages, laws or rights at law. These, pursuant to the capitulation, lay in the hands of their new sovereign. Following upon the treaty a commission was issued to Governor Murray whereby he was directed that as soon as possible he should set up a House of Assembly, which, with himself as Governor, and his council, was to have "full power and authority to make . . . laws . . . for the public peace, welfare and good government of *our said province and of the people and inhabitants thereof.*" Until the Assembly should be set up the Governor, assisted by his council, was to administer the affairs of the new colony by way of ordinance. Murray and his council having misunderstood the terms and intent of the proclamation of 7th October, 1763, whereby the operation of the Treaty of Paris was proclaimed (with, it must be admitted, gross ambiguity) in Canada, issued, on September 17th, 1764, an ordinance establishing civil courts for the province, wherein *the laws of England* were to apply, excepting as follows—

> The French laws and Customs to be allowed and admitted *in all causes in this Court between the natives of this province where the cause of action arose before the first day of October, one thousand seven hundred and sixty-four.*

In view of the terms of the capitulation, the treaty and the proclamation thereof upon which Canadian submission and decision to become and remain as British subjects were based, this ordinance of 1764 (applying, as it purported to do, a construction to the King's proclamation of October 7th, 1763, which involved an intent to dishonour its accepted terms) naturally caused resentment and discontent, which were reflected in petitions to the sovereign from his new subjects, and the matter being referred to the Imperial Law Officers, they observed, *inter alia,* as follows—

> The Second and great source of disorders was the alarm taken at the construction put upon His Majesty's Proclamation of October 7th, 1763. As if it were his Royal Intention by his Judges and Officers in that Country, at once to abolish all the usages and Customs of Canada, with the rough hand of a Conqueror, rather than with the true Spirit of a Lawful Sovereign, and not so much to extend the protection and benefit of his English Laws to His new subjects, by securing their lives, libertys and propertys with more certainty than in former times, as to impose new, unnecessary and arbitrary Rules, especially in the *Titles of Land, and in the modes of Descent, Alienation and Settlement,* which tend to confound and subvert rights, instead of supporting them.

The Law Officers advised and recommended as follows—

> *First* in all personal actions grounded upon Debts, Promises, Contracts and Agreements, whether of a Mercantile or other nature, and upon wrongs proper to be compensated in damages, to reflect that the substantial maxims of Law and Justice are everywhere the same. The *modes of proceeding and Trial*, and perhaps in some degree also the strict Rules of Evidence may vary, but the Judges in the province of Quebec cannot materially err, either against the Laws of England, or the ancient Customs of Canada, if in such Cases they look to those substantial maxims.
>
> *Secondly, in all suits or Actions relating to Titles of Land, the Descent, Alienation, Settlements and incumbrances of Real property, we are humbly of opinion, that it would be oppressive to disturb, without much and wise deliberation and the Aid of Laws hereafter to be enacted in the province, the local Customs and Usages now prevailing there;* to introduce at one Stroke the English Law of Real Estates, with English modes of Conveyancing, Rules of Descent and Construction of Deeds, must occasion infinite confusion and Injustice. British Subjects who purchase Lands there, may and ought to conform to the fix'd local Rules of Property in Canada, as they do in particular parts of the Realm, or in the other Dominions of the Crown. The English Judges sent from hence may soon instruct themselves by the assistance of Canadian Lawyers and intelligent Persons in such Rules, *and may Judge by the Customs of Canada, as your Lordships do in Causes from Jersey by the Custom of Normandy. It seems reasonable also, that the rules for the Distribution of personal property in Cases of Intestacy, the modes of assigning and Conveying should be adhered to for the present.*

It was recognized that an injustice had been done.[3] Enquiries necessary to the preparation of the Quebec Act, which ultimately applied the remedy, and delays incident to covert opposition from powerful sources, delayed its enactment. Another year's delay and, in all likelihood, *British* North America would not now exist. The date of the Quebec Act is 1774. The American Revolution was then germinating.

Chief Justice Hay of Canada was examined, with others, in England while the Quebec Act was before Parliament. He testified that—

> The Canadians conceived that the introduction of English laws, and the exclusion of their own, at least their doubt and uncertainty how far that matter went, was their greatest grievance; and the remedy proposed to be applied was the restoration of their own laws and customs *in toto*. I own myself I thought that went too far . . . I was willing to allow them the whole law with respect to their tenures, with respect to the alienation, descent and mode of conveying or incumbering their real property, to the rights of dower and marriage, and the disposition of their personal estate in case of intestacy. . . . . The rest of their law, as the law respecting contracts, debts, disputes of

[3] See Annex 4 of *Report to the Senate* pp. 11 - 15, "note re the Pre-Quebec Act Civil Law."

> a commercial nature, the law of evidence, and many other matters of that kind I thought might safely stand upon English bottom. . . . They seem perfectly satisfied with the English criminal law.

The terms of section 8 of the Quebec Act go far beyond Chief Justice Hay's limit of "willingness." They are that

> His Majesty's Canadian subjects within the province of Quebec . . . . may also hold and enjoy *their property and possessions together with all customs and usages relative thereto,* and all *other* their civil rights &c. And in all matters of controversy, relative to property and civil rights, resort shall be had to the laws of Canada as the rule of decision of the same &c. And all causes that shall hereafter be instituted in any of the courts of justice. . . . within and for the said province . . . . shall, with respect to such property and rights be determined agreeably to the said laws and customs of Canada until they shall be varied or altered by any ordinance that shall, from time to time, be passed in the said province . . . .

I construe the words "*other* their civil rights" in the above citation as an indication that property rights (using the word "property" adjectivally) were, *inter alia,* regarded as and called civil rights and that the Canadians were to enjoy (*a*) their property, (*b*) their property rights and (*c*) all *other* their civil rights. That is to say, I construe the first division of the above quotation as dealing with *property and civil rights,* and in a wide sense of the term. Thus, when the quoted words proceed to mention "property and civil rights" the latter words must be read to mean property, *plus* the rights incident to property, *plus* all other civil rights, and it is to these that the "rule for decision" indicated by the statute is to be applied. The purpose of the statute is, I think, to re-enact the law as it stood a moment after the execution of the Treaty of 1763, lest it be contended that the repeal of the repealed instruments which purported to have introduced English civil law did not operate so as to restore the conditions existent prior to the utterance and promulgation of those repealed instruments.

I conclude, therefore, that in the Quebec Act the expression "civil rights" meant that part of the law of ancient Canada which remained by the law of England in force in Canada immediately after the cession of 1763, to wit, the private law —the law as between subject and subject, involving the rights of one subject against another, as I have above defined or described it.

The Royal Instructions of 1775 to Governor Carleton and those of 1786 to Lord Dorchester fall short of expressing the

full civil rights of the Canadians, but that fact is immaterial because they enjoyed their rights at the time under statute. Royal Instructions even in our day have not always kept pace with changing, overriding, laws and conventions.

An Ordnance "for establishing Courts of Civil Judicature in the Province of Quebec" dated February 25, 1777, provides by Article 2 that—

> The said courts shall have full powers, jurisdiction and authority to hear and determine all matters of controversy relative to property and civil rights, according to the rules prescribed by an Act of Parliament made and passed in the fourteenth year of the reign of His present Majesty intituled "An Act for making more effectual provision for the Government of the Province of Quebec, in North America," (*viz., the Quebec Act of 1774*) and such ordinances as may hereafter be passed by the Governor and Legislative Council of the said Province.

Since 1785, by a Quebec statute (25 Geo. III, c. 2, sec. 10; Con. Stat., L.C. c. 82, sec. 17) the English rules of *evidence* have been applied in *commercial matters*.

The Constitutional Act of 1791 divided the province into Upper and Lower Canada, but so that all laws, statutes and ordinances in operation at the time when the Act came into effect should—

> remain and continue to be of the same force, authority and effect in each of the said provinces respectively, as if this Act had not been made, and as if the said province of Quebec had not been divided; except in so far as the same are expressly repealed or varied by this Act, or in so far as the same shall or may hereafter by virtue of and under the authority of this Act, be repealed or varied by His Majesty, his heirs or successors, by and with the consent of the legislative councils and assemblies of the said provinces respectively.

Before the Act was introduced in Parliament a draft of it was sent to Lord Dorchester, Governor in Chief of Canada, for his inspection and comment.[4] A clause was left in blank "for the insertion of such commercial regulations, if any, which it may be thought expedient to introduce as exceptions to the Canadian laws respecting property and civil rights". No such exceptions were made in the Act. I deduce that at the time of the passing of the Act commercial matters as well as non-commercial matters were understood to come within the expression "property and civil rights," and that this condition continued after the passing of the Act.

[4] See Annex 4 of *Report to the Senate* pp. 19 and 20.

The Legislature of Upper Canada, at its first session, held in 1792, passed an Act (*inter alia*) "to introduce the English law as *the rule of decision in all matters of controversy relating to property and civil rights*," repealed thereby for Upper Canada the enactment of the Quebec Act (that "in all *matters of controversy relative to property and civil rights* resort shall be had to the laws of Canada as the rule for the decision of the same") and enacted that—

> the authority of the said laws of Canada, and every part thereof, as forming *a rule of decision in all matters of controversy relative to property and civil rights*, shall be annulled, made void, and abolished throughout this province (of Upper Canada), *and that the said laws, nor any part thereof as such, shall be of any force or authority within the said province, nor binding on any of the inhabitants thereof.* (*Section 1 of the Act.*)

The same Legislature having thus—

1. Repealed the statutory provision which had made the laws of Canada the rule of decision "in all matters of controversy relative to property and civil rights"; and
2. Enacted that the authority of "the said laws of Canada" as a rule of decision "in all matters of controversy relative to property and civil rights" should stand null, void and abolished throughout the province,

enacted an additional provision the effect of which is not readily apparent on a quick reading of the Act. It is as follows—"*and that* the said laws (meaning the laws of Canada), nor any part thereof as such, shall be of any force or authority within the said province, nor binding on any of the inhabitants thereof". The word "neither" seems to have been accidentally omitted after the word "that," at least according to our present-day style, but the meaning of the provision is plain in any event. Imagine the words "Be it enacted &c." before the word "that" (the section so commences) and it is plain that the words quoted above are general and not restrained in their effect by the previous provisions relating to the rule of decision in matters of controversy relative to property and civil rights.

I think that the terms of the section indicate, so far, that in the mind of the legislature of Upper Canada in 1792, as in the mind of the Parliament of England in 1774, the expression "property and civil rights" did not embrace the whole field of

the civil law of Canada. I have before suggested that what I have termed civil rights existent as between subject and subject alone come under that expression. I am not attempting, as yet, to consider to what consequences that suggestion leads.

However, section one of the Upper Canada Act of 1792 having enacted as mentioned, Upper Canada would be, unless further enactment followed, a country devoid of a very important branch of civil law. It was conquered territory. The laws of England did not automatically attach themselves to its inhabitants although these were, almost to a man, British subjects. These things must have been present to the mind of the Legislature. Assume, as we must, that they were and let us note what the legislature considered to be sufficient additional legislation to equip the province with a complete system of civil laws, applying as between subject and subject. There were some English civil laws remaining in force. I have called them civil laws of a *public* character. At any rate, the Legislature seems to have thought that there were some civil laws of some kind in force, for they enacted section three of the Act and it is the foundation upon which a large part of the existing civil law system of Ontario is built. Section three is as follows—

> From and after the passing of this Act, in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of England as the rule of decision of the same.

Save a provision in section six that the Act is not to "introduce any of the laws of England respecting the maintenance of the poor or respecting bankrupts," and section five, which applies "the rules of evidence established in England," the Act contains nothing taking from or adding to the quoted section three. I take it from all this that by "civil rights" in the statute of 1792 was meant civil rights as above described. What I have called "public law" was *in force*. No enactment was passed relating to it.

When, in 1840, the provinces of Upper Canada and Lower Canada were re-united, the first section of the Union Act was prefaced by a recital that it was "necessary that provision be made for the good government" of the two provinces "*in such manner as may secure the rights and liberties* and promote the interest of all classes of her Majesty's subjects within the same." The only section of the Act relevant to the immediate enquiry is section 46, which saves in continued operation all laws existing

in Lower Canada and Upper Canada, respectively, with the courts, officers &c. as of the date of Union. Let us look back and note what were the bases of these laws and, in a general way, what kind of laws they were.

First, as to Lower Canada. The Quebec Act (1774) had confirmed the inhabitants of Lower Canada in the ownership and possession of their property and possessions. Technically, a conqueror might, by express action on his part, forfeit and take to himself all or any of the property and possessions of all or any of the conquered inhabitants. The Act had quieted all fears in that regard. It had also confirmed to them their civil rights and enacted that controversies concerning such civil rights, including rights relating to their property, should be decided by the courts pursuant to *the laws and usages of Canada*. Technically, a conqueror might, by express action on his part, impose upon conquered inhabitants his own laws and deny them any rights, even the *benefit* of the new laws imposed, unless upon sufferance; but by the year 1774 the former practice of forfeiture of property and imposition *in toto* of the conqueror's laws had fallen into disuse among the more highly civilized nations. Notwithstanding the last stated fact, however, indubitable oppression amounting to bad faith had been practised in Canada, owing to a mis-reading therein of the Royal Proclamation of 1763, and it was thus necessary to restore the honour of Great Britain by way of express statutory grant to the inhabitants of Canada of those civil rights, including *property rights*, which international law held *ought not* to be taken away from them, at large, by a conqueror. My own view is that the Canadians had never legally lost them — that everything done towards taking them away was illegally done. So much as to the Quebec Act. It was one of the laws which, in 1840, by virtue of section 46 of the Union Act was, except to the extent amended, in force and continued as law of the Union. Also the whole "public law" of England was in force. Within it I would include the criminal law and laws relating to Crown Practice, the courts and procedure therein, the rules of evidence (English law as to evidence was actually introduced in 1785; see Con. Stat. L. C. c. 82, sec. 17) and, in general, all laws except those which relate to controversies and dealings between subject and subject, as distinguished from sovereign (or state) and subject. With the exception aforesaid all these fields of law fell properly under the law of England. Also, of course, there were such Imperial statute laws, other than the Quebec Act,

as had been enacted and remained in force, and all surviving legislation of the Parliament of Lower Canada.

Second, as to Upper Canada. The laws in force at the union of 1840 would be, *mutatis mutandis*, the like of those in force in Lower Canada. The point of distinction would be that the "property" laws and the "civil rights" laws of Lower Canada would be governed by the ancient law of Canada and the "property" laws and the "civil rights" laws of Upper Canada would be governed by the law of England. This was precisely what each of these provinces had contended for and secured, and to the mind of both Lower and Upper Canadian, doubtless, his most prized right was his right to have his *controversies* concerning his civil rights decided under the particular legal system of his ancestors.

If, in 1840, the Imperial Parliament, had desired to deal with the matters of property and civil rights specially, instead of, as it did, by continuance in general terms of all existing laws in Lower Canada and Upper Canada, respectively, it could fittingly have done so in the following terms—

> The legislature may make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:
>
> 1. Property
> 2. Civil rights.

When, in 1867, the Imperial Parliament did desire to deal with those matters specially it enacted in the following terms—

> In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:
>
> 13. Property and civil rights.

Whatever "property" meant in 1774 it would mean the same in 1791 and 1840. Whatever "civil rights" meant in 1774 it would mean the same in 1791 and 1840. Would it necessarily mean the same in 1867? Upper Canada's history and Lower Canada's history, so far as the expression "property and civil rights" is concerned, had been the same. It meant to both of them, I am convinced, the same thing, for Upper Canada was statutory heir to it, and by voluntarily using it, knowing the meaning that had been attached to it, Upper Canada accepted and adopted that meaning.

Whether, in 1867, the commercial law (as that term is known in, and for the purposes of the Civil Code in force in, Quebec) came within the expression " civil rights " has been doubted. It does not appear under the head of civil rights in the Civil Code of Lower Canada, but under a head of its own. The codifiers indicate it as being something outside the civil law. Thus—

> In a few instances the rules of the commercial law may be found in the statute book or in the ordinances of France, but much of it is to be sought in usages and jurisprudence. Our system, if system it may be called, has been borrowed without much discrimination, partly from France and partly from England; it has grown up by a sort of tacit usage and recognition, without any orderly design or arrangement, and has not yet received any well designed or symmetrical form from the decisions of our courts. (See Commissioners' Reports V. 3, p. 214.)

As to commercial matters the laws of most countries are practically the same. The "law merchant," which has an international character, has become recognized as part of the law of England, so Quebec had found it easy to accept in course of time much of those branches of English law which fell under the title "commercial matters".

I am inclined to think that the question whether what were technically " commercial matters " came within the expression " civil rights " is now immaterial, because all or practically all "commercial matters," as that term should be construed in Quebec, which might have come within the expression "civil rights," are now enumerated as matters of Dominion jurisdiction under section 91 of the B.N.A. Act.

The Provinces Generally

In view of the importance attached and the scope given by the Judicial Committee to these two words "civil rights" it is, I think, curious, and somewhat enlightening, that in the thousands of pages of Confederation Debates in the three confederating provinces of Canada, Nova Scotia and New Brunswick not a dozen lines relate to this now tremendous local power. Hon. Mr. Cauchon (at the Quebec conference) asked whether the civil rights provisions ought not to include Marriage, which appeared in the central government powers. No answer was given at the time, but at London, two years after, "Solemnization of Marriage" was transferred from the Dominion powers to the

provincial, and in the earlier drafts of the B.N.A. Act it appeared added to the words "Property and Civil rights". It was afterwards specially enumerated. There was no discussion at all of the effect of the words "Property and Civil Rights" in Nova Scotia or New Brunswick.

There was, however, discussion during the Confederation Debates over section 94 of the B.N.A. Act. That section also relates to property and civil rights, and from that discussion we may gather, possibly, what kind of rights Macdonald and the other delegates to Quebec had in mind when they used the term "civil rights." Here is the section.

> 94. Notwithstanding anything in this Act, The Parliament of Canada may make Provision for the *Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick*, and of the Procedure of all or any of the Courts in those Three Provinces, and *from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted;* but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Section 94, in the Quebec and London resolutions and in the first drafts of the B.N.A. Act drawn by the London Conference, formed part of what is now section 91 of the Act. It was one of the Dominion's enumerated legislative powers. That is to say, it had been part of a section which was dealing with *the enactment* of laws — the making of statutory law. For example — this is how it appeared in an early "rough draft," so called, of the conference:—

> 36. The Parliament shall have power to *make laws respecting* the following subjects:—
>
> 32. Rendering uniform all and any of the laws relative to property and civil rights in Upper Canada, Nova Scotia and New Brunswick and rendering uniform the procedure of all or any of the courts in these provinces; but any statute for this purpose shall have no force or authority in any province until sanctioned by the Legislature, and when so sanctioned the power of amending, altering or repealing such laws shall thenceforth be vested in the Parliament only.

Now, remembering that Quebec is excluded from the operation of the preceding draft (as that province is excluded from the operation of section 94 of the B.N.A. Act) and that all three provinces to be affected by the draft (and by section 94) at confederation were English common law provinces, there

would have been no necessity to render uniform the *unwritten* laws relative to property and civil rights. They were already uniform. Accordingly, the "laws" in mind which were to be made uniform, as referred to in "head" 32, above (and in section 94 of the B.N.A. Act) were, as were the "laws" which were to be *made* as mentioned in section 36 of the draft above, *statute laws*, although, unquestionably, in the process of enactment of the uniform laws there would be nothing to prevent part codification of the common law to enable production of a well-rounded statute. Even the Criminal Code of Canada is not a complete code. Much of the common law as to crimes remains outside, uncodified.

That this was the understanding and intent — that the "laws" in mind were *statute laws in relation to civil rights, to be enacted* — is apparent from the following extract from the Confederation debates in the Canadian Legislature in 1865:—

> *John A. Macdonald*: ". . . although, therefore, a legislative union was found to be almost impracticable, it was understood, so far as we" *(the delegates at Quebec)* "could influence the future, that *the first act of the confederate government should be to procure an assimilation of the statutory law of all those provinces*, which has, as its root and foundation, the common law of England."

All the provinces concerned, it seems, were agreed that the Dominion should have jurisdiction, at large, to enact concerning the uniformity of property and civil rights laws, but subject to provincial approval. At the time (1864) the provincial representatives of the concerned provinces favoured an intent that "the first act" of the now Dominion should be the achievement of assimilation of the property and civil rights laws of the English common law provinces, whereafter the now No. 13 of section 92, as it was understood in 1865-66, was to become (so far as the English common law provinces were concerned) *pro tanto* spent.

In No. 1 of Joseph Howe's "Letters to the People of Nova Scotia," dated April 20th, 1871, and appearing in vol. 2 of Sir Joseph Chisholm's "*Speeches and Letters of Joseph Howe*," the latter said, with relation to section 94 of the B.N.A. Act, that

> By the British North America Act it was provided that an effort should be made to make uniform the laws of the English-speaking provinces and it was naturally suggested that the Attorneys-General of the provinces would be the proper persons to accomplish this work and Mr. Wilkins (Attorney-General for Nova Scotia) was asked if

he would serve. But it was soon found that the policy of assimilation required the sanction of all the local legislatures and that before it could be entered upon with advantage a vast amount of preliminary work must be done. Colonel Gray was selected to do this and the project of a joint commission was indefinitely postponed.

Quebec was out. It had just completed a Code of civil laws that either already *contained* such property and civil rights laws as the province desired, or, if not, then the Code could be, in that respect, amended by Quebec after confederation.

As to the English common law provinces, they could codify all their *property laws*. There would be no difficulty (or so *they* thought) in identifying what was a "law" (that is a statute) "in relation to property". It would be one that directly concerned property. As to *civil rights laws* the English common law provinces might have a *different conception of what is the most just rule of decision when applying a civil rights law* from that of the province of Quebec, but that would not matter. It was because of such differences in legal conceptions that section 94 was being enacted as between the English common law provinces *only*. Court procedure laws were also to be codified, if agreement could be had. These are entirely statutory. Thus section 94 looked principally to the unification of the statutory property, civil rights and procedure laws of the three provinces.

Section 97 of the B.N.A. Act reads that —

> Until the *laws relative to property and civil rights* in Ontario, Nova Scotia and New Brunswick, and the procedure of the Courts in those provinces are made uniform, the Judges of the Courts of those provinces appointed by the Governor-General shall be selected from the respective bars of those provinces.

In the Quebec (Res. 34) and London (Res. 34) Resolutions, and in all the drafts of the B.N.A. Act up to the "Final Draft" as printed in Pope's *Constitutional Documents* the precursory provisions which result in section 94 read that "*Until the consolidation of the laws of Ontario, etc.,*" instead of "*until the Laws relative to property and Civil Rights of Ontario, etc.*" Macdonald had tried hard to achieve a legislative union or one as close as possible to it.

Recurring to the absence of discussion concerning the Resolution which resulted in section 92, head 13 — "Property and civil rights in the province," that, too, would relate itself, in the mind of a delegate or a member of a legislature in 1864

or 1866 to *the making of statutory laws*. That was what sections 92 and 94 alike were for — to authorize the enactment of statutes. There would be nothing to discuss. All were agreed. That the simple scheme of distribution of legislative powers which they had conceived would, by now, have become, by judicial decree alone, what it now is they could not have foreseen nor would they have believed. They had provided, as they thought, that all "general matters" whatsoever would be enacted by a central Parliament and only local or provincial "matters" by the provincial legislatures.

Now note the manner and words in which and whereby a *settled* province clothes itself with common law and other jurisdiction.

In 1871, shortly before British Columbia entered confederation, that colony enacted, by No. 70 of 34 Vict. (applying to the united colony a provision which the Governor had by Proclamation of 19th November, 1858, put in force in the Mainland Colony), as follows—

> *The civil and criminal laws of England*, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the colony of British Columbia.[5]

In 1874, by 38 Vict., c. 12, the Manitoba legislature enacted that—

> The Court of Queen's Bench shall decide and determine all matters of controversy relative to *property and civil rights* according to the laws existing, or established and being in England, as such were, existed and stood on the 15th day of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province.

The statute exhibits the situation of to-day, whatever it may be, in Manitoba.

In 1886 (see R.S.C. 1886, c. 50, sec. 11) the Dominion enacted as to Rupert's Land and the North-Western Territories that,

> the laws of England relating to *Civil* and criminal *matters*, as the same existed on the 15th day of July, 1870, shall be in force in the Territories in so far as the same are applicable to the Territories,

[5] Nova Scotia, New Brunswick and Prince Edward Island are also *settled* provinces. The expression "property and civil rights," therefore, has played no part in their *ante* 1867 history. But Ontario and Quebec settlers carried that expression into Manitoba, made up of lands settled in 1670.

but subject to such alteration therein as had been, since, completely made. Previously the law in force was that of the date of the Hudson Bay company's charter — 1670.

In 1888 "to remove doubts" the Dominion statute 51 Vict., c. 33, was enacted, as follows—

> The laws of England relating to matters within the Jurisdiction of the Parliament of Canada, as the same existed on the 15th July, 1870, were from the said day and are in force in the Province of Manitoba, in so far as the same are applicable to the said provinces, and in so far as the same have not been and are not hereafter repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the said Province, or of the Parliament of Canada.

Manitoba had been carved out of the territories in 1870. The Dominion Act, of course, could not apply beyond its terms. In *Sinclair* v. *Mulligan*, 5 Man.R. 17; 3 Man.R. 481, Taylor C.J. said that until 1870, when Manitoba was constituted as a province, the law of England of 1670 was the law in force in the territory which in 1870 became Manitoba, "and indeed," he added,

> except as to matters which have been dealt with by the Dominion Parliament or which are within the jurisdiction of the provincial legislature and have been dealt with by it, that is the law of this province at this present day.

Application of Section 92 (13) of the B.N.A. Act

Section 92 of the B.N.A. Act does not assign to the provincial legislatures general jurisdiction over any *field of law*. The Judicial Committee, in *Dobie* v. *Temporalities Board* (1882), 7 App. Cas. 136, ruled, consonantly with the terms of section 129, that the powers conferred by that section are "precisely co-extensive with the powers of direct legislation with which these bodies (the legislatures of the provinces) are invested by the other clauses of the Act of 1867." The Board means by "the other clauses" all the clauses of Part VI of the Act, being those which distribute *legislative jurisdiction*. It is, therefore, superlatively important to measure the precise extent of such *legislative powers* as, by section 92, are assigned to the provinces, for, by the precise terms of section 91, the residuum of those *legislative powers* is in the Dominion Parliament and section 92 is, by reference, made the means of measurement of the extent of that residuum.

Accordingly, it is an error to say that the Act commits to the provinces general jurisdiction over, for example, property and civil rights, as a class or field of *law*. Section 92 limits the exclusive provincial *legislative power* as follows:—

> 92. In *each* province the legislature may *exclusively* make laws in relation to *matters coming within the class of . . . . . property and civil rights in the province.*

That is the *kind* of a law *in relation to* a matter coming with the expression " property and civil rights " that *a province*, if we regard only the *text* of the Act, apart from judicial decisions, may enact. There is a residuum. *Each* province is confined to the making of property and civil rights laws for *that* province. The limitation is territorial. There is a gap left, incident to the fact that *each* province is a component part of a confederacy. Legislative power in relation to property and civil rights in a provincial aspect — " from a provincial point of view " — has been covered, but, especially if we attribute to the expression "property and civil rights" a wide meaning —a broad scope—there can be, and we know that there are, such things as property and civil rights in a Dominion aspect that may require that laws be made *in relation to* them in that aspect, which laws no province can enact, for the territorial limitation, if nothing else, prevents.

Every class of section 92 has its limitation. In most cases it is territorial. In some it is otherwise. For example, in class No. 11 — the incorporation of companies *with provincial objects* — the limitation is in the italicised words. Here, too, there is a gap, for there *can* be companies with Dominion objects. Section 91 contains no enumerated power enabling the ncorporation of a company by Act of Parliament. But this fact does not stand in the way, because section 91 having authorized the Parliament of Canada 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,"* that Parliament necessarily has authority to incorporate companies with *other* than provincial objects. This was first decided by the Judicial Committee in the *Parsons Case* (1881), 7 App. Cas. 96, which has been since, several times, approved and followed. The jurisdiction is attributed solely to the residuary clause of section 91.

There is a gap also in the case of class 3 of section 92—the borrowing of money on the *sole* credit of the province. Can there be any doubt that in the case of a Dominion guaranteed provincial loan any necessary legislation must be that of the Dominion Parliament under the residuary clause of section 91?

Many of the enumerated classes of section 91 relate to property and civil rights and this fact alone is sufficient to shew that section 92 (13) contemplates no more than what it so precisely says, that each province may *exclusively* make laws of merely provincial scope in relation to property and civil rights. I suggest that when this provincial power is fully exercised a gap remains and that all legislative power to enact property and civil rights laws — except and other than power to enact such laws in a provincial aspect in relation to property in *each* province — (e.g. such laws as may be enacted in a Dominion aspect for all, or for more than one province) resides in the Dominion Parliament. Such a construction, although logical, is, I freely admit, one that offers to the Dominion temptation towards abuse, but I have several further suggestions as to this. In the first place the opportunity for abuse would not be as great as, off hand, it seems. The doors of the courts remain open. The courts have not shewn any lack of disposition to resist, nor experienced any difficulty in preventing any improper assumption or seizure of power, or any indirection of action, accidental or designed, of either Dominion or provinces. With specific reference to section 92 (13) — "Property and civil rights in the province" — the danger of abuse is no greater than it is with relation to any other class enumerated in that section. Consider the history of its companion class 92 (16)—"Generally, all matters of a merely local or private nature in the province." It has been open to abuse all along but it has not been abused, for the reason that it has been recognized that, saving the effect of the final paragraph of section 91 of the Act, matters which are in pith and substance of a local or private nature are of exclusively provincial cognizance. There is no reason to fear that if there were frank recognition that Confederation was founded and the B.N.A. Act enacted upon the principle that matters of Dominion import are within exclusively Dominion cognizance and matters of provincial import are within exclusively provincial cognizance, that any abuse of power will result. It will still be the function of judicial tribunals to separate the wheat from the chaff, the sheep from the goats. With direct relation to property and civil rights,

recognition that laws relating to matters coming within that class can be of Dominion import as well as of provincial import will not tie, but will loose, the hands of justice. The Dominion Parliament neither seeks nor needs, in order to make laws for the peace, order and good government of Canada, *legislative authority to enact laws directly relating to property, or laws directly relating to civil rights, in a province.* The power to enact such laws is, and should strictly remain, in the provinces. The Dominion's complaint is that its legislative power has been emasculated by the denial of the right to enact under the residuary, or "peace, order and good government clause" of section 91 of the B.N.A. Act so as to *"affect"* or to "trench upon" section 92 (13) "Property and civil rights in the province." The Dominion urges that if it is to legislate at all under its general powers it must by any law enacted for the Dominion *affect* and *trench upon* section 92 (13) in every province, and that the text of the B.N.A. Act only withholds from it the power to make laws in *direct relation* to property and civil rights in a province. For example, the *Snider (Industrial Disputes Investigation Act) Case,* [1925] A.C. 396. It was enacted from a Dominion point of view, as truly as was the Canada Temperance Act, in the interest of the public order and welfare of Canada. (See *Russell* v. *The Queen* (1882), 7 App. Cas. 829, and *Provincial Prohibition Case,* [1896] A.C. 348). It was destroyed by the Judicial Committee because of its necessarily incidental affecting of private rights of contract. It was not a law that could be described as one *in relation to* civil rights, or one *in relation to* contracts. But it *affected* contracts, hence it *affected* civil rights, and that was held to be enough to warrant its destruction. Other like cases could be cited. Compare the fate of the Industrial Disputes Investigation Act with the intent and aims of the framers of the B.N.A. Act, as expressed by the Colonial Secretary, Lord Carnarvon, in support of the B.N.A. Act in the House of Lords in 1867, who said—

> The real object which we have in view is to give to the Central Government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the provinces; and at the same time, to retain for each province so ample a measure of municipal liberty and self-government as will allow, and indeed compel, them to exercise those local powers which they can exercise with great advantage to the community.[6]

[6] These words appear almost *verbatim* in the decision of Lord Sankey L.C. in the *Aeronautics Case,* [1932] A.C. 54.

He added that—

> It will be seen under the 91st clause that the classification is not intended 'to restrict *the generality' of the powers previously given* to the Central Parliament and that those powers extend to all laws made for the peace, order and good government of all the Confederation.

I plead for a proper construction and fearless application of the precise terms of the Act, unaffected by the bugaboo of possible abuse by the Dominion of the legislative powers which, as a result of that proper construction of the terms of the Act, may be found to have been distributed to the Dominion Parliament.

I would like to make plain what I mean by abuse of power. I do not mean the invalid *assumption or seizure of power*, or such indirection of action as that of the Dominion which was held to have failed in the *Reciprocal Insurers' Case*, [1924] A.C. 328, or of a province, which was held to have failed in the *Alberta Taxation of Banks Reference*, [1939] A.C. 117. There are several other like cases.

What I have in mind is the argument in some of the decisions that what seems plainly to vest in the Dominion or in a province a particular legislative power cannot be held to have done so, because if it be held that it has done so the Dominion or the province, as the case may be, if it proceed unwisely to exercise the power to its full possible extent, in other words, to abuse the power, can put the province or the Dominion, as the case may be, at a disadvantage.

On the *Reference as to Questions to Courts*, [1912] A.C. 571, Earl Loreburn L.C. said that "whatever belongs to self government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act; that it certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self government and obviously bestowed by the British North America Act. Indeed it might ensue from the breach of almost any power."

In *re Alberta Taxation of Banks* (*supra*) the Judicial Committee explained *Bank of Toronto* v. *ambe* (1887), 12 App. Cas. 575, as follows—

> Its true meaning may be appreciated by stating in effect the argument to which it was addressed in the following form: 'A bank is an institution which comes within the words of section 91 (15). To tax a bank with sufficient severity would destroy it. Therefore

the province cannot tax a bank at all.' The answer of the Judicial Committee in substance was no more than this: 'You are asking the Board to imply in section 91 a proviso to the effect that if a power expressly given to the provinces is capable, by a particular and unusual application, of infringing a power given to the Parliament of Canada, then no similar use of the provincial power, however moderate, can be permitted under any circumstances. The answer is that the legislature in passing the British North America Act did not assume that a misuse of the provincial powers was likely to occur and accordingly had to be provided for. No such proviso can therefore be implied.' It was never laid down by the Board that if such a use was attempted to be made of the provincial power as materially to interfere with the Dominion power, the action of the province would be *intra vires*.

After citing from *Bank of Toronto* v. *Lambe* (*supra*) the Board concluded by observing that—

> This proposition is no more than what was stated in precise terms by Davies J. in the case of *Abbott* v. *City of Saint John* (1908), 40 Can. S.C.R. 597 at p. 606, when he observed:
>
> > 'Time and again the Judicial Committee have declined to give effect to this anticipatory argument or to assume to refuse to declare a power existed in the legislature of the province simply because its improvident exercise might bring it into conflict with an existing power of the Dominion.'

In *Bank of Toronto* v. *Lambe* (*supra*) it was contended that it ought not to be held that a province could tax a bank, because the unrestricted power to tax involved the power to destroy by taxation. The Judicial Committee met the argument as follows—

> Their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self government on great countries such as Quebec it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. . . . But whatever power falls within the legitimate meaning of classes 2 and 9 is, in their Lordships' judgment, what the Imperial Parliament intended to give, and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construction of the Federal Act.

Such a contention, said the Board, would—

> allow no power to the provincial legislatures under section 92 which may by possibility and if exercised in some extraordinary way, interfere with the objects of the Dominion in exercising their powers under section 91. . . . And the question that they [the Board] have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a

> legislative power falls within section 92 it would be quite wrong of them *to deny its existence because of some possibility it may be abused or may limit the range which otherwise would be open to the Dominion Parliament.*

The preceding observations, which, of course, have *vice versa* operation, as well, are confirmed by the Board in *A. G. for British Columbia* v. *Kingcome Navigation Co.*, [1934] A.C. 45.

I am, of course, aware that my suggested proper construction and application of section 92 (13) of the Act is in conflict with quite a number of the decisions, notably with Lord Watson's decision in the *Prohibition Case*, [1896] A.C. 348, but this article does not purport to state the law. It is a reprint of part of my report to the Senate, made in compliance with a Senate Resolution which called for my opinion, regardless of decided authorities. The Senate, with the possibility of amending the B.N.A. Act in mind, did not ask — What do the decisions say? It asked — What do you think that they ought to have said, in view of the text of the Act?

I think that in the *Prohibition Case (supra)* Lord Watson *legislated* for Canada and that a proper construction of the B.N.A. Act in accordance with its terms disposes of the fears expressed by him in that case as to the danger of destruction of the autonomy of the provinces if the residuary clause of section 91 of the B.N.A. Act be given what I contend, upon the text of the Act, is its plain effect, and I fail to appreciate the logic of an actual partial destruction of the autonomy of the Dominion by reason of fear that if that Dominion autonomy be not destroyed the Dominion may destroy the autonomy of the provinces. Such reasoning would justify the murder of someone, lest if he be not murdered he become a murderer.

If there be conceded to the Parliament of Canada for Dominion purposes legislative authority over that residuum of the fields of "property" law and "civil rights" law which remains after *legislative authority* over the same fields *"in the province"* has been distributed to the provinces, then, unless the Parliament of Canada proceed to enact laws, *not* for the peace, order and good government of Canada *in relation to* property or civil rights (that is laws as to property not in Dominion aspects, or as to civil rights not in Dominion aspects, but laws *in relation to* property or to civil rights in the province such as the province itself might enact), there would be no invasion of any provincial *field of legislation*, and, I repeat, neither section 91 nor section 92 distributes any *field of law*.

A valid Dominion statute might incidentally affect property and civil rights in the province, as occurs now in the case of legislation under an enumerated power of section 91, but such incidental affecting under the residuary or general Dominion powers could no more "destroy the autonomy of the provinces" than the like under the enumerated powers of the Dominion has destroyed it. Finally, admitting the possibility of attempted Dominion encroachment, the answer appears above, where I have cited and quoted from the decisions which show that the Dominion must be trusted as to that and if the Dominion abuses its statutory powers the Courts will restrain the abuse.

The introductory words of section 91 *themselves* exclude from Dominion cognizance all matters coming within the provisions of section 92, so, if the matters which Lord Watson had in mind in the *Prohibition Case* as "in substance local or provincial" were really so, then under no circumstances could the Dominion validly enact concerning them under purported authority of section 91[7] nor at all unless the matter in question "affected the interest of the Dominion as a whole" in the sense that the matter was *not* of merely local or provincial interest but of Dominion interest, in which case it would not "come within" section 92 at all, but the *enactment* relating to the *matter* would be, in the very words of section 91, a law made for the peace, order and good government of Canada, in relation to a matter *not coming within* the class of subject by the B.N.A. Act assigned exclusively to the legislatures of the provinces, that is to say, *not* coming within class No. 13 of section 92—"Property and civil rights *in the province*," properly construed.

Review of Authorities

I proceed now to a review of the decisions of the Judicial Committee of the Privy Council in "property and civil rights" cases. Of the seventy-one decisions extracted for Annex 3 of my report to the Senate, twenty-nine called for examination, as concerned with section 92 (13) of the Act, but not so many got it. However, I dealt with the most important of them as follows:

In *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96, counsel argued that the "Property and civil rights in the province" provision of section 92 of the B.N.A. Act (to which I shall hereinafter refer as section 92 (13)) conferred an exclusive

[7] This is what was wrong with the Dominion Licence Act of 1883. The Judicial Committee gave no reasons but the reasons are apparent.

right to create within the province rights of property and such rights as flow from the operation of law as the legislature of the province could exercise, without infringing a right in the Dominion Parliament, over contracts and the rights resulting therefrom. The contention was, I think properly, rejected. I think that section 92 (13) includes authority to make local laws in relation to rights resulting from contract but that it does not include exclusive authority over contracts or rights resulting from contract. The enumerated provisions of section 91, which abound in *ex contractu* subjects, afford enough proof of my point, and if I am right in my argument elsewhere[8] that these enumerations are mere instances of the character of legislative authority encompassed by the residuary, or peace, order and good government clause of section 91, that clause, too, shares with section 91 (2) authority over contracts and rights resulting therefrom. Nothing said in the *Parsons Case* conflicts with what I have just said. The Board did not need to define the meaning of section 92 (13) and did not do so. Indeed it said that it ought not to do so. It said, too, in effect, that if it erred in holding that the provincial legislation which it was supporting came under section 92 (13) then that legislation came, at any rate, under section 92 (16) as a merely local matter. My view is that in the result the case was rightly decided, but that it ought to have been expressly assigned to section 92 (16) and that the "matter" of the legislation involved was rather *obligation* imposed by locally applicable statute than *right*, civil or other. Neither the Dominion nor any province was represented at the argument.

In *Russell* v. *The Queen* (1882), 7 App. Cas. 829, the Board, in deciding, guided itself by "the aspect doctrine" which, in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, is expressed as follows—

> Subjects which in one aspect and for one purpose fall within section 92 of the British North America Act may in another aspect and for another purpose fall within section 91.

By "subjects" is meant *subject "matters" of legislation*, —not " classes of subjects." The latter are fixed by the statute in their places, whether in section 91 or 92. Note the "aspect" doctrine in action in *Russell* v. *The Queen*. The Board asks itself —What, in pith and substance, has the legislature dealt with by this law that it claims to have made? What is the class or character of this alleged law?

> Their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects "Property and Civil Rights." It has *in its legal aspect* an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs or of dangerously explosive substances. These things, as well as intoxicating liquors, can, of course, *be held as property*, but *a law* placing restrictions on their sale, custody or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed *a law in relation to property*, in the sense in which those words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is *not a matter in relation to property and its rights, but one relating to public order and safety*. That is the *primary* matter dealt with, and though *incidentally* the free use of things in which men may have property is *interfered with*, that incidental interference *does not alter the character of the law*. Upon the same considerations the Act in question cannot be regarded as legislation *in relation* to civil rights. In however large a sense these words are used it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property and certain acts in relation to property to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house, on the ground that such an act endangers the public safety, or to overwork his horse, on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation *in relation to* property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. Laws of this nature designed for the promotion of public order, safety or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have *direct relation to* criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada.

The intent and scope of *Russell* v. *The Queen* (*supra*) is summed up, by practically the same Board that decided that case, in *Hodge* v. *The Queen* (*supra*) as follows—

> The sole question there was, whether it was competent to the Dominion Parliament, *under its general powers to make laws for the peace, order and good government of the Dominion*, to pass the Canada Temperance Act, 1878, *which was intended to be applicable to the several provinces of the Dominion*, or to such parts of the provinces as should locally adopt it. It was not doubted that the Dominion Parliament had such authority, under section 91, unless the subject fell within some one or more of the classes of subjects which, by section 92 were assigned exclusively to the legislatures of the provinces.

Then the Board quotes approvingly from *Russell* v. *The Queen* the following:

> *The true nature and character of the legislation* in the particular instance under discussion must always be determined, in order to ascertain the *class of subject* to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that *the matter of the Act in question* does not properly belong to the *class of subjects* 'Property and Civil Rights' within the meaning of sub-section 13.

I ask attention to the fact that *Russell* v. *The Queen* and *Hodge* v. *The Queen* by precept and example apply the enumerated provisions of section 91 to the purpose of discovery, by legal interpretation of sections 91 and 92, whether a given enactment should, as between section 92 (13) and the general, residuary, "peace, order and good government" provision of section 91, be held to "come within" the latter, as a law enacted "in relation to" the latter, and that having decided upon "the aspect doctrine" that, because enacted in relation to, it *came within* the latter (which it *could not* if it had been taken out of section 91 by the words "may exclusively make laws *in relation to* . . . . Property and Civil Rights in the Province") the process of interpretation was complete and that no overriding of, overbearing of, or trenching upon section 92 was or could be thereby committed, the situation being, simply, that section 92 (13) was foreign material. I suggest that these cases imply, as I read section 91 to express, that the enumerated provisions of that section are provided "for greater certainty" as express instances of the scope of the opening words of section 91 and as limitations upon the scope of section 92 (16) which is the general law-making provision of section 92. See the final paragraph of section 91. If I am right the remedy for any grievance, from a Dominion standpoint, arising out of undue exaltation of the influence of section 92 (13) is not amendment of the terms of the B.N.A. Act, but proper interpretation of sections 91 and 92 by the Judicial Committee of the Privy Council.

The meaning of the expression "laws in relation to *property* in the province" needs no definition. The meaning of the expression "laws in relation to *civil rights* in the province" has never been defined. I would not attempt to place any restriction at all upon the authority of a province, acting *bona fide*, to define by statute what shall be civil rights in the province. After all, that is what section 92 (13) is for.

The complaint from the standpoint of the Dominion rests not so much upon erroneous ruling as to what is a *civil right in a province* as upon erroneous ruling as to what is a *law in relation to* a civil right, whatever civil right may mean, in a province. No principle of interpretation of the B.N.A. Act has had more consistent lip service than the "aspect" doctrine, but upon occasions it has been ignored. Let it have its proper effect always and, as was contemplated at confederation, the respective legislative authorities of the Dominion and the provinces will be nurtured and preserved by it. Failure to apply it defeats the intent of the B.N.A. Act. Pursuant to that doctrine if, in pith and substance, a *law in relation to* a matter that comes within section 91 has been enacted it will be, as it ought to be, assigned to section 91. Likewise, if, in pith and substance *a law in relation to* a matter that comes within section 92 has been enacted it will be, as it ought to be, assigned to section 92.[9]

Lord Watson may not always have paid due regard to the aspect doctrine, but no one has better applied it than he did in *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580. The contest was as to whether section 4 of the British Columbia "Coal Mines Regulation Act, 1890," which prohibits Chinamen of full age from employment in underground coal workings, was in that respect *ultra vires* of the provincial legislature. Specifically the point was whether the legislation was *in relation to* coal mining or *in relation to* Chinamen. The legislation, in its pith and substance, being found to be *in relation to* Chinamen, was held to be *ultra vires* of the province. Lord Watson stated :

> The provisions of which the validity has thus been affirmed by the courts below are capable of being viewed in two different aspects, according to one of which they appear to fall within the subjects assigned to the provincial parliament by section 92 of the British North America Act, 1867, whilst, according to the other, they clearly belong to the class of subjects exclusively assigned to the legislature of the Dominion by section 91, subsection 25. They may be regarded as merely establishing a regulation applicable to the working of underground coal mines; and, if that were an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature, by virtue either of section 92, subsection 10, or section 92, subsection 13. But the leading feature of the enactments consists in this—that they have

[8] In Annex 1 of *Report to the Senate*, pp. 18-51, under heading "Judicial Deviation from the Text of Section 91 of the B.N.A. Act."

[9] In applying that doctrine regard must be had, of course, to the *deeming* provision at the end of section 91, the sole intended office whereof is, in my opinion, to *deem* all legislation (although it be clearly of a *local* character) to be *general* legislation of Dominion import if it *otherwise* comes within any of the 29 enumerated classes of section 91.

> —and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the province of British Columbia.

The *Hamilton Street Railway Case*, [1903] A.C. 524, also involved the "aspect doctrine." The issue was as to the *intra vires* character of a Lord's Day Act of the Province of Ontario. The province supported the impeached Act as being one "dealing with property and civil rights under section 92 (13) of the B.N.A. Act 1867"; also as coming under section 92 (16) as "merely local or private matter". The Dominion opposed this argument by way of the "overriding" enumeration of section 91—The Criminal Law, etc. "The primary object of the Act was the promotion of *public* order, safety and morals, and not *the regulation of civil rights as between subject and subject.*" The Act was held to be *intra vires*. I would add that, in my opinion, upon the whole history of the expression "civil rights" in Canada, Dominion counsel was right in his argument in this case that that expression relates only to "civil rights as between subject and subject." Another excellent application of the aspect doctrine is presented by *G.T.Ry.* v. *Canada*, [1907] A.C. 65, known among lawyers as the "contracting out" case. The Railway Act of Canada having prohibited "contracting out" on the part of railway companies within the jurisdiction of the Dominion Parliament from the liability to pay damages for personal injury to their servants, Lord Dunedin, sustaining the legislation, said that—

> It is not disputed that, in the partition of duties effected by the British North America Act, 1867, between the provincial and the Dominion legislatures, the making of laws for through railways is entrusted to the Dominion.
>
> The point, therefore, comes to be within a very narrow compass. The respondent maintains, and the Supreme Court has upheld his contention, that this is *truly railway legislation*. The appellants maintain that, under the guise of railway legislation, it is truly legislation as to civil rights, and, as such, under section 92, subsection 13, of the British North America Act, appropriate to the province. . . .
>
> The true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but *whether this law is truly ancillary* to railway legislation. . . .

A case like in principle to the foregoing was *Proprietary Articles Trade Association* v. *A. G. for Canada*, [1931] A.C. 310, wherein Lord Atkin said—

> If then the legislation in question is authorized under one or other of the heads specifically enumerated in section 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in section 91 do affect property and civil rights but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers there is constitutional authority to interfere with property and civil rights. The same principle would apply to section 92, head 14, 'the administration of justice in the Province,' even if the legislation did, as in the present case it does not, in any way interfere with the administration of justice.[10]

It may be well, at this point, to interject that some (such as those preceding) of the decisions that I have been reviewing have ascribed paramountcy of Dominion legislation over provincial to the fact that the Dominion legislation was assignable to an *enumerated* head of section 91, and that if the fact had been otherwise, that is, if the Dominion legislation had had to be supported as against section 92 (13) upon the opening words of section 91—the residuary clause of that section—the provincial provision, section 92 (13), must have triumphed as against the Dominion section 91. This is so by reason of a sort of primacy or superiority of influence which the Judicial Committee has attached to the enumerated provisions of section 91.[11] I have, in my report to the Senate, disagreed, and given reasons for disagreeing, with that interpretation of section 91. For my immediate purpose, which is to demonstrate that the interests of both Dominion and provinces alike are served by the aspect doctrine, which operates notwithstanding what I believe to be collateral legal error, *any* kind of a decision in which that doctrine has been properly applied is as useful as any other kind of a decision. In my opinion, however, for so long as that primacy or superiority of influence to which I have referred (of the enumerated provisions of section 91 over the residuary—peace, order and good government—clause of section 91) continues, Dominion legislative authority will be restricted in frustration of the text of the B.N.A. Act.[12]

[10] These 1931 words of Lord Atkin are in conflict with his 1937 words in *The Weekly Rest Reference*, [1937] A.C. 326, as follows—"It would be remarkable that while the Dominion could not initiate legislation, however desirable, which *affected civil rights in the provinces etc.* . . . If the new functions affect the classes of subjects enumerated in section 92 legislation to support the new functions is in the competence of the provincial legislatures only." The 1937 words, perhaps, evidence no more than erroneous statement. But perhaps not. How are we to know?

[11] Annex 3, pp. 18 - 51 and 52 - 77 of *Report to the Senate*.

[12] *Paquet* v. *Pilot Corporation*, [1920] A.C. 1029; *Royal Bank* v. *Larue*, [1928] A.C. 187; *Weekly Rest Reference*, [1937] A.C. 326; *Re Farmers' Creditors Arrangement Act*, [1937] A.C. 391; *Re Trade and Industry Commission Act*, [1937] A.C. 45 and *Shannon* v. *Lower Mainland Dairy Products Board*, [1938] A.C. 708.

In the *John Deere Plow Company Case*, [1915] A.C. 330, Lord Haldane, after referring to the wisdom of deciding each case without indulging in unnecessary construction of the Act, said that

> this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words 'civil rights' in particular cases. An abstract logical definition of their scope, is not only, having regard to the context of sections 91 and 92 of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may, in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the *legislative attempt* of the Dominion or the province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and reality. *This may not be difficult to determine in actual and concrete cases.* But it may well be impossible to give abstract answers to general questions as to the meaning of words, or to lay down any interpretation based on their literal scope apart from their context . . .
>
> The expression 'Civil Rights in the Province' is a very wide one, *extending*, if interpreted literally, to much of the field of the other heads of section 92 and also to much of the field of section 91. But the expression cannot be so interpreted, and it must be regarded as excluding cases expressly dealt with elsewhere in the two sections, notwithstanding the generality of the words.

In 1916 the Dominion Government questioned (in *A.G. for Canada* v. *A.G. for Alberta*, [1916] 1 A.C. 588; and *In re Insurance Act of Canada*, [1932] A.C. 41) the Supreme Court of Canada, and ultimately the Judicial Committee, as to the legislative authority of the Parliament of Canada to license insurance companies. The Judicial Committee decided that the legislation in question (two sections of the Insurance Act of the Dominion) could not be supported under section 91 (2), the Regulation of Trade and Commerce, or under the only other possible provision of section 91, the residuary clause of that section, because it trenched upon the legislative authority conferred on the provinces by head (13) of section 92, to make laws in relation to "civil rights in the province." The Board said, *inter alia* that—"the principle illustrated by *Russell* v. *The Queen* (1882), 7 App. Cas. 829, that subjects which in one aspect come within the authority of the provincial Legislatures may in another aspect fall within the authority of the Dominion Legislature is well established but ought to be applied with great caution;" which observation, one that ought to apply to

every decision of every court, can have no effect upon the authority of the principle mentioned.

Viscount Haldane, for the Board, said—

> It must be taken to be now settled that the general authority to make laws for the peace, order and good government of Canada, which the initial part of section 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in section 92. There is only one case, outside the heads enumerated in section 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under section 92.

Could there be any better instance of the conditions produced by the complications judicially injected into the interpretation of section 91 than the words beginning with "There is only one case," above? The opening words of section 91 of the B.N.A. Act are—

> It shall be lawful for the Dominion Parliament 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 so far away from the text of that section have the decisions travelled that, following them, it needs to be demonstrated by the Judicial Committee that there is only one case in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under section 92. As I read the text of section 91, for *any* "matter" *ever* to come within that section it must (subject only to the *deeming* clause at the end of section 91) be one that "lies outside all of the subject-matters enumeratively entrusted to the province under section 92.

Application of the "aspect doctrine," which Lord Haldane attempted, instead, to subject to a discount, would have prevented such a wandering from the text of the Act. The wandering persists in the *Board of Commerce Case*, [1922] 1 A.C. 191, and in the *Fort Frances Case*, [1923] A.C. 695, it reaches the end of the road. Although half a dozen decisions of the Board had held that the distribution of legislative authority as between the Dominion and the provinces is *exhaustive*, Lord Haldane, and the Board following his lead, having foreclosed by previous

decision the possibility of reliance upon either the residuary clause of section 91 or the "Regulation of Trade and Commerce" provision of that section, must needs *add to totality* by basing upon an *implied* power for the safety of the Dominion as a whole, the Dominion authority to deal with a sufficiently great emergency, such as that arising from war, although in so doing it trenches upon property and civil rights in the provinces, from which subjects it is excluded in normal circumstances. In such emergent event, it was held, no provision of section 92 of the British North America Act, 1867, is repealed but a new aspect of the business of government emerges.

> It is clear says Viscount Haldane, that in normal circumstances the Dominion Parliament could not have so legislated as to set up the machinery of control over the paper manufacturers which is now in question. The recent decision of the Judicial Committee in the *Board of Commerce Case* ([1922] 1 A.C. 191), as well as earlier decisions, show that as the Dominion Parliament cannot ordinarily legislate so as to *interfere with* property and civil rights in the Provinces, it could not have done what the two statutes under consideration purport to do had the situation been *normal*. But it does not follow that in a very different case, such as that of sudden danger to social order arising from the outbreak of a great war, the Parliament of the Dominion cannot act under other powers which may well be implied in the constitution. The reasons given in the *Board of Commerce Case* ([1922] 1 A.C. 191) recognize exceptional cases where such a power may be implied.

Then, to such *implied* legislative authority of the Dominion, Lord Haldane proceeds to attribute an effect that the Board has over and over denied to the *express* residuary clause of section 91 — (the necessary source of *all* the legislative authority of the Dominion) — an authority *overriding* section 92 (13) "Property and civil rights in the province." Next he further complicates the law as follows—

> In the event of war, when the national life may require for its preservation the employment of very exceptional means, the provision of peace, order and good government for the country as a whole may involve effort on behalf of the whole nation, in which the interests of individuals may have to be subordinated to that of the community in a fashion which requires section 91 to be interpreted as providing for such an emergency. The general control of property and civil rights for normal purposes remains with the Provincial Legislatures. But questions may arise by reason of the special circumstances of the national emergency which concern nothing short of the peace, order and good government of Canada as a whole.
>
> The overriding powers enumerated in section 91, as well as the general words at the commencement of the section, may then become applicable to new and special aspects which they cover of subjects

> assigned otherwise exclusively to the Provinces. It may be, for example, impossible to deal adequately with the new questions which arise without the imposition of special regulations on trade and commerce of a kind that only the situation created by the emergency places within the competency of the Dominion Parliament. It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within section 91, because in their fullness they extend beyond what section 92 can really cover. The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the State as a whole. For it is not one that can be reliably provided for by depending on collective action of the Legislatures of the individual Provinces agreeing for the purpose. That the basic instrument on which the character of the entire constitution depends should be construed as providing for such centralized power in an emergency situation follows from the manifestation in the language of the Act of the principle that the instrument has among its purposes to provide for the State regarded as a whole, and for the expression and influence of its public opinion as such.

How much simpler it would have been to have returned to the simplicity of the text of the Act and declared that legislation in relation to paper control, being a subject matter not local, did not come within section 92, wherefore it came within the residuary clause of section 91. But previous error prevented.

The *Snider Case*, [1925] A.C. 396, involved the constitutionality of the Lemieux Act, relating to the investigation of industrial disputes. Ignoring the aspect doctrine, which would have required (preliminarily to the assignment of the legislation to *either* section 91 or 92) an answer to the question—What *kind* of an Act is this? In other words,—to what does its pith and substance *relate,* to the preservation of peace and order in and in the interest of the Dominion or to the civil rights as between subject and subject of individuals in a province, Viscount Haldane, for the Board, dealt with the case from the standpoint disclosed below—

> Whatever else may be the effect of this enactment, it is clear that it is one which could have been passed, so far as any Province was concerned, by the Provincial Legislature under the powers conferred by section 92 of the British North America Act. For its provisions were concerned directly with the civil rights of both employers and employed in the Province. It set up a Board of Inquiry which could summon them before it, administer to them oaths, call for their papers and enter their premises. It did no more than what a Provincial Legislature could have done under head 15 of section 92, when it imposed punishment by way of penalty in order to enforce the new restrictions on civil rights. It *interfered* further with civil rights when by section 56, it suspended liberty to lock-out or strike

during a reference to a Board. It does not appear that there is anything in the Dominion Act which could not have been enacted by the Legislature of Ontario, excepting one provision. The field for the operation of the Act was made the whole of Canada.

This "decision" is one that doesn't decide. Although the mere making of the field of operation of an Act the whole of Canada cannot establish it as one coming within the authority of Parliament (witness the Dominion Licence Act decision) the aspect of the legislation may be such as to stamp the Act as one which, in its nature, is not local, and *therefore* the Act is one coming within section 91.

Next in the history of the application of section 92 (13) to the facts of life there followed Lord Tomlin's four "propositions" stated in *A.-G. for Canada* v. *A.-G. for British Columbia*, [1929] A.C. 111.

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:—

(1) The legislation of the Parliament of the Dominion, *so long as it strictly relates to subjects of legislation expressly enumerated in section 91*, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by section 92: see *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31.

(2) The general power of legislation conferred upon the Parliament of the Dominion by section 91 of the Act *in supplement of the power to legislate upon the subjects expressly enumerated* must be strictly confined to such matters as are unquestionably of national interest and importance, and *must not trench on any of the subjects enumerated in section 92* as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348.

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation *expressly enumerated* in section 91: see *Attorney-General of Ontario* v. *Attorney-General for the Dominion*, [1894] A.C. 189; and *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348.

(4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Ry. of Canada* v. *Attorney-General of Canada*, [1907] A.C. 65.

The intimate relation of these propositions, which I have attacked at their source in my report to the Senate in Annex 1 at pages 35 to 50, is readily apparent.

Re Natural Products Marketing Act, [1937] A.C. 377 held invalid the Dominion Act for the reason that it extended to marketing wholly within a province, and its otherwise valid terms relating to foreign and interprovincial trade were not severable in the form in which the Act had been prepared. The Board held that purely provincial marketing came within section 92 (13). Rulings of the Judicial Committee to a like effect have now become so crystallized that it is but rarely that quotations from the decisions are informative or of interest. Even the powerful decision of Duff C.J. in the Supreme Court of Canada, which the Judicial Committee adopts, consists necessarily of little more than a marshalling of authorities binding upon the Supreme Court of Canada as previously decided by the Judicial Committee.

Finally, *Re Employment and Social Insurance Act,* [1937] A.C. 355, holds—

1. That the legislation in question, being in pith and substance an insurance Act *affecting* the civil rights of employers and employed in each province, was within the exclusive competence of the provincial legislatures under section 92 (13) of the British North America Act, 1867.
2. That that legislation did not purport to deal with, and could not be supported on the ground of, any *special emergency* arising from the degree of unemployment in Canada at the relevant date.

Lord Atkin, delivering the decision of the Board, said—

> There can be no doubt that *prima facie* provisions as to insurance of this kind, especially where they affect the contract of employment, fall within the class of property and civil rights in the Province, and would be within the exclusive competence of the Provincial Legislature. It was sought, however, to justify the validity of Dominion legislation on grounds which their Lordships on consideration feel compelled to reject. Counsel did not seek to uphold the legislation on the ground of the treaty-making power. There was no treaty or labour convention which imposed any obligation upon Canada to pass this legislation, and the decision on this question in the reference on the three labour Acts does not apply. A strong appeal, however, was made on the ground of the special importance of unemployment insurance in Canada at the time of and for some time previous to the passing of the Act. On this point it becomes unnecessary to do more than to

> refer to the judgment of this Board in the reference on the three labour Acts and to the judgment of the Chief Justice in the Natural Products Marketing Act which on this matter the Board have approved and adopted. It is sufficient to say that the present Act does not purport to deal with any *special emergency*. It founds itself in the preamble on general world-wide conditions referred to in the Treaty of Peace: it is an Act whose operation is intended to be permanent: and there is agreement between all the members of the Supreme Court that it could not be supported upon the suggested existence of any *special emergency*. Their Lordships find themselves unable to differ from this view. . . . If on the true view of the legislation it is found that in reality in pith and substance the legislation *invades* civil rights within the Province or in respect of other classes of subjects otherwise *encroaches* upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain. In the present case their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act *affecting* the civil rights of employers and employed in each Province, and as such is invalid.

The decision (apart from its invocation of Lord Haldane's "special emergency" doctrine and its "invasion" and "encroachment," and "affecting" lapses from the phraseology of the B.N.A. Act) leaves out of account the fact that the legislation was not, as in the ordinary case, a law whereby the Dominion Parliament purported to enact in compulsory regulation of the insurance business or of the persons in the various provinces who are engaged in that business or of other persons having dealings with persons engaged in that business. Civil rights in the province, I submit, are confined to civil rights as between subject and subject. The Employment and Social Insurance Act was one whereby and whereunder *the Crown*, in the right of Canada, *itself, via* the Commission route, *engaged in the insurance business*. In my report to the Senate I have suggested that the executive Government of Canada may, by virtue of prerogative right, engage in any business, and that the B.N.A. Act has not distributed to the provinces legislative jurisdiction over *the Dominion Crown in business*. The decision treats the legislation as if it were an ordinary Act enacted to control the insurance business of residents of the province and those insured. Every authority cited relates to others than the Crown in that business. Sections 91 and 92 of the B.N.A. Act do not purport to bind the Crown. The Crown has never assented to any Act depriving it, in Canada, of the right to engage in business for the benefit of the State. I submit that, legislative authority to enact laws in relation to the Dominion Crown in business not having been distributed to the provinces, that legislative

authority is necessarily in the Dominion Parliament, the distribution of legislative authority in Canada, as the Judicial Committee has many times ruled, being exhaustive.[13]

* * * *

The foregoing being a transcript of but one of several interlocking submissions made in my report to the Senate, I have to add (lest my views, to the extent above expressed, be not fully appreciated or be misunderstood) a relatively brief résumé of such other contentions appearing in that report as are relevant to the purposes of this article. The summary hereunder is founded solely on the text of the Act and I am to be understood as contending that to the extent to which the cases are out of line with the summary they are out of line with the text, to which the reader (assumed for the purposes hereof to be a victim of forty-five years of erroneous judicial interpretations of a few lines of print in section 91 of the Act) should constantly refer, not forgetting that the report summarized is one made to a legislative body, for legislative—not juridical—purposes.

SUMMARY

The later Privy Council decisions applying the expression "property and civil rights" have been shewn to be out of line with the pre-confederation history of that expression. They are, as far, out of line with the text of section 92 (13) of the B.N.A. Act, which is, in full, that—

> *In each province* the legislature may *exclusively make laws* in relation to matters *coming within the class* of subjects . . . . property and civil rights *in the province.*

It is easy to overlook the intended force and meaning of such expressions as "exclusively make laws" and "make laws *in relation to* matters" and "*matters coming within the classes* of subjects" and "property *in the province*" and "civil rights *in the province*", as they are used in section 92. The like is true of the phrasing of section 91. The reader is therefore invited, for the purposes of what follows, to read the two sections anew, as if for the first time, both "before and after taking".

[13] The decision of Sir Lyman Duff C.J. in the recently decided reference concerning appeals to His Majesty in Council seems to have been rested by him on this ground—that any legislative power not in a province is necessarily in the Dominion.

Section 92 of the B.N.A. Act merely grants to the *legislatures* of the provinces of Canada exclusive authority, as against the *Parliament* of the Dominion, to *"make laws"*, that is, to enact statutes, of a definite nature and limited scope. Neither under that section nor otherwise is there granted, to provincial legislatures or to the provinces themselves, any exclusive general jurisdiction over any *field* of law, as such. There are such things as the law of property and the law of civil rights. These laws may be admitted to include within their scope (*qua* property) devolutions and successions, and (*qua* civil rights) contracts and torts. Since a *sale* of property involves both a conveyance and a contract, the law of sales, we can admit, would come in part within both the property and civil rights fields of law. The fields, in the provinces except Quebec, are fields of the common law of England. That is to say, they come under the legal system of these provinces, which is something that parallels the B.N.A. Act, but which has not, as such, been brought within it. The legal systems of the provinces attach to the *inhabitants* thereof, subject to such legislation as may be enacted by a competent legislative authority. In the provinces other than Quebec the common law exists, extraneously to the Act, as a heritage of their inhabitants. In the province of Quebec the same is largely true, and such parts of the legal system of that province as do not come under the common law of England are assured, subject as aforesaid, to its inhabitants by Imperial statutes. Thus the situation is in all the provinces the same. *Legislative authority* over, for example, the common law, is exhaustively distributed by the B.N.A. Act *between* the Dominion and the provinces, as is made plain by the details of sections 91 and 92. Consequently, in each province its inhabitants have, with relation to the common law, dual rights and obligations (Dominion and provincial) and though its rules are alterable or abrogable pursuant to the distribution of legislative authority as between the Parliament and legislatures, the common law is so inherent with respect to the inhabitants, (heirs to it either through original settlement by British subjects or by statute) that upon repeal of an impairing or abrogating statute the impaired or abrogated common law rule *ipso facto* revives and reattaches to the inhabitants. In the province of Quebec, as already stated, much of the common law of England, civil and criminal, is, in addition to purely French law and Quebec statute law, as fully in force as in the other provinces.

So, necessarily, the "laws" (statutes) which the legislature of the province may *"exclusively* make" (enact) are only such

laws (so far as section 92 (13) of the B.N.A. Act is concerned) as are laws "in relation to *matters coming within* the class of subjects "property and civil rights *in the province*". That is to say, only (*a*) property laws and (*b*) civil rights laws, in their exclusively provincial aspects, come exclusively under provincial legislative authority. And, necessarily, in view of the opening words of section 91 of the Act, all other, if any, property laws or civil rights laws must be validly enactable by the Dominion. The words of section 91, defining Dominion authority, are—"to make laws in relation to all *matters not coming within* the classes of subjects by this Act assigned exclusively to the legislatures of the provinces". Section 91, when it thus refers to "classes of subjects . . . . assigned exclusively to the legislatures of the provinces" initiates a phrasing which re-appears in enumerated class 29 of that section and, as well, in the deeming clause, at its end.[14] The intended scheme of distribution of legislative authority provided by the text of sections 91 and 92 is, really, a very simple one. It is to assign, by section 92, to the provincial legislatures exclusive legislative authority in relation to such *subject matters of legislation as come within sixteen definite classes of subject matters* of legislation, and to assign by section 91 to the Parliament of Canada legislative authority in relation to all other *subject matters of legislation*. An Act *in relation to* a concrete subject matter that *comes within* a definite class must necessarily be, so far as it goes, an Act in relation to the class within which that subject matter comes. The B.N.A. Act fully classifies the legislative authority of the provinces but it does not attempt full classification of the legislative authority of the Dominion, to which it assigns simply such legislative authority as the provinces have not. Thus the authority of the legislatures is made the measure of the authority of the Parliament, and it will be shown later on that the authority actually granted by section 91 is as exclusive as that granted by section 92.

It is plain that in applying to consideration of the *intra vires* character of definite legislation a scheme of distribution of legislative authority such as that above described it is essential that, preliminarily, the nature of the legislation be determined, for if its nature be local it cannot be assigned to Dominion

[14] This clause may be so termed because although it actually prohibits the deeming within *section 92* of legislation which comes within any of the 29 enumerated classes of section 91, the *effect* of the prohibition, when applied to a matter of a local or private nature, is to deem it (although local or private in its nature) out of its natural place, section 92, and in section 91.

authority unless, although local, it be deemed (pursuant to the concluding words of section 91 of the B.N.A. Act) out of the operation of section 92 and into some class of subject matters enumerated in section 91. If error occurs in the determination of the nature of legislation, so that legislation essentially not local in its nature becomes assigned, say, to section 92 (13) as legislation in relation to property *in the province* or to civil rights *in the province*, the simple scheme of distribution of legislative authority provided by the Act will be frustrated in the particular case, but that will be through fault in the interpreting tribunal and not through fault in the scheme of the Act. To be a "law in relation to" a matter coming within the class "property", the law must answer the description of a *property law*. To be a law "in relation to" a matter coming within the class "civil rights", the law must answer the description of a civil rights law. This seemed so plain to the Fathers of Confederation that neither in conference nor elsewhere did they or any of them, so far as there is any record in the thousands of printed pages available, even discuss for as long as two minutes the phrase "property and civil rights in the province". That because a Dominion enactment in relation to *the business of insurance throughout Canada* incidentally affected or concerned *contracts* it could be held to be *a law in relation to civil rights in a province*—that for a like reason a Dominion enactment in relation to strikes and lockouts throughout Canada could be held to be *a law in relation to civil rights in a province*—would have been to them inconceivable. Laws primarily in relation to contracts in the province (they would have urged), laws such as Acts in relation to sales of goods in the province or Acts in relation to the law of consideration in the province will, of course, come exclusively under the law-enacting authority of the provinces as, in their nature, laws in relation to *civil rights in the province;* but (they would have conceded) there are many laws properly enactable by the proposed Dominion Parliament from a Dominion, and not a local, point of view, and for Dominion purposes, and these, although they be laws which affect or interfere with contracts in the provinces, will not be laws which conflict with the exclusive right of any provincial legislature *to legislate in relation to civil rights in the province*. They will not be laws *about* contracts, but about something else, possibly *affecting* contracts, but, if so, merely incidentally or subsidiarily.

Thus, determination of the true aspect in which any particular legislation is enacted should precede assignment of it to

either section 91 or 92. If, essentially, its aspect *is local to a province* and it does not come under the deeming clause at the end of section 91 it should be assigned to section 92. If, essentially, its aspect is *not local to a province* it should be assigned to section 91. But Dominion legislation, the subject matter whereof is essentially local (unless it is legislation such as comes within one of the enumerated provisions of section 91), cannot be justified merely on the ground that it produces uniformity or purports to extend to two or more, or all, provinces of the Dominion. The *nature* of Dominion legislation must be other than local or, *unless* as aforesaid, (in which case actually local legislation is to be *deemed* to be general in its nature) it will be *ultra vires*.

Several references having been made to the "deeming clause" of section 91, it is necessary (for a better understanding of the text of section 92) to examine the text of that clause and to note its implications.

The definiteness of the text of the first fifteen of the sixteen classes of section 92 was probably relied upon by "The Founding Fathers" as sufficient to prevent inadvertent invasion or attempted extension of legislative authority by either the Dominion or the provinces. The intentional indefiniteness of the text of the sixteenth *exclusive* "class" (which is an omnibus clause and not a class at all) on the other hand, seemed to invite, on the part of the provinces, at least inadvertent invasion of the Dominion field of authority.

Section 91 accordingly concludes as follows—

> And any matter coming within *any of the classes* of subjects enumerated in this section shall not be deemed to come with *the class* of matters of a 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 quoted clause (obviously, it is submitted, applying only to class sixteen of section 92, reading—"Generally, all matters of a merely *local or private nature* in the province") is now judicially held, so as to conform with other errors, to apply to *all sixteen* of the classes of section 92. So to apply, the clause should read—

> And *any matter* coming within any of the classes of subjects enumerated in this section shall not be deemed to come within any of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

It thus appears that by way of judicial legislation the following pregnant words have been boldly struck out of the clause, to wit—

> the class of matters of a local or private nature comprised in the enumeration.

Observe that, whether or not construed according to its grammatical meaning, the deeming clause of section 91 does not deprive section 92 (16) of exclusive legislative authority in relation to matters of a merely local or private nature which *do not come within* any of the twenty-nine enumerated classes of section 91 — viz. — matters, in fact of a local or private nature, which, if they were not such, would be capable of coming within the residuary clause of section 91. That is to say, section 92 (16) retains its exclusiveness, as to matters of a local or private nature, as against the residuary clause, read as if *minus* the twenty-nine enumerated classes, of section 91. Observe, also, that the *exclusiveness* of section 92 (16) so far as it goes, is as potent as that of any other of the enumerated classes of section 92. Is there, then, *concurrent* legislative authority of Dominion and provinces in relation to the multitude of "matters" of legislation which may "come within" the residuary clause of section 91 and class sixteen of section 92, respectively? There is not. The more one examines sections 91 and 92 the more soundly must one be convinced that, *according to the mode of distribution of legislative authority which section 91 adopts*, neither "concurrent" legislative authority, nor "overlapping" of legislative authority, nor "conflict" of legislative authority is *possible* if the *aspect* of the "matter" of legislation in question has been properly determined, and that confusion and doubt have ensued from judicial efforts to pervert the intention of section 91. The authority of Dominion and provinces alike is to legislate in relation to "matters" of legislation, some whereof can and others cannot *come within* defined classes of legislation. Sections 91 and 92 both contemplate precise enactments, *in esse* or *in posse*. To repeat in other words what has been already said, the exclusive legislative authority of the provinces is not over, say, property and civil rights, but to make laws which are such as to answer the description of "laws in relation to matters coming within the class of subjects — property and civil rights in the province." *Classes of subjects* may overlap but not "matters" of legislation. The latter, as precisely enacted or precisely conceived to be enacted, belong to, and, dependent upon the precise aspect of enactment, must be assigned to, section 91

or section 92, as the case may be, *exclusively*. To argue otherwise is to fly in the face of the Act, which assigns to the exclusive operation of section 92 "matters (of legislation) coming within" the sixteen classes of that section and assigns to section 91, with necessarily consequential and equivalent exclusiveness, all "matters (of legislation) not coming within" *those same classes of section 92*. Thus (except under sections 93 and 95 of the Act) concurrent authority to enact in relation to any specific *matter of legislation* can never reside, at the same time, in whole or in part, in both Parliament and a provincial legislature. Courts can, and do, err in locating the niche to which specific legislation, *in esse* or *in posse*, ought to be assigned, but that niche, nevertheless, as the only rightful home of the specific "matter," always awaits it.

Considerable further examination of section 91 (all relevant to interpretation and application of section 92, class 13, beclouded, as it has become since written, by case law) is still necessary.

Section 91 is divisible into four parts — (1) The residuary clause. (2) The declaratory clause. (3) The enumerated classes of subjects of legislation. (4) The deeming clause. No. 4 has been sufficiently discussed. No. 3 requires, and in part has had, incidental consideration. Nos. 1 and 2 have yet to receive final attention.

It will be observed that although section 92, as to all its sixteen enumerated classes, *enacts* that the provincial legislatures may make laws in relation to matters coming within those sixteen classes, *section 91 does not, as to all or any of its twenty-nine enumerated classes, independently enact that the Dominion Parliament may make laws in relation to matters coming within those classes.* So far as the text of section 91 is concerned, the only laws which the Dominion Parliament may make are laws made under authority of the residuary clause. The twenty-nine enumerated classes of subjects of legislation which are set forth in the section connect up with the declaratory clause, which goes only to their *exclusiveness* as against section 92. They proceed from and exist solely by virtue of the residuary clause which (by vesting in the Dominion Parliament legislative authority over all matters of legislation *not coming* within the classes of subjects exclusively assigned, under section 92, to the legislatures of the provinces) exhausts the grant of legislative authority possible under the statutorily intended legislative authority of the Dominion and provinces *together*. It is because of this exhaustion of intended grant that the section *declares*, not (as

one or more of the cases quote the clause) that "the exclusive legislative authority of the Parliament of Canada *shall extend*" to the twenty-nine enumerated classes of subjects, but, instead, that that exclusive legislative authority (taken as necessarily existent by virtue of the residuary clause) "*extends*" to those enumerated classes.

Lord Haldane, I have been told, was never able to conceive why the enumerated classes of section 91 were ever written into the Act at all unless they were meant to have that primacy over the residuary clause of that section which Lord Watson originally attached to them. I submit that there were two reasons, one political and the other arising out of section 92, class 16.

The preamble of the B.N.A. Act recites that it was enacted in response to an expressed desire on the part of the confederating provinces. That desire was expressed in and by the London Resolutions of 1866–67.[15]

The resolutions upon which the Act was founded had to be made such as would be politically acceptable to the electorates concerned. Provincial legislative authority must be, could be, and was, defined in these resolutions. This being done, were it not for the indefiniteness of the resolution which resulted in the now section 92 (16), the fact that complete and absolute *residuary* authority was to be in the Dominion Parliament would have made unnecessary any specific definition by classes of Dominion legislative authority, and no such definition was attempted, but, "for greater certainty" (in view, it is submitted, of the dangerous possibilities of the now section 92 (16)) an existing and acceptable partial list of definite Dominion powers was, after discussion as to the necessity of it, written into the resolutions; but when, at the London Conference of 1866–67, the conference prepared and approved the final draft of the B.N.A. Act (which the Imperial Parliament afterwards enacted without change) the now section 91 was further equipped with two "safety" provisions, viz.—

(*a*) its declaratory clause — "and for greater certainty but not so as to restrict the generality of the foregoing terms" (meaning the residuary clause) "of this section,

[15] The B.N.A. Act is not based upon the Quebec Resolutions of 1864. They represent merely a step in the history of confederation. Of the five provinces which sent delegates to Quebec to consider confederation of *the whole of British North America*, one province alone (Canada) accepted the Quebec Resolutions, and only three of the five provinces sent delegates to London and entered the *less extensive* confederation of 1867.

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 twenty-nine classes of subjects enumerated in the section;

(*b*) its deeming clause — "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 a 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 absence from the text of section 91 of any enactment of *legislative authority* other than that appearing in the residuary clause of that section and the fact that the text of its declaratory clause is confined to the matter of the *exclusiveness*, as against section 92, of laws made in relation to matters coming within the classes enumerated in section 91, identifies those enumerated classes as no more than instances of Dominion legislative authority selected from the totality of possible classes of subjects which, by the residuary clause, are assigned to the Parliament of Canada.

Nothing can, as respects section 92 in general and its class 13 (property and civil rights in the province) in particular, be of more importance than consideration of the *scope* of the "exclusive legislative authority" of the Parliament of Canada which section 91 provides. To the extent to which that authority exists it can, by reason of the "paramountcy" doctrine, reduce section 92, in case of seeming conflict, to nothingness. In 1894 (*Tennant Case*, [1894] A.C. 31) Lord Watson, *obiter*, confined the exclusiveness of section 91 to its enumerated classes. In 1896 (*Provincial Prohibition Case*, [1896] A.C. 348) he clinched the matter, citing his *obiter* pronouncement as his "authority". The last cited case has ever since been followed. I think that these and all other decisions which deny to the residuary "peace, order and good government" clause of section 91 of the B.N.A. Act that exclusiveness, as against section 92, which they accord to the 29 enumerated provisions of section 91 are erroneous, because, by the text of section 91, *residuary legislative authority alone* is granted to the Dominion Parliament and the residual grant made is exhaustive, wherefore Dominion and provincial legislative authority are *mutually* exclusive. Sections 91 and 92 take one thing—the sum total of the legislative authority of the confederating provinces—and divide it into two things.

1.—Dominion legislative authority and 2.—Provincial legislative authority. It follows from the severance alone, or, if not, from the *mode* of severance that the legislative authority of the Dominion under section 91 and that of the provinces under section 92 are *mutually* exclusive. That mode was to distribute to the Dominion all the legislative authority possessed at confederation by the confederating provinces *minus* only sixteen specific classes of *exclusive* legislative authority distributed to the provinces. The legislative authority of the provinces is thus *expressly* exclusive as against the Dominion. It is, as well, *sole*, because it constitutes the *minus* quantity which delimits the extent of Dominion legislative authority. (The provinces were given legislative authority over all "matters *coming* within" the sixteen classes and the Dominion was given legislative authority over "all matters *not coming* within" the same sixteen classes). The provincial legislative authority *in toto* being sole and exclusive as against the Dominion, it follows that the Dominion legislative authority *in toto* is sole and exclusive as against the provinces. In brief, under section 91 the Dominion gets nothing that the provinces have, but gets, exclusively, everything that they have not.

There is an elusive, but important, distinction between the drafting scheme of section 91 and that of section 92. It is that the legislative authority of the provinces is to make laws in relation to such *subject matters* as come within definite *classes of subject matters*, whilst the legislative authority of the Dominion is, less restrictively, to make laws in relation simply to *subject matters*. Both sections *contain* enumerated classes of subject matters, but these do not in both sections serve the same purpose. Thus, any "matter" which, because it *does not* come within any of the classes of section 92, comes within section 91, need not come within any of the 29 enumerated classes of the latter section. These, for convenience, have been mentioned hitherto as if they were not, although they are, part of the declaratory clause of section 91, wherein they serve a purpose other than that which (under compulsion of, it is submitted, erroneous judicial decisions) is now attributed to them. Their true purpose is that which is declared in the clause of which they form part, viz,—to ensure "greater certainty" in the construction, "without restricting the generality" of the scope, of the residuary clause.

The terms of sections 91 and 92 were intended to be *mutually* exclusive. We know, apart from the text of the Act,

which, when carefully examined, will be found to execute that intent, that "The Fathers" did not believe that conflict between the two sections as originally drafted in the resolutions was even *possible*. When, however, the skilled draftsman of the Act, in association with the London Conference of 1866-7, was converting the resolutions into statutory shape he attempted to provide by the declaratory clause against any conflict between the sections of the Act that might result from erroneous interpretation of *the words* of those sections. The intended grant of legislative authority in full, as between the Dominion and the provinces, was being exhausted by a combination of the authority granted under section 92 and the authority granted under the residuary clause of section 91. The latter consisted of everything not included in the former. *Each* was exclusive as against the other. The draftsman, because of this exhaustion of grant, *had* to provide, if at all, as to anything else, in declaratory terms. All this appears on the face of section 91. Read free of the influence of a series of judicial decisions which began in 1894, the declaratory clause goes no further than to declare, *notwithstanding anything in the Act*, with relation to that quality of exclusiveness as against section 92 which (for the reasons hereinbefore given) attaches to the residuary clause, that it "*extends*" to the twenty-nine enumerated classes of subjects which are set out as part of the declaration. These are all taken to be classes of subject matters which, *inter alia*, come within the residuary clause. Further, the clause, in whole, is, on its face, one that is merely interpretative. It is provided "for greater certainty". Of what? It is preceded in the section by the residuary clause only. It is "not to restrict the generality" of that exhaustive and exclusive clause. It is pertinent here to ask whether the decisions of the Judicial Committee from 1894 up to now concerning the exclusiveness as against section 92 of the enumerated classes set out in the declaratory clause of section 91, and denying like exclusiveness to the residuary clause (from which alone, if at all, the quality of exclusiveness can extend to those enumerated classes) have or have not restricted the generality of the latter *necessarily exclusive* clause. The declaratory clause no more *creates or imparts* any exclusiveness than it enacts any legislative authority. It *derives* such exclusiveness as it declares from the residuary clause and, rightfully, it assumes, without declaring, that legislative authority must be found where alone it can be—in the residuary clause.

It might well be argued that the deeming clause, at the end of section 91, was intended to be part of the declaratory clause, but, although it begins with the word "And", I regard it as an independent *enactment.* Without it the draftsman of the Act, who, when drafting section 91, would be looking after the grant, and protection of the grant, of Dominion legislative authority, would have failed to provide against a very real danger to the Dominion interest. He had been assisting the London Conference in an attempt to express in statutory form the desire of the Conference that, in general, legislative authority over matters of a local nature should be distributed to the local legislatures and legislative authority over matters other than those of a local nature should be distributed to a central Parliament. It was possible that because of the words—"make laws . . . . in relation to all matters not coming within the classes of subjects by this Act assigned *exclusively* to the legislatures of the provinces" (appearing in the residuary clause of section 91) read along with the words "*exclusively* make laws in relation to matters coming within the class of subjects . . . Generally, all matters of a merely local or private nature in the province" (appearing in section 92) that that exclusiveness of the residuary clause of section 91 which the Conference desired to extend from that clause to the enumerated classes of section 91 might be construed to extend only to such subject matters of legislation coming within those classes as were *of a nature other than local.* The Conference, as is evidenced by the character of the enumerated classes, and the terms of the deeming clause of section 91, must have considered that *the inherent nature* of those subject matters of legislation which *could* come within the enumerated classes of section 91 was such that they must be subjected to Dominion legislative authority even where, e.g., as to *place,* they were of a local or private nature. Whence the terms of the deeming clause at the end of the section.

But what about the *non obstante* provision of the declaratory clause of section 91? Does it not, in the case of a Dominion law coming within one or more of the classes of section 91 enable an "overriding" of all the classes of section 92? If it does so enable, then, does it not fully execute, as to all the latter classes, a purpose which the deeming clause of section 91, as above interpreted, expounded and applied, can execute as to one only (class 16) of the classes of section 92? I answer in the negative and proceed to my reasons, spelling them out, as usual, from the text of the Act. I know of decisions to a

contrary effect but, my task being to construe the Act as of July 1st, 1867, for my purposes they cannot be admitted to exist.

At the outset I have to deny that the operation of section 91 ever is to "override" or "overbear" section 92 or anything in it. Section 91 itself provides that for a "matter" to come within it the "matter" must be one that *does not come within* section 92. The "overriding" and "overbearing" conceptions are just bricks in a false front that has been added to the Act by way of judicial decision.

Any "matter" coming within any enumerated class of section 91 must enter that class *through* the exhaustive and wholly exclusive residuary clause of that section. The classes of subjects of legislation recited in the section are no more than examples of the scope of its residuary clause. Only "for greater certainty" do they appear in the Act at all. Re-examine them. Is there any of them that (assuming proper construction of its meaning) can be said to be of a "*merely* local or private nature" in a province? Remember that we are engaged in setting off the *non obstante* provision of the declaratory clause of section 91 against the deeming clause of that section, the operation of the latter being taken to be over section 92 (16) alone. Even if the declaratory clause, with its enumerated classes, had never been written, might not all of the enumerated classes of section 91, designed, as they were, to apply to a confederation of provinces, have been held to be of a nature transcending the *merely* local? By the way, the implications of the not unusual word "merely" in section 92 (16) ought not to be overlooked. I suggest that its meaning, in its setting, is that when a province is making laws by virtue of section 92 (16) it has not *exclusive* authority to enact unless the subject matter of legislation in question is of a nature which in the enacting province, is local *only*, so that if that subject matter is of a mixed nature it would be outside of the terms of the class. In circumstances easily conceived the residuary clause of section 91 may well attract into its ambit a local, but not in its nature *merely* local, "matter."

I continue to examine into the respective functions of the *non obstante* provision and the deeming clause of section 91.

On the second reading of the B.N.A. Act, 1867, (in the House of Lords) Lord Carnarvon said that — "The authority of the central Parliament will prevail whenever it may come into conflict with the local legislatures." I think that "the para-

mountcy doctrine," as we have it, was thus inaccurately expressed by Lord Carnarvon, whose exposition of the Act in the Lords was not a particularly capable effort. I cannot admit that actual conflict between two valid laws, (one Dominion, the other provincial) is possible under the B.N.A. Act in a case where the "matter" concerned is assigned, under the "aspect doctrine" (which does not owe its origin to the B.N.A. Act) to its proper section — 91 or 92, as the case may be. I think that these sections are mutually exclusive as to the "matters" which come within them. I think that the *non obstante* provision of section 91 (read, as it ought to be read, as declaring in the enumerated provisions of section 91 that same *exclusiveness* as against section 92 which necessarily, under our scheme of distribution of legislative powers, attaches to that section) establishes for us the *kind* of paramountcy or predominance that the B.N.A. Act intends, and that, far from contemplating *conflict* between valid Dominion and provincial enactments, our kind of paramountcy is based upon the theory that conflict is *impossible*, because no "matter" that "comes within" section 91 *can* "come within" it unless it is one that *cannot come within* section 92.

The declaratory clause of section 91, with its included enumerated classes of subjects of legislation, contemplates, and provides only for, laws enacted or enactable by the Parliament of Canada *under the authority of the precedent residuary clause of the same section.* These laws, notwithstanding anything in the Act — and all the classes of section 92 are in the Act— must be irrebutably presumed to come within the law-making authority of the Dominion, which is to be found in the residuary clause alone. Coming within that clause by force of statutory declaration, they must be taken to be laws "not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." In such circumstances, clash, conflict, overriding, overbearing, interfering and the like, so troublous to some judicial minds of the past, simply cannot come about unless as the result of previous judicial error.

Such is the effect of the *non obstante* provision of section 91. We have yet to consider and compare the effect of the deeming clause of that section. The declaratory clause, which contains the *non obstante* provision, contemplates laws enacted or enactable *by the Dominion.* The deeming clause, although contained by section 91, contemplates laws enacted or enactable *by the provinces.* The design of the deeming clause of section 91 is to prevent enactment by any province, under section 92 (16),

of any law in relation to a matter which, *although* it be of a local or private nature in the province, comes, pursuant to the declaratory clause of section 91, within any of the classes of subjects enumerated in the latter clause. It is only matters of a *merely* local or private nature that come within section 92 (16). That description does not fit such matters as are enacted in the enumerated classes of section 91. Section 92 (16), unlike the other fifteen classes of the section, was one written in general and indefinite terms, wherefore the express *ex abundante cautela* prohibition upon provincial law-making power which the deeming clause of section 91 provides.

I think that the deeming clause limits the enacting power of class sixteen, only, of section 92. I disagree with any contrary decisions. So I must deny *to that deeming clause* of section 91 any capacity to authorize Dominion enactment of legislation that will be paramount to or "override", say, legislation enactable under section 92 (13), "property and civil rights in the province." Nevertheless, in my opinion, for reasons above stated, whenever a matter of legislation is one that comes *at all* within section 91 (meaning whenever it comes within either an enumerated or unenumerated provision of that section) *every part of section 92* becomes not merely overborne, or overridden, or the like, but *irrelevant*.

. . . . .

Having reached conclusions such as those above expounded, I reported, in effect, to the Senate that, in my opinion, the text of the B.N.A. Act required no amendment — that the cause of such dissatisfaction as had prompted suggestions of amendment was deviation by judicial decision from that text, and that the right remedy was compulsion of observance of the terms of the Act. I suggested Imperial enactment, upon Dominion request, of a British North America Act *Interpretation* Act which should declare, preferably, if possible, in words extracted from certain decisions of the Judicial Committee, the true status of the residuary clause of section 91 as one not subject to any primacy of the enumerated classes of that section over it.

The proposed legislation should in some form express that the residuary clause of section 91 contains, and is the fount from which flows, the exclusive legislative jurisdiction of the Dominion Parliament, and the terms of that legislation should be such as to ensure that no Dominion law be held to be *ultra*

vires merely because it cannot be based upon an *enumerated* provision of section 91.

The principal effect of such legislation would be to enable a Dominion law in relation to a matter coming within the residuary clause of section 91, but not coming within any enumerated classes of that section, to be as freely held to be *intra vires* as if that law were one coming within an enumerated class of that section. This would restore the law respecting the interpretation of sections 91 and 92 of the B.N.A. Act to its state as of the year 1894, previous to Lord Watson's *obiter dictum* in the *Tennant Case*, upon which the existing primacy (over the residuary clause) of the enumerated provisions of section 91 is based. So far as section 92 (13) is concerned, the suggested legislation would render Dominion laws coming within the residuary clause of section 91 as exclusive (against section 92, classes one to fifteen) as Dominion laws coming within any of the enumerated classes of section 91 are now held to be. Section 92 (16) and the residuary clause of section 91 would then operate, to some extent, over common fields but *in different aspects*, such particular matters in a field as are not assignable to any enumerated provision of section 91 being assigned, when merely local in their nature, to section 92 (16) and, when other than *merely* local in their nature, to the residuary clause of section 91.

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