THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL AND THE DISTRIBUTION
OF LEGISLATIVE POWERS IN THE
BRITISH NORTH AMERICA ACT, 1867

by

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A SYNOPSIS OF THE JUDICIAL
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THE DISTRIBUTION OF LEGISLATIVE POWERS
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This thesis was undertaken with the intention of filling four serious gaps in the vast amount of writing that has been done on the interpretation of the British North America Act by the Judicial Committee of the Privy Council. First of all, an effort has been made to examine all the decisions handed down by the Board, then to analyse these decisions so as to obtain an understanding of the basic principles established, and lastly to summarise these principles into a coherent picture of the way in which the Constitution of Canada has been shaped, and of the manner in which Canadian constitutional problems of today must be viewed. Secondly, a similar attempt has been made regarding the arguments which the Judicial Committee's interpretation has produced, these arguments likewise being thoroughly examined, analysed into basic components, and summarised into a coherent pattern. Thirdly, one particular point of view, badly neglected in the past, has been given special attention. Finally, a great deal of emphasis has been placed on the bibliography, where the intention is not only to bring together all the major references on this subject, but also to bring these references together in
such a way as to indicate their general character and relative importance.

The body of the thesis is divided into seven chapters. Chapter I deals with governmental forms in general and the federal form in particular, the conclusion being reached that the distinguishing feature of a federation is a distribution of legislative powers between coordinate authorities. An analysis of the Judicial Committee's interpretation of Sections 91 and 92 of the British North America Act is then carried out in Chapter II; two fundamental problems are isolated—the problem of residuary powers and the problem of leaky compartments—and the Judicial Committee's solution to them is discovered in the "three-compartment scheme" and the "Aspect," "Ancillary Powers," "Cooperation," and "Unoccupied Field" doctrines. Two problems requiring special solutions are examined in Chapter III, where it is found that Section 91, subsection 2 and Section 132 have both been severely restricted in scope. Chapter IV contains a legal or textual evaluation of the Judicial Committee's interpretation, and the opinion is given that if the concluding words of Section 91 are a poor support for the "three-compartment scheme," the introductory words prove that the Judicial Committee's interpretation is legally correct. Three different historical arguments are looked into next, after which Chapter V concludes with a negative answer to the question underlying these arguments:
has historical reasoning any connexion with statutory interpretation in the first place? The purpose of Chapter VI being to determine the practical effects of the Judicial Committee's interpretation, an examination is made of the resulting difficulties; it is decided that before any change is contemplated the admittedly unfortunate consequences must be balanced against the necessity of maintaining Canadian unity—and hence of respecting the French-Canadian attitude regarding provincial autonomy. Finally, in Chapter VII a try is made at summarising the main points of the preceding chapters, and a number of recommendations are then offered with one eye on the present and the other on the future. The thesis concludes with an analytical bibliography and an appendix containing a copy of sections 91 and 92 of the British North America Act, 1867.
"The word federal is the key which unlocks the clauses and reveals their contents."

Edward Blake
CONTENTS

PAGE

PREFACE ........................................ iii

CHAPTER

1. FEDERAL GOVERNMENT ....................... 1

II. THE JUDICIAL COMMITTEE'S INTERPRETATION
    OF SECTIONS 91 AND 92 ..................... 8

III. SECTION 91, SUBSECTION 2 AND
    SECTION 132 ................................ 31

IV. THE LEGAL ARGUMENT ..................... 45

V. THE HISTORICAL ARGUMENT ................ 58

VI. THE PRACTICAL RESULTS .................. 85

VII. SUMMARY AND RECOMMENDATIONS ........... 109

BIBLIOGRAPHY .................................. 119

APPENDIX ...................................... 143
For eighty-three years, from 1867 to 1949, the last court of appeal for the settlement of Canada's constitutional problems was the Judicial Committee of the Privy Council. By the end of this period, certain fundamental principles, by which the British North America Act was and, barring the passage of an interpretative statute, always must be interpreted, were established. The object of this thesis is to isolate, analyse, consolidate and criticise these principles.
CHAPTER I

FEDERAL GOVERNMENT

Before a subject like the Judicial Committee's interpretation of the British North America Act can be properly understood, it should first of all be viewed from a distance and thus placed in some sort of perspective. For this reason, it has been thought wise to begin this work with a brief discussion of governmental forms in general and the federal form in particular. Roughly, then, there are three main types of governmental organisation: a legislative union, a federation, and a confederation. While differences of opinion occur as to the chief characteristics of these various types, political theorists generally agree on the fundamental differences. A legislative union, for instance, is defined as a form of government, like that of Great Britain, in which the regional authorities are subordinate to a single central legislature. As illustrated by the American Articles of Confederation, 1777, an exactly reversed situation is found in a confederation, where it is the central government that is subordinate to, and hence dependent on, the regional ones. Finally, and compromising between these two, there is a federation, a form of government in which neither the central nor the regional legislatures are
subordinate, but where coordinate authority exists instead. Since this was the form of government established in Canada by the British North America Act of 1867, however, it should perhaps be examined in greater detail.

One of the best definitions of a federation was made by Sir Robert Garran in the Report of the Royal Commission on the Australian Constitution (1929): it is, he said, "A form of government in which sovereignty or political power is divided between the central and the local governments, so that each of them within its own sphere is independent of the other." The point to notice here is that it is not a mere division of functions that distinguishes a federal state. The decisive feature is rather that this division must be between coordinate authorities. Thus while the United States and Australia are both real federations, the United Kingdom is not, for although Northern Ireland has its own parliament at Stormont, this parliament derives its power from and can consequently be overruled, or indeed abolished altogether, by the Parliament at Westminster. Similarly, the Union of South Africa cannot properly be described as a federation since again the laws made by the provincial councils are subject to the approval of the Union Parliament, which can also legislate on the same

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matters. Admittedly, this principle of coordinate authority is not universally accepted as the cardinal characteristic of federal government. Some writers, for example, go one step further and declare that it is not even enough to divide legislative powers between equal bodies—this division must also involve the giving of certain specific powers to the central government and the leaving of all residual authority to the regional ones. Others feel that the main idea is for the uniting states to retain their original constitutions; any country in which new regional governments were created at or after the union, in other words, is not a true federation. Still others believe that the essence of a federation is that both the central and regional governments act directly upon the people, whereas in a confederation only the regional legislature can operate in this way. Despite such deviations, however,

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2 For a summary and criticism of this viewpoint see Wheare, *Federal Government*, pp. 12-13.


most students of political science—Freeman, Brown, Kennedy, Quick and Garron, Moore and Dicey, for instance—agree, and convincingly prove, that none of the above ideas are really basic enough, and that, in the words of K. C. Wheare, "Federal government means therefore a division of functions between co-ordinate authorities, authorities which are in no way subordinate one to another either in the extent or in the exercise of their allotted functions."  

With the principle of coordinate authority accepted, then, as the salient characteristic of a federation, let us move on to see how such a government is actually organised. This survey reveals that while many differences exist in the organisation of federal states, four essential features are common to all. First, there must be a written constitution, setting down the distribution of legislative powers in explicit terms, and thus preventing one government from encroaching on the exclusive preserves of another. If neither the central nor the regional legislatures are

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subordinate to the other, they are both subordinate to this constitution, for, as is stated in the Constitution of the United States, such a constitution is "the supreme law of the land." Thus, while in the case of the British Parliament, with its unlimited powers, "unconstitutional" means nothing more than "contrary to general usage or custom," the term has a very specific meaning in the case of a federation like Australia, the United States, or Canada. As Professor Wheare puts it, people in the United Kingdom "may doubt whether acts of parliament are good laws, but they cannot doubt that they are good law. In a federation it is otherwise. There, it is possible to doubt not only whether the acts of some legislature in the federation are good laws but also whether they are good law, and it is possible for a court to declare acts which are almost universally recognised as good laws to be bad law and no law at all." The first requirement of a federation, then, is a written constitution, and thus the United States has its constitution of 1787, Australia, its constitution of 1900, and Canada, the British North America Act passed by the Imperial Parliament in 1867. The second requirement is that this constitution, as far as the distribution of powers is concerned, at any rate, must not be altered unilaterally.

7 Wheare, What Federal Government Is, p. 4.
Neither the federal nor the provincial legislatures, in other words, can possess the ability to change the constitution alone, for that would naturally allow either legislature to redistribute powers to its own advantage and in this manner place itself in a superior position. In practice this need is provided for in several ways; in the United States, for instance, amendments are normally dependent on a two-thirds majority in both houses of Congress plus a simple majority in the legislatures of three quarters of the states, while in Australia the people are associated in the amending process through a referendum. In Canada it was thought best to give the power of amendment to an outside authority, and action by the Parliament of the United Kingdom is consequently still the sole means of securing changes in the distribution of legislative powers. In all three cases, however, the principle is the same: constitutional amendments cannot be obtained unilaterally.

The third requirement of a federation is a body, other than the central and regional governments, able to settle disputes over the extent of authority. For it has been found that no line can be drawn clearly enough to separate the fields of legislative power once and for all. Accordingly,

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8 By 13 George VI, Chapter 81 (16 December, 1949), the Dominion was granted the right of amendment save in matters affecting provincial interests.
the United States has a Supreme Court, Australia has
High Court and, for some cases, the Judicial Committee of
the Privy Council, while Canada, up to December 10, 1949,
had this same Judicial Committee. Finally, the last require-
ment of a federal state is that each partner should have
sufficient financial resources to perform the functions
assigned to it in the constitution. No matter how strictly
the principle of coordinate authority is upheld in law, it
is obvious that if either the central or the regional legis-
lation has to look to the other for grants, subsidies or
the like, it will become in fact a subordinate government.
A perfect illustration of such a case is found, as will be
seen later, right in our own country. In conclusion, then,
it can be said that, whatever else differs, four things--
a written constitution, an amending provision prohibiting
one-sided changing of the constitution, a supreme court, and
financial self-sufficiency--are the essential features of a
federal government. The fundamental feature of such a gov-
ernment, as we have already seen, however, is that it can be
distinguished from a legislative union, on the one hand, and
a confederation, on the other, by a division of legislative
powers between two equal authorities, each of which is the
paramount authority in its own field and neither of which
can invade the field reserved to the exclusive competence
of the other.
CHAPTER II

THE JUDICIAL COMMITTEE'S INTERPRETATION

SECTIONS 91 AND 92

One grand idea can safely be said to have dominated the framing of the British North America Act, 1867—Canada was to be a federation. Legislative powers in the new dominion, in other words, were to be divided between the federal and provincial parliaments, and this division was carried out in sections 91 and 92 of the act. While these sections may have seemed perfectly plain to the Fathers of Confederation, however, they were soon found to contain two really separate, though closely related, ambiguities. First of all, the actual number of compartments dividing Canada's legislative powers was not clear, while, secondly, the compartments themselves were not mutually exclusive. It is the purpose of this chapter to examine these two basic ambiguities, together with the interpretation given them by the Judicial Committee of the Privy Council.

As far as the first one is concerned—the number of compartments dividing Canada's legislative powers—these powers, as noted above, had been distributed by sections 91 and 92 of the British North America Act. In the actual wording used, however, the former section, defining the powers of the federal parliament, is in
effect split into two parts. First, there is the general, residuary, or, as it is sometimes called, "peace, order, and good government" clause, which entrusts the federal parliament with the power to legislate over any matter "not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Secondly, there is a list of twenty-nine "classes of subjects," in which "exclusive Legislative Authority" is stated to lie with the federal parliament, "notwithstanding anything in this Act." And there, in these two parts of section 91, is where the basic ambiguity in Canada's constitution lies. Do the twenty-nine enumerations of 91 supplement or illustrate the scope of "peace, order, and good government"?

Let us suppose, to begin with, that the enumerations of 91 supplement the scope of "peace, order, and good government." This would mean that the non obstante clause ("notwithstanding anything in this Act") covers the enumerations of 91 only, and does not refer back to "peace, order, and good government." But this in turn would mean that legislative powers in Canada were distributed not into two but into three compartments. For the non obstante clause would give the enumerations of 91 indisputable paramountcy over section 92, while section 92 would be

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1 See appendix below for a copy of sections 91 and 92.
paramount to "peace, order, and good government" because of the stipulation included with this last expression that it refer only to matters "not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Thus if the enumerations of 91 supplement the scope of "peace, order, and good government," the settlement of any conflict concerning the competence of either the federal or provincial parliaments would entail three possibilities: if the particular legislation in question were substantially covered by the enumerations of 91, the federal parliament alone would be competent; if covered by section 92 and not by the enumerations of 91, then the provincial parliaments would have the power; and finally, if covered neither by the enumerations of 91 nor by section 92, then--but not till then--the federal parliament would be able to legislate on the authority of "peace, order, and good government."

But suppose, on the other hand, that the enumerations of 91 illustrate the scope of "peace, order, and good government." In that event, the non obstante clause would refer back to "peace, order, and good government," and would consequently virtually eliminate the stipulation that these general powers are to embrace only those matters "not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Now there are not three but only two compartments into which
subject-matters can be fitted: section 91 as a whole, and section 92. Moreover, since all of section 91 is now covered by the non obstante clause, the power of the federal parliament is considerably increased, for it can now legislate, on the premise that such legislation is for the general advantage of Canada as a whole, over matters covered by section 92—something that would be next to impossible under the three-compartment scheme mentioned above.

If the enumerations of 91 illustrate the scope of "peace, order, and good government," then, the settlement of any conflict between the federal and provincial parliaments would entail only two possibilities: if the particular legislation in question were judged to be substantially for the "peace, order, and good government" of Canada, the federal parliament would be entirely competent to pass it; if, on the other hand, it were judged to be merely of provincial scope, the provincial parliament concerned would be the authority.

Thus before any systematic interpretation can be given to the distribution of powers in the British North America Act, one basic question has to be answered: do the enumerations of 91 supplement or illustrate the scope of "peace, order, and good government"? During the earliest years, the Judicial Committee would almost appear to have avoided answering this question; at any rate, no defi-
nite choice one way or the other can be traced with any clarity in the first decisions. By the 1880's, however, a single trend seemed to be emerging, and by the middle 1890's, the Judicial Committee's solution, to be followed with almost perfect consistency thereafter, was unmistakable: the enumerations of s. 91 supplement the scope of "peace, order, and good government."

One of the very best illustrations of this point of view is found in Attorney-General for Ontario v. Attorney-General for Canada (the "Prohibition Case") (1896) A.C. 348, from which the following quotation is taken:

The general authority given to the Canadian Parliament by the introductory enactments of s. 91 is "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 it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard
to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

Other good examples of this same general interpretation can be found in Re Board of Commerce Act (1922), 1 A.C. 191; Fort Francis Pulp and Power Company v. Manitoba Free Press (1923), A.C. 695; Toronto Electric Commissioners v. Snider (1925), A.C. 396; Attorney-General for Canada v. Attorney-General for British Columbia (the "Fish Canning Case") (1929), A.C. 111; Proprietary Articles Trade Association v. Attorney-General for Canada (1931), A.C. 310; Attorney-General for Canada v. Attorney-General for Ontario

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But now let us turn to the second basic ambiguity the Judicial Committee had to face—the fact that the compartments dividing Canada's legislative powers were not mutually exclusive. It was soon discovered that legislation capable of assignment to both sections 91 and 92, or at least affecting matters mentioned in both sections, could and would appear, and the consequent problem was how to settle such conflicts. In examining the Judicial Committee's solution to this problem, we should begin by noting two general points. Firstly, there is the so-called "Aspect Doctrine." Best expressed in Hodge v. The Queen (1883) 9 A.C. 117, when it was stated that "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91," this idea, which was simply to examine the legislation in question in the light of both sections 91 and 92 in order to see which one suited it best, was adopted by the Judicial Committee as an aid in settling conflicts between the

3 Cited in Cameron, Canadian Constitution, p. 344.
two sections. In applying it, however, the Judicial Committee came up against their three-compartment scheme, and that is the second point to note. Section 91 was held to consist of two separate parts, "peace, order, and good government" and the enumerations of 91, and the problem of a clash between sections 91 and 92 actually consisted, therefore, of two separate problems: the problem of a clash between "peace, order, and good government" and section 92, and the problem of a clash between the enumerations of 91 and section 92. Thus the application of the "Aspect Doctrine," as we shall now see, had to be adapted to suit the particular requirements of each of these problems.

In connexion with the first one, it must be remembered that section 92 was considered paramount to "peace, order, and good government" because of the restrictive stipulation in the latter expression to the effect that it referred only to those matters "not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." If the subject-matter in question, therefore, is covered in section 91 merely by "peace, order, and good government," and is also covered by section 92, the provincial parliament must be judged the competent authority; the cases mentioned earlier in illustration of the three-compartment schemes are clear examples of this principle as well. Nevertheless, there is one possible
exception to the general rule, and here is where the "Aspect Doctrine" comes in. The following statement, made in Re Board of Commerce Act (1922) 1 A.C. 191, indicates the nature of this exception:

It has already been observed that circumstances are conceivable, such as those of war or famine, when the peace, order and good Government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either section 92 or section 91 itself. Such a case, if it were to arise, would have to be considered closely before the conclusion could properly be reached that it was one which could not be treated as falling under any of the heads enumerated. Still, it is a conceivable case, and although great caution is required in referring to it, even in general terms, it ought not, in the view of (sic) their Lordships take of the British North America Act, read as a whole, to be excluded from what is possible. For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects.4

The implication of this statement, the direct result of the "Aspect Doctrine" is that, contrary to the normal practice, "peace, order, and good government" may be invoked in certain circumstances so as to override section

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92. This idea, also reflected in Fort Francis Pulp and Power Company v. Manitoba Free Press (1923) A.C. 695 and Toronto Electric Commissioners v. Snider (1925) A.C. 396, was naturally considered, for a while, as an escape mechanism through which the federal parliament could be enabled to pass general legislation. On occasion, indeed, as in In re Regulation and Control of Aeronautics in Canada (1932) A.C. 54 and In re Regulation and Control of Radio Communication in Canada (1932) A.C. 394, such a liberal interpretation has been given to the Re Board of Commerce Act statement. It is noteworthy, however, that in these cases the Judicial Committee upheld the federal authority primarily for other reasons, and that when, as in the three Bennett "new deal" cases, the decision would have to rest ultimately on "peace, order, and good government" alone, the Board has always been reluctant to apply the "aspect doctrine" in this manner. In actual fact, then, unless the particular legislation is supported in some other way as well, it is practically impossible to invoke "peace, order,


and good government" so as to override section 92. The very expressions used when the Judicial Committee has admitted the theoretical possibility of such an event—"abnormal circumstances," "exceptional conditions" (Re Board of Commerce Act), "very exceptional means," "national emergency" (Fort Francis Pulp and Power Company v. Manitoba Free Press), "some extreme peril to the national life of Canada," "epidemic of pestilence" (Toronto Electric Commissioners v. Snider)—as well as the fact that the conditions produced by the depression of the 1930's were not considered sufficiently exceptional to warrant any departure from the normal interpretation, all clearly prove that the "exceptional circumstances" in which "peace, order, and good government" can be used to override section 92 are very exceptional indeed. Such circumstances can arise, as was shown by the Fort Francis Pulp and Power Company Case; but on the whole it may be said that the "Aspect Doctrine," in reality, has been paid only lip service as far as the problem of a clash between "peace, order, and good government" and section 92 is concerned.

There is one case, however, in which the "Aspect Doctrine" was applied quite liberally--Russell v. The Queen (1882) 7 A.C. 829. The following extracts will indicate the type of argument underlying the Judicial Committee's
decision in this case:

Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. 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.

The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it. There is no ground for saying that the evil or vice struck at by the Act in question is local or exists only in one province, and that Parliament, under colour of general legislation, is dealing with a provincial matter only.7

It cannot be denied that the Judicial Committee has had difficulty in reconciling these statements with its subsequent interpretation of how conflicts between "peace, order, and good government" and section 92 should be handled. Some critics claim, indeed, that Russell v. The Queen actually represents a fundamental departure from the general current of Judicial Committee decisions. The Canada Temperance Act being questioned here, they say, was upheld

7 Cited in Cameron, Canadian Constitution, pp. 319 and 321.
as general legislation, and by thus admitting the validity of federal legislation supported only by "peace, order, and good government" but passed for the general advantage of Canada as a whole, the Judicial Committee really swung the non obstante provision over to the support of the residuary clause of section 91, and consequently really departed from the three-compartment scheme. The Judicial Committee's own explanation of the Russell verdict, on the other hand, is that the Canada Temperance Act was not upheld as general but as emergency legislation. It is, then, quite in accord with the three-compartment scheme, being merely one of those emergency measures that can be passed, because of exceptional circumstances, on the sole authority of "peace, order, and good government." This last explanation is the one that must, of course, be accepted in law, but even so, it should be noted, Russell v. The Queen still presents difficulties. For as we have seen, the Judicial Committee has insisted on extremely exceptional circumstances before allowing "peace, order, and good government" to override section 92. To say, then, that the conditions produced through liquor irregularities in Canada during the 1880's were sufficiently exceptional, while the depression condi-

\[8\] cf. Toronto Electric Commissioners v. Snider (1925) A.C. 396 for a particularly good example of this argument.
tions of the 1930's were not, seems illogical to say the least. If only for this reason, Russell v. The Queen, while it can, perhaps, be brought into the same general current as the other Judicial Committee decisions, must be admitted to present a contrast to subsequent interpretations of the manner in which conflicts between "peace, order, and good government" should be settled.

Considering now the problem of a conflict between the enumerations of 91 and section 92, we should note, to begin with, that mainly because of the non obstante clause the former enumerations have been accorded indisputable paramountcy. In other words, so long as the particular legislation in question is covered by one of the subheads of section 91, the federal parliament must be judged the competent authority. When this simple formula was put into practice, however, two complications were found to exist. First of all, it was discovered that to be effective, and sometimes to be passed at all, legislation involving the enumerations of 91 quite often had to involve section 92 as well, and the resulting question was whether the federal parliament could trench on provincial authority in this way. One of the best illustrations of the Judicial Committee's answer is found in Tennant v. Union Bank (1894) A.C. 31,

9 But not solely; see below, chapter IV.
where this statement was made:

Sect. 91 gives the Parliament of Canada power to make laws in relation to all matters not coming within the classes of subjects by this Act exclusively assigned to the legislatures of the provinces, and also exclusive legislative authority in relation to certain enumerated subjects, the fifteenth of which is "Banking, Incorporation of Banks, and the Issue of Paper Money." Sect. 92 assigns to each provincial legislature the exclusive right to make laws in relation to the classes of subjects therein enumerated; and the thirteenth of the enumerated classes is "Property and Civil Rights in the Province."

Statutory regulations with respect to the form and legal effect, in Ontario, of warehouse receipts and other negotiable documents, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that province; and the objection taken by the appellant to the provisions of the Bank Act would be unanswerable if it could be shown that, by the Act of 1867, the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by sect. 92. But sect. 91 expressly declares that, "notwithstanding anything in this Act," the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in sect. 91, are "Patents of Invention and Discovery," and "Copyrights." It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces.10

10 Cited in Cameron, Canadian Constitution, pp. 444-445.
As this very clear statement shows, the Judicial Committee has thus recognised the competence of the federal parliament to pass laws affecting matters ordinarily classed within section 92, but necessarily incidental or "ancillary" to legislation involving the enumerations of 91. Other examples of the application of this so-called "Doctrine of Ancillary Powers" are found in Cushing v. Dupuy (1880) 5 A.C. 409, when it was used for the first time, as well as in Attorney-General for Ontario v. Attorney-General for Canada (the "Bankruptcy Case") (1894) A.C. 189; Attorney-General for Ontario v. Attorney-General for Canada (the "Prohibition Case") (1896) A.C. 348; and Proprietary Articles Trade Association v. Attorney-General for Canada (1931) A.C. 310.

Before leaving this particular doctrine, however, we should be especially careful to notice that it can be invoked only when the trenching involved is necessarily incidental or ancillary to legislation covered by the enumerations of 91. The great stress placed on this requirement is well illustrated in Montreal v. Montreal Street Railway (1912) A.C. 333, which is a good example of what must happen should the trenching not be considered necessarily incidental:
The right contended for in this case is in truth the absolute right of the Dominion Parliament wherever a federal line and a local provincial line connect to establish, irrespective of all consequences. This dual control over the latter line whenever there is through traffic between them, at least of such a kind as would lead to unjust discrimination between any classes of the customers of the former line. In their Lordships' view this right and power is not necessarily incidental to the exercise by the Parliament of Canada of its undoubted jurisdiction and control over federal lines, and is therefore, they think, an unauthorized invasion of the rights of the Legislature of the Province of Quebec.

One of the arguments urged on behalf of the appellants was this: The through traffic must, it is said, be controlled by some legislative body. It cannot be controlled by the provincial Legislature because that Legislature has no jurisdiction over a federal line, therefore it must be controlled by the Legislature of Canada. The answer to that contention is this, that so far as the "through" traffic is carried on over a federal line, it can be controlled by the Parliament of Canada. And that so far as it is carried over a non-federal provincial line it can be controlled by the provincial Legislature, and the two companies who own these lines can thus be respectively compelled by these two Legislatures to enter into such agreement with each other as will secure that this "through" traffic shall be properly conducted; and further that it cannot be assumed that either body will decline to co-operate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of "through" traffic.

The last part of this statement introduces the "Cooperation Doctrine": if control over a particular subject-matter is not judged necessarily incidental to legislation involving

11 Cited in Cameron, Canadian Constitution, pp. 722-723.
the enumerations of 91, the only way that subject-matter can be legislated over is by "cooperation" between the federal parliament and the provincial legislature concerned. A comparison of this doctrine with the "Doctrine of Ancillary Powers" will reveal the influence of the "Aspect Doctrine" on the problem of clashes between the enumerations of 91 and section 92.

The second question complicating the simple formula by which these enumerations were held paramount to section 92 was this: could a province legislate concerning matters covered by the enumerations of 91 if the federal parliament had not done so? The best illustration of the Judicial Committee's answer to this question is found in Attorney-General for Canada v. Attorney-General for Ontario (the "Fisheries Case") (1898) A.C. 700, from which the following quotation is taken:

The earlier part of this section (section 91) read in connection with the words beginning "and for greater certainty" appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in s. 91 is not within the legislative competence of the Provincial Legislatures under s. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a Provincial Legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted
by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of s. 91, and in particular to the word "exclusively." It would authorize, for example, the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with these subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act.

It is true that this Board held in the case of Attorney-General of Canada v. Attorney-General of Ontario that a law passed by a Provincial Legislature which affected the assignments and property of insolvent persons was valid as falling within the heading "Property and Civil Rights," although it was of such a nature that it would be a suitable ancillary provision to a bankruptcy law. But the ground of this decision was that the law in question did not fall within the class "Bankruptcy and Insolvency" in the sense in which those words were used in s. 91.12

A careful reading of these two paragraphs will reveal the two answers, again reflecting the influence of the "Aspect Doctrine", given by the Judicial Committee to the question of an unoccupied field of legislation. As the first one explains, if the subject-matter in question is substantially covered by the enumerations of 91, the provincial parliaments are incompetent and cannot legislate over it regardless of whether the federal parliament has legislated or

12 Cited in Cameron, Canadian Constitution, pp. 555-556.
not. As the second paragraph implies, however, if the subject-matter is not substantially within the enumerations of 91, or, in other words, if it is ancillary to those enumerations, the provinces can legislate over it. Such a case occurred in Attorney-General for Canada v. Attorney-General for Ontario (the "Bankruptcy Case") (1894) A.C. 31, when this statement was made:

It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.13

13 Cited in Cameron, Canadian Constitution, p. 456.
The recognition given by this statement to the idea that a province can legislate, in the absence of federal legislation, over subject-matters ancillary to the enumerations of 91 can also be found in L'Union St. Jacques v. Bélisle (1874) L.R. 6 P.C. 31, where it first appeared, but perhaps most conveniently in Grand Trunk Railway v. Canada (1907) A.C. 65, in which the following summing up, as good a description as any of the "Unoccupied Field Doctrine," was made:

But a comparison of two cases decided in the year 1894--viz., Attorney-General of Ontario v. Attorney-General of Canada and Tennant v. Union Bank of Canada--seems to establish these two propositions: First, that 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; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.\(^{14}\)

In summary, then, the Judicial Committee of the Privy Council can be said to have begun its interpretation of the distribution of legislative powers in the British North America Act by declaring that these powers were distributed into three compartments. When faced with the fact that these three compartments were not mutually exclusive, it was able to break down this large problem into two subsidiary ones: conflicts between "peace, order, and good

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\(^{14}\) Cited in Cameron, *Canadian Constitution*, p. 638.
government" and section 92, and conflicts between the enumerations of 91 and section 92. As far as the first of these conflicts is concerned, section 92 was held paramount to "peace, order, and good government," any departure from this rule being possible only in the event of some extraordinary circumstance necessitating emergency legislation for the safety of the country as a whole. In connexion with the second conflict, the enumerations of 91 were considered paramount to section 92, three "doctrines"—"Ancillary Powers," "Cooperation," and "Unoccupied Field"—being invoked to settle particular questions complicating this general rule. Under the "Doctrine of Ancillary Powers," the federal parliament was authorised to legislate concerning matters classed within section 92, providing such legislation was necessarily incidental to legislation involving the enumerations of 91. Under the "Cooperation Doctrine," the federal parliament was prohibited from legislating over matters not considered necessarily incidental to legislation over the enumerations of 91, any such matter being capable of control only by cooperation between the federal parliament and the provincial legislature concerned. Finally, under the "Unoccupied Field Doctrine," a province was barred from legislating over matters substantially within the enumerations of 91, even though the federal parliament had not legis-
lated concerning them, but could legislate, in the absence of a federal law, over matters that would be considered ancillary to the enumerations of 91. Such, in a very general way, is the Judicial Committee's basic, overall interpretation of sections 91 and 92 of the British North America Act, 1867.
In this chapter two problems, not directly connected with but certainly relevant to the previous discussion will be considered. First of all, because "peace, order, and good government" was judged subordinate to section 92, attempts were often made to support the federal parliament's legislative powers by invoking the "Regulation of Trade and Commerce" provision granted to the Dominion by subhead 2 of section 91. The Judicial Committee was consequently forced to define the scope of this expression. The main question involved was whether it had a territorial limitation—whether, in other words, it referred to all matters relating to "trade and commerce" or to interprovincial and external trade and commerce only. The first indication of the trend the Judicial Committee would take in answering this question was given in Citizens Insurance Company v. Parsons (1881) 7 A.C. 96, where the two following statements were made:

The words "regulation of trade and commerce," in their unlimited sense are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shews that the words were not
used in this unlimited sense. In the first place the collection of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the minds of the legislature, when conferring this power on the dominion parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.

Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion. Their Lordships abstain on the present occasion from any attempts to define the limits of the authority of the dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete, with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of sect. 92.1

According to this decision, then, the federal parliament's power to legislate for trade and commerce affects inter-provincial and external trade and commerce only, and if the particular trade or commerce involved is confined within the boundaries of a single province, the legislature of that

1 Cited in Cameron, Canadian Constitution, pp. 280-282.
province is the exclusive authority. This general idea has prevailed ever since, as is shown most clearly, perhaps, in Colonial Building Association v. Attorney-General of Quebec (1883) 9 A.C. 157; Bank of Toronto v. Lambe (1887) 12 A.C. 575; Attorney-General for Canada v. Attorney-General for Alberta (1916), 1 A.C. 588; Attorney-General for British Columbia v. Attorney-General for Canada (Re Natural Products Marketing Act) (1937) A.C. 377; and Shannon v. Lower Mainland Dairy Products Board (1938) A.C. 708. The third of these cases might be noted especially as declaring a further limitation on the Parsons decision by which the federal parliament was denied the right to regulate the contracts of a particular business in a province; now it was declared that "the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces." 2 But this is simply another particular limitation on the federal parliament's power over the regulation of trade and commerce. In general, as is shown by the following quotation from the last of the cases mentioned above, the interpretation still remains as it was first

stated in Citizens Insurance Company v. Parsons:

It is now well settled that the enumeration in section 91 of "the regulation of trade and commerce" as a class of subject over which the Dominion has exclusive legislative powers does not give the power to regulate for legitimate provincial purposes particular trades or businesses so far as the trade or business is confined to the province. Citizens Insurance Company of Canada v. Parsons (1881) 7 A.C. 96. Re the Dominion Natural Products Marketing Act, 1934 (1936) S.C.R. 398, (1937) A.C. 377. And it follows that to the extent that the Dominion is forbidden to regulate within the province, the province itself has the right under its legislative powers over property and civil rights within the province.3

Two more points should be noted in connexion with the problem posed by the expression "Regulation of Trade and Commerce." To begin with, it will be apparent that the splitting of this expression into the two aspects of general and provincial trade and commerce is yet another instance of the influence of the "Aspect Doctrine." It will also be apparent that the assignment of these aspects to the exclusive legislative authority of the federal and provincial parliaments respectively brings into this particular situation the "Doctrine of Ancillary Powers." All that needs to be added is that the Judicial Committee has, in general, adopted much the same attitude as was revealed

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in the case of clashes between the enumerations of 91 and section 92, allowing the federal parliament to legislate over matters that would normally be classed as coming within the expression "trade and commerce in a provincial aspect," but control over which is "necessarily incidental" to legislation involving "trade and commerce in an inter-provincial or external aspect." The next statement, made by Chief Justice L. P. Duff on behalf of the Supreme Court of Canada and approved by the Judicial Committee when deciding the Re Natural Products Marketing Act case (1937) A.C. 377, aptly summarises this use of the "Aspect" and "Ancillary Powers" doctrines as they have been applied to section 91, subhead 2:

...the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.4

This application of the "Ancillary Powers Doctrine" is closely related to the second point mentioned above. In

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John Deere Plow Company v. Wharton (1915) A.C. 330, Lord Haldane made the following statement:

Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in Citizens Insurance Co. v Parsons (7 App. Cos. 96, at pp. 112 and 113) on head 2 of section 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade. This head must, like the expression 'Property and Civil Rights in the Province,' in section 92, receive a limited interpretation. But they think that the power to regulate trade and commerce at all events enables the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the entire Dominion should be exercisable, and what limitations should be placed on such powers. For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade.  

One implication of this statement is that the federal parliament has the authority to regulate trade and commerce, even though in a strictly provincial aspect, providing such regulation is necessary for the exercise of a legitimate federal power, such as the incorporation of companies with dominion objects. This authority must consequently be added to our account of the federal parliament's control over inter-provincial and external trade and commerce. But the statement contains another implication as well: the implication that the federal parliament can legislate so as to affect trade and commerce in a provincial aspect only.

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5 Cited in O'Connor, Report, Annex 3, p. 73.
in aid, as Lord Haldane expressed it in the Snider case, "of what the Dominion Government are specifically enabled to do independently of the general regulation of trade and commerce...." This idea, reflected also in Great West Saddlery Company v. The King (1921) 2 A.C. 91 and Re Board of Commerce Act (1922) 1 A.C. 191, would have placed a considerable limitation on the use of the "Ancillary Powers Doctrine" as regards the "Regulation of Trade and Commerce." By combining the Duff statement and the first implication of the Haldane one, we would conclude that the federal parliament was competent to legislate over trade and commerce in a provincial aspect if such legislation were necessarily incidental to legislation involving trade and commerce in an interprovincial or external aspect, and also if such legislation were necessarily incidental to legislation involving a matter not covered by section 92. On the other hand, the second implication mentioned above would have the effect of striking out the first of these propositions and of thereby confining the federal parliament's authority over trade and commerce in a provincial aspect to the passing of legislation involving a matter not covered by section 92 only. In actual fact, however, the Judicial Com-

mittee later repudiated this second implication, as is shown by the next quotation from Proprietary Articles Trade Association v. Attorney-General for Canada (1931) A.C. 310:

Their Lordships merely propose to dissociate themselves from the construction suggested in argument for passage in the judgment in the Board of Commerce Case ((1922), 1 A.C. 191, 198), under which it was contended that the power to regulate trade and commerce could be invoked only in furtherance of a general power which Parliament possessed independently of it. No such restriction is properly to be inferred from that judgment. The words of the statute must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject-matter.7

But now let us turn to the other main problem that should be considered along with clashes between sections 91 and 92. In 1867 Canada still lacked control over at least one vital aspect of national sovereignty—foreign relations. There was then absolutely no indication that the British Empire would reach a state where every self-governing member was fully entitled to pursue its own independent foreign policy. "Empire policy" was the ruling idea. When the question of legislation with regard to treaties with foreign nations was dealt with in section 132, therefore, the following phrasing was adopted:

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

Provided the treaty in question was engaged in by Canada "as part of the British Empire," then, the federal parliament was competent under section 132 to pass any legislation that would be necessarily incidental; section 132, in other words, was, for all practical purposes, almost exactly the same as one of the enumerations of 91. For a few years this system proved quite adequate, but during the twentieth century a major change occurred within the Empire, a change from the idea of a united foreign policy for the Empire as a whole to one of separate foreign policies for the individual member nations. Thus Canada suddenly became competent, in fact, to make direct agreements with foreign countries. Now as the Judicial Committee pointed out in Attorney-General for Canada v. Attorney-General for Ontario (Re Weekly Rest, Minimum Wages and Hours of Labour Acts) (1937) A.C. 326, "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the
performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action."

The question was whether this legislative authority belonged to the federal or provincial parliaments. A review of three cases—In re Regulation and Control of Aeronautics in Canada (1932) A.C. 54, In re Regulation and Control of Radio Communication in Canada (1932) A.C. 394, and Attorney-General for Canada v. Attorney-General for Ontario (1937) A.C. 326—will provide the answer to this question.

In the first of these cases the legislation in question arose from a treaty between the British Empire and seventeen other states, Canada being one of the Empire signatories. The basis of the Judicial Committee's decision, stripped of the additional but subsidiary arguments adopted, is contained in the following extract:

They (the members of the Board) consider the governing section to be section 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries. As far as section 132 is concerned, their Lordships are not aware of any decided case which is of assistance on the present occasion. It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for per-

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forming the obligations of Canada, or any Province thereof. It would therefore appear to follow that any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out.\(^9\)

The second case, *In re Regulation and Control of Radio Communication in Canada*, involved a different situation. Here the treaty concerned was not engaged in by Canada as a part of the British Empire but on her own account, and the Judicial Committee accordingly ruled that it was not covered by section 132. The following statement will indicate the basic argument underlying the decision handed down to meet this new situation:

This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-à-vis to the mother country Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either section 91 or section 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by section 132. Being, therefore, not mentioned explicitly in either section 91 or section 92, such legislation falls within the general words at the opening of section 91 which assign to the Government of the Dominion the

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power to make laws 'for the peace, order and
good government of Canada in relation to all
matters not coming within the classes of sub-
jects by this Act assigned exclusively to the
legislatures of the Provinces.' In fine,
though agreeing that the Convention was not
such a treaty as is defined in section 132,
their Lordships think that it comes to the
same thing.10

The implications that might at first seem to lie within
the two decisions mentioned above were later clarified
in Attorney-General for Canada v. Attorney-General for
Ontario (1937) A.C. 326, where once again the treaty
involved was not an Empire one. The next quotation sums up
this clarification:

The Aeronautics case (1932) A.C. 54, concerned
legislation to perform obligations imposed by
a treaty between the Empire and foreign coun-
tries. Section 132 therefore clearly applied;
and but for a remark at the end of the judg-
ment, which in view of the stated ground of the
decision was clearly obiter, the case could not
be said to be an authority on the matter now
under discussion. The judgment in the Radio
case (supra) appears to present more difficulty.
But when that case is examined it will be found
that the true ground of the decision was that
the convention in that case dealt with classes
of matters which did not fall within the enu-
merated classes of subjects in section 92 or
even within the enumerated classes in section
91. Part of the subject matter of the conven-
tion, namely broadcasting, might come under an
enumerated class but if so it was under a head-
ing "Interprovincial Telegraphs," expressly
excluded from section 92. Their Lordships are

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10 In re Regulation and Control of Radio Communi-
cation in Canada (1932) A.C. 54, cited in O'Connor, Report,
Annex 3, p. 139.
satisfied that neither case affords a warrent for holding that legislation to perform a Canadian treaty is exclusively within the Dominion legislative power.\textsuperscript{11}

Having made this explanation, the Board then proceeded to lay down the principles on which cases involving domestic legislation passed in connexion with foreign treaties have since been decided:

It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions. It is true, as pointed out in the judgment of the Chief Justice, that as the executive is now clothed with the powers of making treaties so the Parliament of Canada, to which the executive is responsible, has imposed upon it responsibilities in connection with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion executive. 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. If they do not, the competence of the Dominion Legislature is declared by section 91 and existed \textit{ab origine}. In other words the Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth.\textsuperscript{12}


\textsuperscript{12} \textit{Ibid.}, pp. 163-164.
To summarise the situation regarding foreign treaties, then, so long as the treaty involved was entered into by Canada as part of the British Empire, the federal parliament has, because of section 132, exclusive competence over any necessarily incidental domestic legislation. If the treaty was accepted by Canada on her own account, however, it does not come under section 132, and the federal parliament cannot pass domestic legislation, even though necessarily incidental, if such legislation involves a subject-matter normally falling within the exclusive legislative competence of the provinces. Thus "while the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure."

CHAPTER IV

THE LEGAL ARGUMENT

One way in which the Judicial Committee's interpretation of sections 91 and 92 can be defended or attacked is by a "legal" type of argument, or, in other words, by an examination of the actual words used, no regard whatsoever being taken of either their origin or their effect. Before such an examination can be carried out, however, it must be remembered that the foundation underlying the Judicial Committee's interpretation is the three-compartment scheme previously described. Destroy that foundation and the entire superstructure of legal exposition would topple. Our examination must take place, therefore, on the basic level of the three-compartment scheme.

Section 91 begins with the following statement:

It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive

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1 See above, Chapter II, pp. 8-14.
Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

This statement reveals, first of all, that the federal parliament has a general power "to make laws for the peace, order, and good government of Canada...." This power is then limited by the provision that it extends only to those matters "not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces...," and this limitation is emphasised by the use of the word "exclusively," which is affixed three times more to the provincial authority—in section 91 subhead 29, in the concluding words of section 91, and in the opening words of section 92. Immediately after this limitation, however, it is stated that the federal parliament also has certain "exclusive" powers, that is, over the twenty-nine following enumerations. Moreover, the exclusiveness of these powers is further strengthened by the addition of a non obstante or "notwithstanding anything in this Act" clause, a conventional device employed in constitutions when the framers wish to establish the indisputable paramountcy of any particular section. Thus it will be seen, if these three provisions are read backwards, that section 91 establishes an order of paramountcy according to which the enumerations of 91 rank first, sec-
tion 92 ranks second, and "peace, order, and good government" ranks third—or, in other words, according to a three-compartment scheme.

One of the earliest and clearest statements illustrating the Judicial Committee's adoption of the above line of reasoning is found in Citizens Insurance Company v. Parsons (1881) 7 A.C. 96, from which this quotation is taken:

The scheme of this legislation as expressed in the first branch of sect. 91, is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature. If the 91st section had stopped here, and if the classes of subjects enumerated in sect. 92 had been altogether distinct and different from those in sect. 91 no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them and the Dominion Parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in sect. 91; hence an endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" that (notwithstanding anything in the Act) the exclusive legislative authority of the parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that
section. With the same object, apparently, the paragraph at the end of sect. 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of sect. 92.\(^2\)

The last sentence in the above quotation introduces the second line of reasoning that has occasionally been used to support the three-compartment scheme, a line of reasoning based on the concluding words of section 91.

These words read as follows:

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 problem involved here is whether the "class of matters of a local or private nature" refers to all the subheads of section 92 or to the sixteenth one only ("Generally all matters of a merely local or private nature in the Province"). Suppose all the subheads are meant. The concluding words of 91 would then be a sound reason for supporting the three-compartment scheme. For, in the first place, they expressly apply to the enumerations of 91 alone, thereby plainly excluding the general "peace, order, and good government" clause. Moreover, they state that any matter judged to fall within one of the enumerations of 91 must

\(^2\) Cited in Cameron, Canadian Constitution, p. 277.
be considered outside section 92, or in other words, that in the event of a clash of authority the enumerations of 91 are paramount to section 92. But authority over section 92 is assigned "exclusively" to the Legislatures of the Provinces, a word repeated and thus underscored, it might again be noted, in the introductory statements to sections 91 and 92 as well as in section 91, subsection 29. The result is that since the enumerations of 91 are separated from "peace, order, and good government," and since these enumerations are deemed paramount to section 92, and since section 92 is within the "exclusive" authority of the provincial legislatures—"peace, order, and good government," the residuary powers left after the enumerations of 91 and section 92 are subtracted from the totality of Canada's legislative powers, must occupy a third compartment to be used only when the first two cannot be applied. A three-compartment scheme is the logical and, indeed, inevitable consequence, and the Judicial Committee's interpretation of sections 91 and 92 is thus supported by the concluding words of 91—provided, that is, that the "class of matters of a local or private nature" means all the subheads of section 92. But suppose it refers to the sixteenth enumeration only. The whole argument would then, of course, crumble, for the concluding words of 91 would in that case simply be a safeguard against any encroachment of provincial
authority, through section 92 subhead 16, on the enumerations of 91. The other subheads of section 92 would accordingly have no bearing at all on the three-compartment scheme and could not be used either to defend or to attack it. Thus it will be seen that the whole question of whether the concluding words of 91 can be invoked to support the three-compartment scheme depends ultimately on the meaning of the expression "class of matters of a local or private nature...."

The best illustration of an attempt by the Judicial Committee to apply this expression to all the subheads of section 92, and hence to use it in support of the three-compartment scheme, is found in Attorney-General for Ontario v. Attorney-General for Canada (the "Prohibition Case") (1896) A.C. 348, where the following quotation is found:

It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by s. 91 might, occasionally and incidentally, involve legislation upon matters which are prima facie committed exclusively to the provincial legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 91 enacts that "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." It was observed by this Board in Citizens' Insurance Co. of Canada v. Parsons
that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature. It also appears to their lordships that the exception was not meant to derogate from the legislative authority given to the provincial legislatures by these sixteen subsections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91.3

A clear choice is evident here: the concluding words of section 91 are specifically stated to refer both in fact and even in form to all the subheads of section 92 and not just to subhead sixteen. The result is that according to this case the three-compartment scheme can be defended by the concluding words of 91 alone, irregardless of whether these words are supported or not by the introductory statement to that section.

To summarise the arguments in favour of the three-compartment scheme, then, it will be noted, to begin with, that support has been found in two separate places: in the introductory and concluding sentences of section 91. In

3 Cited in Cameron, Canadian Constitution, pp. 490-491.
the first of these, the line of reasoning urged is based on the fact that "peace, order, and good government" is expressly limited by the expression "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," as well as by the word "exclusively," which is used to describe provincial authority in four different places and which would be completely meaningless and quite unnecessary unless such a limitation were carried out. To the two compartments thus established a third is then added on the authority of the non obstante clause, which gives indisputable paramountcy to the enumerations of 91 over section 92. As far as the concluding words of 91 are concerned, the line of reasoning here is that the phrase "class of matters of a local or private nature" refers to all the subheads of section 92 and consequently establishes the paramountcy of the enumerations of 91 over section 92, which is in turn made paramount to "peace, order, and good government" by the clear omission of that general power from the concluding words of 91 and also, again, by the word "exclusively."

In our examination of these arguments the second might be considered first since it can be disposed of fairly quickly. It has already been noted that this argument rests on the basic assumption that the "class of mat-
ters of a local or private nature" means all the subheads of section 92. But that is a very dubious assumption indeed. Consider, for instance, the number of the noun "class." Surely the plural would have been much more natural and appropriate if all the subheads of section 92 were meant. In fact, if they all were meant this is the only time they are referred to in the singular. Thus in the opening words of section 91 this phrase is used: "the classes of matters by this Act assigned exclusively to the Legislatures of the Provinces." Again, in section 91 subhead 29 reference is made to "Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Then too, the "class of matters" referred to in the concluding words of 91 is said to be "comprised in the enumeration of the classes of subjects" in section 92. Moreover, the expression "class of matters of a private or local nature" is almost identical with that used in section 92, subhead 16: "Generally all matters of a merely local or private nature in the Province." Grammatically, then, as indeed the Judicial Committee recognised in Citizens Insurance Company v. Parsons, the concluding words of section 91

4 See above, pp. 47-48.
would appear to be very closely connected with section 92, subsection 16—much more closely than with all the subheads of that section and much too closely, surely, to admit of a simple accident or oversight in the words chosen or of a mere coincidence in phrasing. Finally, apart from such grammatical considerations, there is this general point that if the concluding sentence of 91 referred to all the subheads of section 92 it would have no purpose beyond that of simple repetition, for that function is already carried out by the introductory words of section 91. Admittedly all these arguments might still not be considered absolutely conclusive, but they at least indicate that the probability is stronger that the concluding words of 91 refer to section 92, subsection 16 rather than to all the enumerations of that section—especially when it is noticed, on the other hand, that there is nothing indicating, from the words alone, that the reverse is the case. It must be conceded, then, that at the very best the concluding words of 91 are an extremely insecure foundation on which to rest the three-compartment scheme.

If the argument based on the concluding words of 91 can be fairly successfully engaged, however, it is not so easy to counter the other argument based on the introductory words to that section. The main criticism of this argument is that it fails to give due weight to the expres-
sion, "but not so as to restrict the generality of the foregoing terms of this section." By establishing the paramountcy of the enumerations of 91 over section 92, it is contended, the Judicial Committee not only disregarded this expression but actually introduced the very restriction it specifically forbids. At first glance this contention might seem of some validity but deeper consideration reveals its fallacy. For, to begin with, it will be noticed that the word "restrict" is ambiguous and is in fact capable of two quite different interpretations, each of which would affect the meaning of the expression in a quite different way. If, for instance, a restriction in what might be termed "quality" is meant—if, in other words, the idea is that the enumerations of 91 are not to be considered as of greater weight than "peace, order, and good government"—then the three-compartment scheme definitely violates this expression. If, on the other hand, the restriction is one of "quantity"—if, in other words, the idea is that the enumerations of 91 are not to be considered as comprising all the powers of the federal parliament which, in addition to these enumerated powers, also has a general residuary power—then no violation at all is involved by declaring that the enumerations of 91 supplement rather than illustrate the scope of "peace, order, and good government." The question revolves, then, about the meaning of the
word "restrict"—and here is where the phrase "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," as well as the word "exclusively," must be introduced into the controversy. For if the word "restrict" is defined in the first manner, that is, so as to make the enumerations of 91 merely illustrate the scope of "peace, order, and good government," the non obstante clause would immediately hurdle backwards over the semi-colon and would thus establish the paramountcy of "peace, order, and good government," as well as the enumerations of 91, over section 92. That in turn, however, would involve a plain and inevitable violation of the limitation placed on these general powers by the word "exclusively" and the phrase, "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." If, on the other hand, the second meaning of the word "restrict" is adopted—if, that is, the enumerations of 91 are held to supplement the scope of "peace, order, and good government"—no such violation would result. The two phrases, "but not so as to restrict the generality of the foregoing terms of this section" and "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," as well as the word
"exclusively," can all thus exist quite happily side by side, with no violation or contradiction whatsoever. For this reason, it will be apparent that the word "restrict" simply must be interpreted as a limitation in "quantity" rather than in "quality," that the enumerations of 91 must be admitted to supplement rather than to illustrate the scope of "peace, order, and good government," that the three-compartment scheme must be supported, and that the foundation on which the Judicial Committee has based its interpretation of the distribution of legislative powers in Canada's constitution must be acknowledged not merely as a sound but, from a legal point of view, as the only possible foundation that can exist without a direct violation of the express and clear words used in the British North America Act. Legally, the Judicial Committee's interpretation is correct.
CHAPTER V

THE HISTORICAL ARGUMENT

The "legal" type of reasoning illustrated in the foregoing chapter has seemed to many critics altogether too narrow and technical, and this feeling has led in turn to various attempts at a more liberal approach to the interpretation of the British North American Act. In general these attempts, which may be roughly divided into three main categories, are linked together by one common feature—-they are all based on historical grounds.

The first attempt is concerned with the intentions of the Fathers of Confederation, the idea being to examine such sources as might indicate those intentions, then to compare the results with the Judicial Committee's interpretation. The argument begins with the fact that a centralising tendency is notable in many of the speeches and letters of the time. There is no space here to record all the examples that have been collected to illustrate this inclination, but attention might be drawn to the words of Macdonald, Galt, Cartier, McGee and Carnarvon as particularly good examples of an indisputable leaning on the
part of several of the authors of Canada's constitution. Secondly, there is the point that a desire for a strong central government would seem to be revealed by various portions of the act itself. The fact that residuary legislative authority is left with the federal government rather than with the provinces, that the federal government has the power to appoint the lieutenant-governors, and, perhaps most important of all, that the federal government is capable of disallowing provincial acts would all tend to show, indeed, that the Fathers planned a central government so strong as to be actually capable of exercising control over provincial legislation. Finally, there is also evidence from the general conditions of the period that a strong central government would have been naturally favoured. Within the British North American Provinces an impossible tangle of separate tariffs, different currencies, individual commercial and industrial standards and practices, scattered military forces, and political stalemate had been created by the rampant sectionalism of the preceding years, while, without, there was the dual spectacle

of a Britain no longer interested in the military or economic protection of her colonies and a United States split apart by the doctrine of States Rights. These factors can reasonably be considered to have produced an inclination towards the doctrine of centralisation rather than to that of local autonomy. In short, then, from the speeches and correspondence of many of the Fathers, from certain provisions of the British North America Act itself, and from the general situation existing at the time, it has been inferred that the framers of the Canadian constitution intended the new nation to have a strong central government.

On the other hand, it is urged that the intentions of the Fathers must be examined in the light of one fundamental fact, a fact proved beyond any possible doubt not only by the circumstances surrounding the union of the British North American Provinces but also by the express words, as well as the general scheme and context, of the British North America Act itself—Canada is, and was

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undeniably meant to be, a federation. Once this basic fact is thoroughly appreciated the following points can be raised. First of all, it is admitted that the words of many of the Fathers do reflect an overall desire to see a central government with authority over general matters and provincial legislatures with authority over local ones. That, however, is all they reflect and no indication whatsoever, as some writers would imply, that the Fathers really planned a central government so strong as to be capable of invading a field of legislative authority reserved to the exclusive authority of the provincial legislatures—for any such action would be a direct violation of the essential federal principle underlying the Canadian constitution. The dispute, in other words, is not whether the Fathers intended the federal government to have a more general authority than the provincial leg-

3 In the case of St. Catherine's Milling and Lumber Company v. The Queen (1888) 14 A.C. 46, Edward Blake expressed this idea as well as it will ever be expressed. "You find," he declared, "a single phrase, as I conceive the governing phrase of this Act, appearing only in the preamble but operating upon the whole statute, the phrase 'federally united'. The word federal is the key which unlocks the clauses and reveals their contents. It is the glass that enables us to discern what is written. By its light the Act must be construed. What then is the general scheme of this Act?...It was the design, I say, by gentle and considerate terms to preserve the vital breath and continue the political existence of the old provinces. However this may be, they were being made, as has been well said, not fractions of a unit but units of a multiple. The Dominion is the multiple and each province is a unit."
islatures, but rather over just how strong they wished that central government to be. An attempt to solve this problem can be made at this juncture by introducing the second point, noted above, regarding the placement of residual authority, the appointment of lieutenant-governors, and the disallowance power. Here again, however, if the fundamental fact of Canada's federal status is kept in mind, it becomes obvious that all such provisions must be viewed in one of two ways: either, overlooked or misinterpreted by the other Fathers, they were surreptitiously inserted by a few determined centralists, or else, as the courts have decided, they had a different implication at that time to what some would now claim. In any event, it must be acknowledged that, whatever their original purpose or significance, these provisions cannot be used to obscure the fundamental fact that Canada was intended to be, and was specifically created as, a federal state. Then too, as far as the general situation of the times is concerned, if centralising conditions existed, they were met by conditions tending in exactly the opposite direction. Not

only in Quebec but also in the maritime provinces economic and social, as well as racial, religious and cultural, differences combined to make the British North American Provinces enter union only reluctantly and with a firm determination to retain the maximum amount of local autonomy—as is reflected in the words of men like Dorion, Dunkin, Holton and Huntington, to mention only a few. For all these reasons, it is held that if the Fathers intended the federal government to have authority over general matters, they did not intend and could not have intended, as the centralist arguments outlined in the preceding paragraph would suggest, that that government would be so strong as to be capable of controlling provincial legislation and, in so doing, of destroying the federal foundation on which the constitution of Canada is, and was so clearly meant to be, built.

The second attempt at furnishing a historical background for the interpretation of the British North America Act may now be discussed. This attempt, which is mainly,

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5 For a speech typical of this feeling see Dunkin in Confederation Debates, pp. 501-506.

though not solely, based on historical reasoning, is not concerned with the intentions of the framers of the act but rather with the way in which the act was produced. The original cause of the argument is found in the so-called "compact theory," which maintains that the Canadian constitution is the result of an agreement, treaty, contract, or compact, as it is variously called, among the British North American Provinces, and hence cannot be amended without their unanimous consent. Since there is no amending procedure provided for in the British North America Act, this idea is supported on the three grounds of actual practice, federal theory, and historical reconstruction. The two instances generally mentioned as examples of the compact theory being supported in actual practice are the consultations among all the provinces that occurred before the revision of provincial subsidies in 1907 and before the unemployment insurance settlement of 1940. As far as the federal theory argument is concerned, attention is called to the thirteenth article of the American constitution as it existed between 1777 and 1787 for an explicit illustration of just how the constitution of a confederation must be altered. Lastly, in connexion with historical reconstruction, which, it might again be noted, constitutes the main basis of the compact theory, the following account of the events producing the British North America Act is given. The British North American Provinces all sent
delegations to the Quebec Conference of 1864; these delegations each agreed to seventy-two resolutions as the basis of the proposed union; these resolutions were in turn used as the basis of the British North America Act of 1867; any amendment of that act must, therefore, be carried out in the same manner as the Quebec Resolutions were originally drawn up—by the unanimous consent of the provinces constituting the Dominion. The fact that Prince Edward Island, British Columbia and Newfoundland made no agreement with the other provinces but only with the Dominion, and that Manitoba, Alberta and Saskatchewan were actually created by acts of the Dominion Parliament, is then explained away by reasoning that since the ten provinces are completely equal in status, the compact, which was express as regards the United Provinces, New Brunswick and Nova Scotia, was implied as regards the others. In addition, notice is taken of the frequent use of such words as "treaty" and "compact" by many of the delegates to the Quebec Conference as added proof of the contractual basis of the Canadian constitution. Such, in a very abbreviated form, is the main trend of the compact theory
of confederation.

In reply to the above arguments these points have been raised. The 1907 and 1940 instances of provincial consultation can be discarded as a legitimate argument for two reasons: firstly, although in certain cases amendments affecting a single province or a group of provinces were preceded by consultation, these are the only instances of all the provinces being consulted; secondly, agreement amongst all the provinces or even amongst the particular provinces concerned has not, in practice, been considered necessary before an amendment could be carried out—and the 1907 case is itself a perfect example of this fact since, despite British Columbia's refusal to assent to the settlement aimed at, the amendment was still passed by the Imperial Parliament. Then, as regards the federal theory argument, it is first of all necessary to define one's terms. Again whether in a deliberate attempt at ambiguity, as has been suggested, or whether in a genuine confusion

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7 One of the best examples of an article favouring the compact theory is the memorandum from G. H. Ferguson, Premier of Ontario, to the Prime Minister of Canada, dated 10 September, 1930, and published in The Globe, 20 September, 1930. Pertinent extracts from this memorandum are quoted in N. M. Rogers' "The Compact Theory of Confederation," Papers and Proceedings of the Canadian Political Science Association, vol. 3 (May, 1931), pp. 205-230, which is by far the most extensive and clearest summary of the anti-compact theory arguments outlined in the following paragraph.

as to the distinction, many of the Fathers used the words federation and confederation interchangeably. Political theorists, however, usually distinguish between the two, reserving "confederation" to mean a form of government in which the central authority acts on the citizens of each state only through the state legislatures, whereas in a "federation" the central government acts not only upon the states but also directly upon their citizens. With its provision for a central government with direct authority over all Canadian citizens, the British North America Act on this basis clearly establishes a federation rather than a confederation in Canada. Granted, then, that there is a distinction between a confederation and a federation and granted also that just the second of these terms is truly applicable to the Canadian union, it need only be added that, while the doctrine of unanimous consent does form an integral part of a confederation such as the United States between 1777 and 1787, no such procedure is a necessary feature of a federation such as the United States today, Australia, or, for that matter, Canada. Finally, there is the historical argument. Again it is impossible in so short a space to go into all the bypaths

\[9 \text{ Cf. above, Chapter 1, for a more extended discussion of these terms.}\]
of this controversy, but, as a brief summary of the vast number of points that can be found elsewhere, the following considerations might be noted. Firstly, in 1864 the British North American Provinces had not yet acquired the right to conclude political engagements either with foreign countries or among themselves. Moreover, although the constitutions of the Maritime provinces did not have a statutory basis, that of the United Provinces of Upper and Lower Canada did, and, accordingly, the Crown simply could not authorise any abandonment of or change in that constitution, the Imperial Parliament, which had passed the Union Act of 1840, having the sole power to make an alteration. In addition, any instructions to the governors of the provinces to conclude a treaty of union would have been a violation of the principle of responsible government. For these reasons, all the Crown was able to recommend, and all the Duke of Newcastle's despatch to the Lieutenant-Governor of Nova Scotia actually authorised, was merely a "consultation on the subject amongst the leading members of

Thus the delegates to the Quebec Conference had no, and could not possibly have had any, power to enter into a treaty, contract, or compact. Secondly, within the colonies themselves the legislatures of the Maritime provinces did not give even legislative authority to their delegations to draw up a scheme of union, while similarly none of these legislatures ratified the resolutions that were eventually produced. With four of the five parties to the supposed compact thus neither authorising nor accepting the Quebec Resolutions, it is difficult, to say the least, to see how they can be considered the basis of a treaty among the provinces of British North America. Thirdly, the Quebec Resolutions of 1864 were changed at the London Conference two years later, and this second set of resolutions was in turn changed before the British North America Act was passed—but not even the legislature of the United Provinces, which had been the sole legislature to ratify the Quebec Resolutions, was given the opportunity to consider, let alone to accept or reject, these changes. In view of all these facts, the only possible conclusion is that since the Crown did not—
could not—give the British North American Provinces executive authority to make a compact at Quebec, since the sole legislative authority behind the conference was given by the Imperial Parliament and not by the provincial legislatures at all, while only the legislature of the United Provinces ratified the Quebec Resolutions, and since these resolutions were in any case altered not once but twice without any authorisation or consent from any of the provinces, the Quebec Conference cannot be held to provide any sort of foundation for the compact theory. Last of all, as far as the frequent use of the terms "treaty" and "compact" by some of the delegates to the conference is concerned, the facts are that only the delegates from the United Provinces used these words, that these words were used before it became apparent that the Maritime provinces would refuse to accept the Quebec Resolutions, and that the very men who used these words later expressly rejected the doctrine of unanimous consent. These facts seem to indicate that the use of such terms as "treaty" and "compact" in the debates held in the Canadian Legislature was either simply rhetorical or else a political manoeuvre designed to confine

the discussion to acceptance or rejection of the resolutions as a whole. In conclusion, then, the compact theory can be engaged—and very successfully engaged—on any of the three grounds on which it is based, whether that ground be actual practice, federal theory, or the main one of historical reconstruction.

The third attempt to avoid an excessively technical interpretation of the British North America Act by providing it with some historical background is connected with two particular provisions: section 91, subsection 2, which gives the federal government legislative authority over "The regulation of Trade and Commerce," and section 92, subsection 13, which gives the provincial legislatures authority over "Property and civil rights in the Province." As previously explained in Chapter IV, the Judicial Committee has in effect placed a severe limitation on the first of these provisions, while the second has been given a wide interpretation. Historical evidence, however, would tend to indicate that exactly the contrary situation was originally planned. While once more reference must be made to other sources for a really detailed examination of this problem, the two following paragraphs contain the gist

of the argument.

That the expression "regulation of Trade and Commerce" was intended to imply a regulation by the federal government over the general business life of Canada rather than, as the courts have decided, over trade and commerce in their interprovincial and external aspects only is indicated by five considerations. To begin with, this phrase came into current and official use during the great age of the mercantilist system when, in line with that system's attempt to control not only tariffs and shipping but also banks, currency, manufactures and the like, it acquired a very comprehensive significance. Secondly, the speeches of some of the Fathers seem to support the position that the same comprehensiveness was implied in the case of the British North America Act, as does the absence of any restriction in the wording of the constitution, in the federal government's power over trade and commerce. In addition, it might be noted that because the economy of British North America at this time was founded on trade the people not only used the expression trade and commerce to signify the general business of the country, but also viewed business

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14 See above, Chapter 3, pp. 31-34.

15 Note the following instances in the Confederation Debates especially: Galt, p. 62; Cartier, p. 61; Rose, p. 409. Also cf. Galt's Speech on the Proposed Union, pp. 10, 20, and 52.
as a basically transcontinental and transoceanic affair, impossible to be considered as a local matter in any important sense. In the fourth place, the comprehensive significance of trade and commerce is apparent in the legal as well as in the popular usage of the period; in The Consolidated Statutes of Canada, published in 1859, for instance, legislation concerning weights and measures, banks, interest, promissory notes, limited partnerships and similar subjects is included under the general heading of "Trade and Commerce," while laws relating to the incorporation of public utilities, railway, telegraph, mining and insurance companies, and companies engaged in various manufactures are listed under "Trade Companies and Corporations." Lastly, there is the general fact that one of the primary objectives—indeed, the chief economic objective—for the union of the British North American Provinces in the first place was the commercial integration of the new country on a continental scale; the handing over of commercial leadership to the federal government would consequently have been the logical result.

As far as "Property and civil rights in the Province"

16 Cf. The Consolidated Statutes of Canada, Toronto, Stewart Derbishire and George Desbarats, 1859, Table of Contents, Title 4, p. v.

17 Cf. Consolidated Statutes, Table of Contents, Title 5, p. vi.
is concerned, the argument is based on the three-fold supposition that the original purpose of this provision was to protect the civil autonomy of Quebec, that it accordingly extended only so far as was necessary to attain that purpose, and that it thus referred to the peculiar laws and customs of that province only. In support of this argument it is pointed out, first of all, that the absence of any provision for conflicts of jurisdiction over economic matters, as well as the failure of any of the contemporaries of Confederation to foresee a clash between trade and commerce and property and civil rights, would indicate that the two provisions were intended, and considered, to be mutually exclusive—with no conflict, such as the courts have discovered, possible. Moreover, the British North America Act's section 94, which authorises the "Parliament of Canada" to "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..." the federal government being given the

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18 As pointed out by Professor Creighton, it is noteworthy that "even Christopher Duncan, the voluminous critic of Confederation who devoted considerable space to possible conflicts of jurisdiction, never attempted to set the property and civil rights clause against the Dominion power to regulate trade and commerce." (p. 57).
unrestricted power to legislate over any aspect of property and civil rights thus made uniform, seems foreign to the contention that the property and civil rights clause was meant to protect local interests for all the provinces rather than basically for Quebec alone. Thirdly, in one of the few explanations ever given of property and civil rights by the Fathers, Alexander Galt likewise signified that the essential purpose of this provision was to protect the French Canadian's system of civil law. Finally, once the contention is accepted that property and civil rights was intended to safeguard Quebec's civil laws, it is possible to determine just what those laws embraced by observing such summaries of them as were included in the instructions given to Governor Carleton in 1775:

On the one hand, it is Our Gracious purpose conformable to the Spirit and Intention of the said Act of Parliament (the Quebec Act of 1774), that Our Canadian Subjects should have the benefit and use of their own Laws, Usages and Customs in all Controversies respecting Titles of Land, and the Tenure, Descent, Alienation, Incumbrances and Settlement of Real Estates, and the distribution of the personal property of Persons dying intestate; so on the other hand, it will be the duty of the Legislative Council to consider well in framing such Ordinances, as may be necessary for the Establishment of Courts of Justice, and for the better Administration of Justice, whether the Laws of England may not be, if not altogether,

19 Cf. Galt's Speech on the Proposed Union, p. 15. The pertinent extract is included, with interpretive comments, in D. G. Creighton, British North America at Confederation, pp. 57-58.
at least part of the Rule for the discussion in all Cases of personal Actions, grounded upon Debts, Promises, Contracts and Agreements, whether of a Mercantile or other Nature; and also of Wrongs proper to be compensated in damages....20

In contradiction of the various arguments outlined in the above two paragraphs it might be pointed out, in the first place, that the fact that many aspects of trade and commerce are particularised in section 91 would seem incompatible with the placing of any very comprehensive interpretation on this expression. For as the Judicial Committee has declared, "If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; 21 and even 21, bankruptcy and insolvency." Then, in connexion with the property and civil rights question, it might be noted that this expression has always had a very wide meaning in Canadian constitutional history. It is possible to contend, for instance, that the edict issued by Louis XIV

20 Cited in D. G. Creighton, British North America at Confederation, p. 156.

in 1663 established the entire French law in Canada, that all those laws were thus in force at the time of the conquest, and that it is consequently irrelevant to attempt to determine, by examining such instructions as those given to Governor Carleton, which of these laws were actually in force in 1775. The Quebec Act restored without limitation the entire French civil law, and it is because of this restoration that the expression "Property and civil rights in the Province" must be accorded the wide interpretation the courts have established.

At this point attention must be drawn to one general fact emerging from the account given so far in this chapter. It has been noted that each of the three attempts at going beyond the mere words of the British North America Act has been based mainly on historical reasoning. It will also be noted that, depending to some degree on the reader himself, the various arguments summarised in discussing these three attempts will appear as sometimes—or perhaps always—favouring one side, sometimes—or again it may be always—the other. Now it is imperative to note, in addition, that, whatever side the historical arguments are judged to support, these arguments are all undercut by one primary question: has historical reasoning any place in the interpretation of a statute such as the British North America Act? A negative reply to this question would, of
course, consign all historical arguments, however convincing any of them might seem, to the realm of completely irrelevant considerations. It is apparent, therefore, that this primary question of the application of historical reasoning to statutory interpretation will have to be dealt with before this chapter can be concluded.

The problem of extrinsic evidence and its application to statutory interpretation has long been a favourite source of legal debates and has consequently become an extraordinarily intricate and complicated subject. All that will be attempted here, accordingly, is, first, to summarise in a very general way the fundamental character of the problem, secondly, to indicate the attitude assumed by the Judicial Committee in its actual decisions, and, lastly, to suggest, from a layman's point of view, what would appear to be the wisest course to follow in the particular case of the British North America Act.

The fundamental idea underlying statutory interpretations in the British legal system is to examine the statute in question by itself, with no regard at all either for the events that produced it, the men who wrote

22 A most convenient reference for the following section is V. C. MacDonald's article, "Constitutional Interpretation and Extrinsic Evidence," Canadian Bar Review, vol. 17, no. 2 (February, 1939), pp. 77-93. Other helpful articles for the problem of statutory interpretation in general are listed below, pp. 132-133.
it, the times that molded it, or, on the other side, for the conditions to which it might give rise. The statute stands alone, and its provisions are interpreted solely by the actual words in which they are expressed, those words being given their ordinary and grammatical meaning. The only departure from this procedure permissible in normal circumstances, a departure significant in that it too still confines interpretation within the boundaries of the statute itself, was ideally summarised by Earl Loreburn in 1912:

In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and in what it forbids. When the text is ambiguous, as, for example, when words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act.23

It is true that special circumstances, such as hopelessly irreconcilable provisions or quite impossible ambiguities, might on occasion necessitate a departure from the normal course of textual examination, but, it must be emphasised, such a departure is possible only in the most extraordinary circumstances and is consequently undertaken only with the

23 Attorney-General for Ontario v. Attorney-General for Canada (1912) A.C. 571.
greatest reluctance—and very seldom indeed—by a British court. The usual and by far the most frequent path followed in statutory interpretation is rather the closely confined documentary investigation described above—and that, as will now be shown, is the type of investigation followed, on the whole, by the Judicial Committee of the Privy Council in its interpretation of the Canadian Constitution.

The record established by the Judicial Committee regarding the problem of extrinsic evidence as applied to the British North America Act is not perfectly consistent. On the one hand, for instance, the court has held that the usual contents of bankruptcy statutes have a bearing on disputes over the "Bankruptcy and Insolvency" subsection, that the normal legislative practice of the United Kingdom must be considered in connexion with customs provision, that the "common understanding" of J. S. Mill must be used to distinguish between direct and indirect taxation, and that since section 132 was predicted on a situation existing in 1867 it cannot be stretched to cover Canada's new treaty-making status. On the other hand, the Judicial

26 Cf. Bank of Toronto v. Lambe (1887) 12 A.C. 575.
27 Cf. In re Regulation and Control of Radio Communication in Canada (1932) A.C. 394.
Committee has refused to be influenced by reference to types of legislation enacted before Confederation, by the contention that the federal government's authority over criminal law should be confined to laws included in that category in 1867, or by the argument that the Statute of Westminster cannot be held to affect the exercise of powers provided for in the British North America Act. Similarly, only in a wider sense, the Judicial Committee has fluctuated in its general approach between the two extremes of literalism and liberalism. It must be admitted, in the light of these instances, that the Judicial Committee's attitude towards the use of extrinsic evidence in the interpretation of the British North America Act...


31 As an example of a literal approach see Bank of Toronto v. Lambe (1887) 12 A.C. 575; for two good indications of an apparent change to a more liberal attitude see Edwards v. Attorney-General for Canada (1930) A.C. 124 and British Coal Corporation v. The King (1935) A.C. 500; to illustrate a return to literalism, then see the "new deal" cases, especially Attorney-General for Canada v. Attorney-General for Ontario and Others (1937) A.C. 355.
Act has not always been the same. At the same time, these occasional deviations must not be allowed to obscure an even more obvious fact: in the overwhelming number of cases—even in cases when the court actually began by recommending a liberal general approach—the decisions handed down by the Judicial Committee of the Privy Council have been firmly based on the established rules of statutory interpretation summarised in the preceding paragraph. Moreover, as far as this particular chapter is concerned, it is especially significant to observe that the court’s attitude towards strictly historical arguments, such as the original intentions of the Fathers or the actual conditions of the period, has been both clear and consistent. The Judicial Committee has referred to the circumstances producing the British North America Act, to the Quebec and London Resolutions, to the language of Lord Carnarvon, and to the compact theory—but none of these

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34 Cf. In re Regulation and Control of Aeronautics in Canada (1932) A.C. 54.
references had any controlling effect on the decisions reached, while again in by far the majority of cases the court has not merely declined to be influenced by such considerations but has actually refused to entertain them at all. The Judicial Committee's stand regarding the problem of extrinsic evidence as regards the British North America Act can therefore be said to correspond on the whole to the statement, quoted earlier, by Earl Loreburn.

If an opinion may be ventured here, apart from the abstract legal question of the propriety of employing historical evidence in statutory interpretation, two points would seem to weigh the scales in favour of this stand by the Judicial Committee. First of all, as the chapter has attempted to show, historical arguments tend to offer more scope for disputation and consequent uncertainty than legal ones, and this tendency is particularly noticeable in the case of the British North America Act where historical evidence supporting quite contrary positions can be discovered. Secondly, it must be remembered that the British North America Act, unlike the Australian and American constitutions, has a very meagre documentary background, and this fact necessarily complicates still further the already difficult task of determining just what the historical setting of the act really signifies. In view of these two difficulties, it is suggested that, since agreement cannot
be reached on the historical background of the Canadian constitution, and since the lack of adequate historical records makes any examination into that background so much more tentative and controversial, the well established convention of interpreting statutes on a strictly textual level would appear to be the wisest, and certainly the surest, course to follow in the interpretation of the British North America Act, 1867. Such a conclusion inevitably forces us back to the legal problem discussed above in Chapter IV, a problem which, in the opinion of this writer at any rate, can only be solved the way the Judicial Committee of the Privy Council has solved it—on the basis of a three-compartment scheme.
CHAPTER VI

THE PRACTICAL RESULTS

In the last two chapters an effort was made to determine whether the Judicial Committee's interpretation of sections 91 and 92 of the British North America Act is right or wrong. In this chapter the idea is to determine whether that interpretation has been good or bad. There is, naturally, a great temptation, and perhaps even an unavoidable tendency, to confuse these two different questions, allowing one's sentiments towards the second to influence one's view of the first. It must therefore be emphasised, before the following discussion is begun, that the distinction between the legal or historical correctness of the Judicial Committee's interpretation and its practical results must be carefully and constantly kept in mind. If the court's interpretation is approved, it does not necessarily follow that the effects of that interpretation must also be approved; the two questions are separate and can quite logically be answered in what might at first appear to be a contradictory manner.

The first major difficulty that has developed in connexion with the distribution of legislative powers in Canada's constitution, then, is found in those functions which were divided between the Dominion and the provinces.
In certain cases this division was arranged for by an express provision of the British North America Act, as may be seen in section 95 where concurrent powers are established over agriculture and immigration. In other cases, it will be recalled, the Judicial Committee used the "Cooperation Doctrine" to divide particular subject-matters mentioned in sections 91 and 92. In both cases, however, the resulting joint administration has led, in the words of an official report, to "friction, waste, and inefficiency." Nevertheless, with the once hopeful outlet of one authority delegating power to another now ruled out, and with the subjects now controlled by governmental cooperation daily becoming more and more important, it would appear that, barring any alteration either in the terms of the British North America Act or in the interpretation of the courts, this very system of joint administration which has produced such unfortunate administrative results will actually have to be used with increasing frequency.

1 See above, Chapter II, pp. 23-25.

2 J. A. Corry, Difficulties of Divided Jurisdiction, Ottawa, King's Printer, 1939, p. 8.

So far the chief areas of friction have been the marketing of agricultural products, the regulation of insurance companies, fisheries, and the investigation of labour disputes. A summary of the situation regarding each of these areas will consequently be attempted here as an illustration of the kind of considerations—and the complexities—involving in the general problem of joint administration. According to judicial interpretation, the buying or selling of any product is a trade or business, the regulation of such a trade is primarily a matter of property and civil rights, and the power in such cases thus rests with the provincial legislatures. When a trade or business conducts inter-provincial or export transactions, however, the regulation of these transactions is an aspect of trade and commerce and thus falls within the exclusive competence of the federal government. This division of authority has not caused much difficulty in the marketing of most natural products or of manufactured goods, but because of the special need for imposing standard grades, uniform packaging and honest marks—in short, because of the special need of protection for the producer as well as the consumer—the marketing of agricultural products has been affected and has resulted in acute administrative difficulties. On the other hand, once the dividing line between Dominion and provincial authority was
decided, the problem of regulating insurance companies was fairly successfully met. Here there is no need for the single unified administration essential in the case of marketing regulations, and the principal evils of divided jurisdiction are thus the comparatively minor ones of duplication and overlapping, a consequent nuisance and added expense to the insurance companies, and a resulting high cost of insurance for the public. An improvement in this situation might be achieved by persuading the Dominion and the provinces to agree upon a more exact division of the field so as to avoid duplication of licences, reports, records, and so on. Even so, with several staffs doing the work one could accomplish as well or better, some duplication is unavoidable and the cost of insurance in Canada will most likely never be as low as it could—and should—become. As far as the fisheries are concerned, the federal government is responsible for regulating and administering all except non-tidal fisheries, where, although the Dominion still has the right to make the regulations, the provinces are supposed to assume the administration. In practice various agreements have been worked out to leave the administration of both tidal and non-tidal fisheries with either the Dominion

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or the provinces, so that only in British Columbia is the administration actually divided by the head of tide. Still, the federal government makes the regulations for everywhere, and it is because of this remote control, rather than because of the divided administration, that trouble has developed. Apart from the common confusion as to the meaning of a regulation, the chief reason for this trouble is that a required change in regulations involves such a quantity of investigation, correspondence, reference to the Department of Fisheries, and all the rest, that not only do the provinces feel neglected and resentful, but also the change, when it finally comes, often comes too late to do much good. Finally, with regard to the investigation of labour disputes, there are three types: those in which the Dominion can intervene because of exclusive legislative power over the industry, those in which it can intervene because of enabling legislation passed by a province, and those in which it cannot intervene because they are entirely within provincial jurisdiction. The cooperation problem, of course, occurs in the second type only. In this type unity of administration can be attained, and any complication in the task of investigation and conciliation correspondingly avoided, providing the province concerned supports the enabling legislation, the constitutionality of that device is not
threatened, and the Dominion is thus left to handle the dispute alone. The awkward thing is, however, that not only does the province sometimes refuse to support the enabling legislation, as occurred in 1937 when British Columbia repealed such a law, but also the constitutionality of the system is often, and is more and more frequently being, challenged and challenged with success. Thus more and more the Dominion is being refused the right to mediate labour disputes where federal intervention would be more effective than provincial.

A general commentary on the four particular problems outlined above is now in order. It will be noticed, to begin with, that the muddles resulting from the system of joint administration differ in quality and intensity. In some cases, such as uniform legislation on company law, administrative cooperation can almost be dispensed with; in other cases, some cooperation is necessary—as in the regulation of insurance companies; in still other cases, in the marketing of agricultural products, for instance, a very high degree of cooperation is essential in the interest of efficiency and economy. It will be apparent, therefore, that the system of administrative cooperation must remain an unavoidable, however undesirable, feature of government in Canada. Moreover, as pointed out earlier, all indications point to the conclusion that as time
passes this system will have to be used still more frequently. The question is, then, whether the "friction, waste, and inefficiency" that has resulted in the past from joint administration by the Dominion and the provinces can be eliminated, or at least reduced, in any way short of the extreme measures of interpreting the many decisions handed down by the Judicial Committee, or of amending the British North America Act.

Only one thorough examination has been made into this question and so the final word should not be considered as said. With this consideration noted, the following findings of Professor J. A. Corry might be studied. In the first place, the quite effective cooperation that has taken place in the case of agriculture would seem to indicate that "a progressive improvement in the administrative relationship in the fields jointly occupied by the Dominion and provinces will emerge. As points of differences are raised and settled in one way or another, the area of likely friction is narrowed." At the same time, however, it will apparently have to be accepted that "the area will always remain considerable," for "the

5 i.e. J. A. Corry's *Difficulties of Divided Jurisdiction*.


7 *Loc. cit.*
whole situation seems to point to the probability of rivalry and friction." Thus the rather pessimistic conclusion reached by the only expert to investigate the problem of Dominion-provincial administrative cooperation is that "joint administration is inherently unsatisfactory."

In the short run, at any rate—and it is the short run which counts most in everyday affairs—there is a conflict of interest between the Dominion and particular provinces. Even assuming identity of interest, there is inevitable disagreement about the means of promoting the common interest. In the absence of a common authority to resolve them, disagreements impede and friction tends to debilitate the activity. The importance of unity of direction in administration can scarcely be overemphasized.

The second major difficulty resulting from the distribution of legislative authority carried out in the Canadian constitution can be attributed to a profound change in popular attitude towards the purpose and function of government. In 1867 the laissez-faire school was still the dominant influence, and it was consequently felt that a government should be strictly confined to certain unavoidable activities, its citizens being allowed as much freedom of action as possible. This general philosophy is clearly

8 Corry, Difficulties of Divided Jurisdiction, p. 10.
9 Ibid., p. 36.
10 Loc. cit.
revealed in sections 91 and 92 of the British North America Act, where no specific mention is made of what is now considered the vital governmental function of social service. Such an omission was natural in 1867 when this activity was not considered even a proper, much less a necessary, concern of government. With the change in social and economic conditions that occurred during the twentieth century, however, a change also took place in public opinion so that the government was looked on more and more as an agency for performing such social services as health and unemployment insurance, relief measures, old age pensions, and so on. An extremely important but also extremely difficult problem was thus raised: who had the legislative authority over these services—the Dominion or the provinces? The only way the Judicial Committee of the Privy Council could solve this problem was by placing these new governmental functions under one of the more generally phrased provisions of section 91 or 92, and, as a result, the Board eventually decided the closest fit was section 92, subsection 13, "Property and civil rights in the Province." The general conse-

11 Probably the best instance of the Judicial Committee adopting this position can be found in the cases over the Bennett "New Deal." Cf. Re Weekly Rest, Minimum Wages and Hours of Labour Acts (1937) A.C. 326 and Re Employment and Social Insurance Act (1937) A.C. 355 especially.
quence is that the social services completely unthought of, and hence unmentioned, in 1867, but so necessary and so stressed today, have become the responsibility of the provincial legislatures.

In attempting to exercise this responsibility, however, the provinces soon came up against an insurmountable obstacle: they had acquired the power to perform social functions, but they lacked the financial ability to do so. This obstacle can also be attributed to the particular concept of government that prevailed in 1867. Since few could then foresee any government carrying out the duties demanded today, it was assumed that the various subject-matters listed under sections 91 and 92 pretty well summed up governmental activities for all time. Moreover, since, judging by those subject-matters alone, the federal government undoubtedly had the greater responsibility, it was felt, in addition, that the Dominion should naturally have the greater revenue. Section 91, subsection 2 of the British North America Act accordingly granted the federal government authority over "The raising of money by any mode or system of Taxation," while the provinces were limited, by section 92 subsection 3, to "Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes." For a while this division of taxing power proved quite satisfactory, but as the var-
rious governments were called on to undertake additional
tasks both the Dominion and the provinces set out to dis-
cover additional sources of revenue. Because it could
impose both direct and indirect taxation, the federal gov-
ernment invaded the former field, previously found unnec-
essary, and instituted such direct taxes as the income tax.
On the other hand, despite their even greater need for
more revenue, the provinces found themselves severely
restricted by being limited to direct taxation only. The
result was that a battle immediately took place over the
distinction between the two types of tax, a battle in which
the Judicial Committee was again the final judge, and a
battle which, after a long series of particular cases,
finally produced a fairly thorough understanding of just
what the distinction is. From the point of view of our
inquiry, however, it is not so important to understand this
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distinction as it is to grasp the vital fact that, with

12 Its basis can be found in Bank of Toronto v.
Lambe (1887) 12 A.C. 575. Also note the following cases:
Cotton v. The King (1914) A.C. 176; City of Halifax v.
Fairbanks' Estate (1928) A.C. 117; A. G. Quebec v. Reed
(1884) 10 A.C. 141; A.G. British Columbia v. A.G. Canada
(1927) A.C. 934; Brewers' and Maltsters' Association of
Ontario v. A.G. Ontario (1897) A.C. 231; City of Charlotte-
town v. Foundation Maritime Company (1932) S.C.R. 589; The
King v. Caledonian Collieries Limited (1928) A.C. 358;
A.G. Manitoba v. A.G. Canada (1925) A.C. 561; A.G. British
Columbia v. Kingcome Navigation Company (1934) A.C. 45;
A.G. British Columbia v. McDonald Murphy Lumber Company
Limited (1930) A.C. 357; Lower Mainland Dairy Products
(Continued on page 96).
all possible sources of revenue practically exhausted, the provinces still lack sufficient funds to perform essential duties. That is the pertinent result of the Judicial Committee's interpretation of the way social responsibility and financial authority were provided for in the British North America Act—the provinces have been judged to hold the greater part of the social responsibility, but the Dominion has been considered to possess the greater part of the financial authority. The power to act and the ability to exercise that power have thus been separated.

The many solutions that have been offered to this problem can be conveniently sorted out into four main categories. First, and least drastic, there is the idea of having the federal government provide the provinces with funds to engage in particular social projects. This idea has been carried out by the "grants-in-aid" made at different times for public health, highways, technical education, agriculture, unemployment relief, old age pensions,

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12 (Continued from page 95).
Sales Adjustment Committee v. Crystal Dairy Limited (1933) A.C. 166; and Shannon v. Lower Mainland Dairy Products (1938) A.C. 721. A handy summary of the main principles established in these cases is given in Gonin, L.M. and Claxton, B., Legislative Expedients and Devices Adopted by the Dominion and the Provinces, Ottawa, King's Printer, 1939, pp. 34-35.
and many more. While in theory these grants might seem to provide a solution to the problem of inadequate provincial revenue, in practice their effectiveness is limited by two drawbacks. The first of these is the practical difficulty of achieving effective control and uniform practice, of having one authority spend money raised by another, and of withdrawing a grant once made; in addition, the system has been found to work to the advantage of the wealthier provinces since the grants usually involve an equal expenditure by the province concerned. Secondly, there is the legal obstruction imposed by the Judicial Committee and aptly summarised in the following quotation from Attorney-General for Canada v. Attorney-General for Ontario (Re Employment and Social Insurance Act) (1937) A.C. 355:

That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities would not as a general proposition be denied...But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in section 92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so

13 A list of the major grants of this nature, with a short discussion on each is furnished by Gouin and Claxton in Chapter III of their Legislative Expedients (pp. 17-22).
framed as to invade civil rights within the province; or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device or a pretence. 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.14

According to this interpretation, then, only two of the four possible kinds of grants-in-aid can actually be made. On the one hand, grants which expend money for a provincial object without special statutory authority and grants based on a statute containing an agreement between the Dominion and a province, but omitting any reference to legislation on property or civil rights in the province, are both permissible. On the other hand, grants founded on legislation which expressly states the terms under which money will be distributed to a province and grants made

14 Cited in Gouin and Claxton, Legislative Expedients, p. 17.

15 e.g. the 1919-1931 grants for the eradication of venereal diseases.

16 e.g. The Employment Officers Coordination Act, 1918; The Technical Education Act, 1919; The Domestic Fuel Act, 1927; The Unemployment Relief Act, 1930; The Vocational Education Act, 1931; The Unemployment and Farm Relief Act, 1931; The Unemployment Relief and Assistance Act, 1936; and The Unemployment and Agricultural Assistance Act, 1937.

17 e.g. The Old Age Pensions Act, 1926 and as amended by 1931, c.42 and 1937, c. 13.
under Dominion legislation which operatively deals with a
provincial matter are both properly ultra vires. Thus it
may be said, in general, that for both practical and legal
reasons the system of grants-in-aid has not proved an
entirely satisfactory solution to the problem of furnish­
ing the provinces with additional revenue. Possibly the
relating of such grants to the relative wealth and revenue
18 capacity of the various provinces might be an improvement,
but it seems that even then grants-in-aid would by themselves
still fail to provide an adequate answer.

A different solution is that an increase be made in
the amount of federal subsidies to the provinces. This
solution, however, has likewise met with two criticisms.
First of all, before any such increase is made a revision
of the subsidy system would be necessary. Under section 118
of the British North America Act, the subsidy was placed
on a population basis, but it has since been proved that
the cost of maintaining governmental services is relevant
not only to population but also to the distribution and
growth of that population, as well as to such other factors

18 As suggested by N. M. Rogers in A Submission on
Dominion-Provincial Relations and the Fiscal Disabilities
of Nova Scotia within the Canadian Federation, Halifax,
King's Printer, 1934, p. 194, and mentioned in W. A. Car­
rothers, "Problems of the Canadian Federation," Canadian
Journal of Economics and Political Science, vol. 1 (Feb­
as the taxable capacity of the provinces and the prevailing social and political theories. Any increase in subsidies would accordingly favour Quebec and Ontario, which are the most populated provinces but which need an increased revenue least of all. Moreover, the subsidy has also been shown to have a close connexion with tariff policy. In 1867 the tariff was used basically as a means of acquiring revenue, but in 1879 its first object suddenly became protection instead. While this policy certainly helped industrial Quebec and Ontario, it certainly hurt the other seven provinces, which, with their dependence on primary products, were forced to buy in a protected market and then to turn round and try to sell in the free markets of the world. Increased federal subsidies would undoubtedly serve to redress the balance thus lost—but only if, again, the proportion in which these subsidies are distributed were established on more equitable grounds than simply population. One obstruction in the way of any attempt to increase federal subsidies, therefore, is that a change would have to be made in the population basis of the subsidy first. In the second place, many economists do not consider subsidies a good method of increasing provincial revenues any-

19 For a very brief but useful discussion of the pros and cons regarding the question of subsidies see Carrothers, Canadian Journal of Economics and Political Science, vol. 1 (February, 1935), pp. 31-35.
governments tend to develop a two-sided policy of trying to overcome their difficulties without facing their own electors, at the same time constantly showing, as Dunkin succinctly expressed it as far back as 1865, "a most calf-like appetite for the milking of this one most magnificent government cow." For these two reasons—because a preliminary revision is needed in the very basis of the subsidy system, a revision not so easily achieved as it can be recommended, and because subsidies hardly seem to encourage the best attitude on the part of the provinces, either towards their own people or to the Dominion, anyway—the proposal of increasing federal subsidies so as to increase provincial revenue cannot be considered a complete solution—though, again, it might be a partial one.

A more drastic solution than either of the above would be a redistribution of taxing authority as between the Dominion and the provinces. Such a redistribution could be accomplished by redefining some of the taxes classed by the Judicial Committee as indirect, or else by transferring certain taxing powers from one government to the other. The first of these methods would be almost sure to produce an appallingly involved and lengthy legal dispute, and would at the same time provide no guarantee of

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20 Confederation Debates, p. 519.
a substantial, or even of any, change in the present distinction between a direct and indirect tax. When put into practice, the second method would likewise probably prove a disappointment. Even if, for example, the scarcely possible but essential prior requirement were achieved of the Dominion's relinquishing control over income tax, the result would merely be, as Professor H. R. Kemp has pointed out, "a rather unnecessary gift to the wealthier provinces, which do not yet suffer any great difficulty in making ends meet, while it would be inadequate to give any great help to the provinces which have the greatest need." Thus even a redistribution of taxing powers, while once more possibly helping, would not supply a final solution to the pressing financial difficulties of many of the provinces.

It will be noticed that the above three solutions are connected by one common emphasis: they all attempt to reunite legislative authority with financial ability by trying to pass the latter ability to the former authority. On the contrary, the fourth and last solution exactly reverses this procedure to recommend instead more legis-

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ative authority for the federal government rather than more financial ability for the provinces. As was done in the case of old age pensions, for instance, the Dominion could take over services like health insurance, which would be more effectively and much more economically administered by one central authority. This plan no doubt seems very attractive, but before it is too readily accepted it might be well to notice two points. Firstly, several economists believe, with B. P. Adarkar, "that inferior political entities, like the states and local bodies, are more suitable agencies for carrying out the peaceful activities of social welfare and that though administrative co-ordination is an essential element in the matter, finance must be more and more decentralised in order that the aims of human progress may be achieved." It would appear, then, that the centralising of social services should not generally, or even in the majority of cases, be encouraged, and that since only a few social services might thus be passed over to the Dominion, this solution, like the other three, is itself no panacea. Secondly, efficiency and economy, desirable though both might be, are

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not the only factors to consider when contemplating the transfer of a provincial concern to the federal government, for linked to these considerations is the political and social question of Canadian unity. But that question merits a new section.

Canadian history, like all history, has been, and always will be, interpreted in different ways. Regardless of particular stresses, pet theories, and the like, however, all historians of Canadian history agree that one theme at least can be continually heard throughout the story of this land. That is the theme of French-Canada. From the conquest to the present, and from today as far as can be seen into future, one of the most important facts every political leader has been forced, and will continue to be forced, to keep constantly before him is that, whatever happens, the unity of Canada must not be threatened. Now it has been suggested, and very plausibly suggested, that this admitted necessity of Canadian unity has nothing to do with the distribution of legislative powers in the British North America Act. In other words, the "well-worn indictment" that the Judicial Committee's interpretation of sections 91 and 92 has safeguarded provincial autonomy and thus, indirectly, the French-Canadian way of life is nonsense. For as F. R. Scott puts it, "Much that has been said about Canadian federalism in recent years suggests
that the powers of the provinces were the protection for minorities. On this interpretation every extension of provincial powers becomes an increase of minority rights. There is little in the B.N.A. Act to justify this view. There the basic protection for minorities rests in the writing of the safeguarding clauses into the fundamental law of the constitution, which cannot be changed without resort to the imperial parliament. In addition to this legal type of reasoning, it is also frequently urged that practical facts similarly demolish any notion that provincial autonomy protects minority rights. Not to mention her conventional hold on at least four cabinet posts, with her large and rapidly increasing population, Quebec has, and most likely will continue to have, such a large representation in the Canadian Parliament that any government, no matter which party it represents, will always be, will always have to be, very considerate to say the least of French-Canadian sensitivities. The idea that French-Canadian minority rights might be endangered by increasing the authority of the federal government, therefore, can be disposed of on the ground of practical politics alone. Actually, indeed, minority rights would be better protected.

if the disallowance power, for example, were used more widely and more frequently, since the Dominion could then protect any minority group being discriminated against by a provincial legislature—as happened in the case of the Manitoba Schools Act of 1890. In any event, provincial autonomy and minority rights are separate and distinct subjects, and should be carefully kept apart when considering the effects produced by the Judicial Committee's interpretation of sections 91 and 92 of the British North America Act.

As has been said, all this seems very plausible and might well be correct—but it is all surely beside the point. For the point is simply this: whatever the true facts of the case and whether or not he is really justified in thinking this way, the French-Canadian has always been sure that the continuance of his own culture is dependent on the upholding of his province's autonomy. To him, after all, it is not so much a question of protecting minority rights, which he can be fairly sure of, as it is a question of obtaining respect for, or perhaps better, an understanding of a frame of mind, a distinctive outlook. Thus in spite of all arguments, no matter how plausible, the French-Canadian today still feels as Roger Brossard felt when he wrote this explanation of his people's attitude in 1937:
Thus, French-Canadians have freely accepted the Confederation of 1867 which confirmed the ethnic duality of Canadian nationality, on the basis of a federal union which guaranteed at least to the province of Quebec the most complete autonomy in matters of religion, language, and education. For the remainder, they trusted to rather ambiguous clauses, to the good faith and to the sense of honour and justice of their associates for the protection of their rights. For them, the protection of their creed and of their language was more important than the distribution of legislative powers, taxing rights, and financial obligations.

It is in the light of these historical truths that the various attitudes of the French Canadians towards Confederation must be studied in order to be fully understood. It is these truths which inspire the great majority of French Canadians of Quebec and of the other provinces each time the question of the revision of the constitution of 1867 comes up. It is these truths which explain, above all, the utterances of all our politicians, in principle if not always in practice, in favour of the maintenance of provincial autonomy.

This is the voice of Quebec—and this is the voice that must be remembered when the difficulties of joint administration and inadequate provincial revenues are considered. Efficiency and economy are all very well, but, hard as it might be, this separate but so closely related subject of the French-Canadian viewpoint must be balanced against them. It is for this reason that the various recommendations made in the next chapter of this study are based on one underlying idea: by all means let us do everything.

possible to achieve maximum efficiency and economy, but let us be extremely careful, at the same time, to attempt nothing that might secure these advantages at the cost of something much more precious—Canadian unity.
CHAPTER VII

SUMMARY AND RECOMMENDATIONS

This final chapter has three purposes. First, it is hoped that by summarising, generalising, and analysing the matters discussed up to now the reader may be presented with a coherent pattern against which any argument, whether covered or overlooked in this report, can be examined and thus placed in a proper perspective. Secondly, while carrying out this first purpose the writer will try to stress certain ideas so as to clarify and emphasise his own point of view. Finally, this point of view will be used as the basis of a number of recommendations offered with the intention of both improving the present situation and charting a rough course for the future.

To start, then, it will be recalled that the distinctive feature of a federation is the division of legislative powers between two coordinate authorities, neither of which may invade the sacred precincts of the other. As far as the Canadian form of this type of government is concerned, the division carried out in sections 91 and 92 of the British North America Act was confused by two problems. First of all, and characteristically of all federations, the fields of Dominion and provincial jurisdiction were found to overlap, thus necessitating judicial clarification
of the dividing line. Secondly, and peculiar to the Canadian type of federation, these fields were described in general as well as particular terms, creating the need for a distinction not merely between a federal and provincial power but also between a general federal power and a particular one. In settling these two problems the Judicial Committee of the Privy Council in effect tackled the latter first, and established the so-called three-compartment scheme, with its recognition of the paramountcy of the enumerations of 91 over section 92 and of section 92 over the "peace, order, and good government" clause in section 91. Turning then to the problem of leaky compartments and using the "Aspect Doctrine" as a general cement, the court patched up the holes, according to their particular shapes, with the three doctrines of "Ancillary Powers," "Cooperation," and "Unoccupied Field." Two openings, however, required more than a simple patch: the relationship of trade and commerce to property and civil rights, and the treaty-making provision of section 132. Accordingly, after a good deal of preliminary fitting and trimming, the Judicial Committee produced two special plugs, the first of which narrowed the meaning of trade and commerce, at the same time widening that of property and civil rights, while by the second the Dominion was denied the right to legislate regarding treaties made in any other capacity than as a
member of the British Empire. Such, in a very general way, are the main difficulties inherent in the distribution of legislative powers provided for in the constitution of 1867, together with the Judicial Committee's solution of them.

The primary fact one must thoroughly appreciate when considering this solution is that two separate but easily confused questions are involved. The question of whether the solution is right or wrong, in other words, must be kept apart from the quite different question of whether its effects have been good or bad. Once this essential requirement is understood and inquiry concentrated on the first question of the correctness of the judicial decisions, it will be seen that these decisions can be approached from two directions. First, we can follow in the footsteps of the Judicial Committee and conduct a strictly textual examination, taking into consideration the general scheme and context of the British North America Act, but being careful not to venture outside the boundaries of the statute itself. Such an examination seems, to this writer at any rate, to admit of only one conclusion: the only way in which all the provisions of the act can be retained intact and without serious contradictions is by interpreting sections 91 and 92 as the Judicial Committee of the Privy Council has done—that is, on the basis of a three-compartment scheme.
As far as the other approach is concerned, here interpretation of the constitution of 1867 is made not only on the text alone but also in consideration of the men and conditions that produced it. Again, however, in the opinion of this writer whatever type of historical investigation is carried out—whether into the intentions of the Fathers, or into the events preceding confederation, or into the original meaning of expressions like trade and commerce and property and civil rights—the main fact to notice is that the results of the search must necessarily be, if only because of the paucity of records available, so tentative and so open to contradiction and dispute as to make one turn back with relief to the narrower but surer path of normal statutory procedure. This conclusion necessitates a return to the legal approach as the only satisfactory one—and compels along with this return an admission that the Judicial Committee's interpretation of the distribution of legislative powers in the British North America Act has been generally correct.

Moving on now to the other question of the effects of this interpretation, we are confronted at the very beginning with a formidable dilemma. On the one hand there are considerations that must be made in the interests of economy, efficiency and the like, on the other hand there is a vital political and social factor, and we have to
attempt the almost impossible task of balancing the two. With so delicate a task involved, all this writer feels able to say is that no matter how important these first considerations may be, and this is said in full awareness of the fact that they are bound to become increasingly important as time passes, they must always be subordinated to the greater need of maintaining Canadian unity. Let every reformer keep one hand constantly on the pulse-beat of French Canada and, at the slightest acceleration, make all haste to reassure the patient.

This talk of reform brings up the matter of recommendations, but before that subject is begun it should perhaps be pointed out that any recommendations a writer makes naturally depend on his special point of view. Thus recommendations made with regard to the British North America Act vary all the way from the extreme suggestion that the whole structure be scrapped and a new start made, through such ideas as reinterpreting sections 91 and 92, passing amendments so as to change various provisions, and so on, to the opposite extreme of continuing the existing system without any change at all. In a like manner, the recommendations now to be made as a conclusion to this thesis rise from and are dependent on the opinions formed by the writer and summarised in the above paragraphs.
As to change in general, first of all, it must be realised at the beginning that the Judicial Committee's interpretation of the Canadian constitution has resulted in many unfortunate conditions. Especially pressing problems of inefficiency, lack of economy, and frequently downright constitutional obstruction have developed in connexion with the system of joint administration and the separation of legislative from financial powers. Urgently needed legislation is also often held up and sometimes blocked altogether. Both the Dominion and provincial governments occasionally seek to reduce and even to avoid unpleasant responsibilities by escaping into the maze of constitutional complexities. The net result is, in the words of L. M. Gouin and B. Claxton, that "there is today an uncertainty and a sense of frustration comparable to the conditions which Confederation was intended to improve." For these and similar reasons it is clear that the British North America Act as it now stands has produced a deplorable situation in which the delay involved in, and at times the impossibility of, passing essential laws has not only failed to produce ideal government, or anything approaching it, but also imposed inexcusable vexations and not infrequent...

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1 Gouin and Claxton, Legislative Expedients, p. 33. This study is a pertinent analysis of the various ways in which the Dominion and the provinces have tried to wriggle out of present constitutional restrictions.
quently considerable hardships on many Canadian citizens. Moreover, as time passes both the federal and provincial governments, and particularly the latter, are apparently going to be called on to undertake even more public services than they provide today, and, far from any signs of improvement, the situation will in all probability correspondingly become actually more critical. Thus changes are required immediately, and more will be required in the future. Before these changes are hurriedly adopted, however, let the warning be given once more that all changes must be considered and reconsidered and considered all over again, and considered always with the attitude of Quebec constantly in mind, before any of them is finally carried out. For with the undoubted need to change the bad features of the present constitutional position, there exists an even greater need to retain the good ones—and in particular to retain the paramount essential of Canadian unity. This, then, is the writer's first and basic recommendation: changes are definitely needed in the British North America Act, but the effect of these changes must be carefully and thoroughly calculated, especially with regard to their reception by the French-Canadian community, before they are implemented.

With this basic recommendation appreciated, more specific suggestions can be made. The first is that probably
the best method of improving the joint administrative system would be to restrict its application and thus arrange for one government or the other, depending on the nature of the subject concerned, to become the sole authority. Without a radical change like this, it would seem that some degree of duplication, friction and all the rest is inevitable. The only other suggestion, for subjects where administrative cooperation between the Dominion and the provinces is absolutely unavoidable, is that a lessening of these difficulties might be achieved through the maintenance of permanent officers and staffs accustomed to working together. It is also recommended that a partial application of all the four proferred solutions might help to solve the problem of the separation of legislative and financial powers. As has been seen in that regard, each of these solutions has its weak points and its limitations, but with certain ideas taken from one or the other, as the particular case required, they could all be used so as at least to reduce the present gap between the financial ability of the Dominion and the legislative authority of the provinces. In any event, it might be well to caution that this is one place where more than usual care must be taken before any major change is made. A third recommendation is that a definite revision of section 132 be undertaken. The intention of this section
seems perfectly clear—the federal government was to possess the ability to implement the terms of any treaties between Canada and foreign states. The fact that the contemporaries of Confederation could not foresee the time when Canada would make these treaties as an independent nation, rather than as a member of the British Empire, accounts for the peculiar wording used, wording because of which the Judicial Committee could not interpret the section in any other way than it did, but wording which has now become a severe restriction and an obvious anachronism. Thus an amendment to the British North America Act is needed to bring section 132 up to date. Finally, one more suggestion, offered in recognition of the fact that such patchwork changes as have been recommended here will probably only stave off rather than properly settle Canadian constitutional difficulties, might be made. There are roughly two ways in which a radical change in the character of the British North America Act can be accomplished—that is, by reinterpreting its terms or else by amending them. The writer feels that the second alternative would be by far the less controversial and much the wiser course, but this feeling is only a logical extension of the conviction that the Judicial Committee's interpretation of the Canadian constitution has been correct. If, however, the first method is chosen, it is suggested that any
reinterpretation be confined to reinterpreting the meaning of specific provisions such as "The Regulation of Trade and Commerce" and "Property and Civil Rights in the Province." In other words, whatever is done, leave the "Aspect," "Ancillary Powers," "Cooperation," and "Unoccupied Field" doctrines alone, and, above all, do not tamper with the fundamental three-compartment scheme. For with those doctrines and with that scheme the Judicial Committee of the Privy Council established the constitution of Canada on a firm and sound foundation.
BIBLIOGRAPHY

Two comments are in order on the following bibliography. First of all, it is not meant to be a compilation of all the written material relating to the subject of this thesis, for several pertinent books and articles were unavailable. Thus while an effort has been made to cover as many references as possible, this bibliography cannot be considered exhaustive. Secondly, in planning this section of his work, the writer wished to go beyond a simple listing of his references and to give the reader some understanding of their character and relative value as well. It was feared, however, that a critical note for each of the three hundred odd books and articles would produce a bibliography of inordinate length. Eventually, therefore, it was decided to approximate the desired effect by grouping together references of the same character, in sections roughly corresponding to the chapters of this study. Within each section books are dealt with first, followed by periodical articles, a brief commentary is included for the most important material, and the references listed without comment are noted down alphabetically according to the surnames of their authors. Some duplication will be apparent, but this is unavoidable under such a system.
Chapter I: Federal Governments


Chapters II and III: The Judicial Committee's Interpretation of Sections 91 and 92, and Section 91, subsection 2 and Section 132

Undoubtedly the most authoritative Canadian sources for verbatim reports of Judicial Committee decisions are the *Dominion Law Reports* begun in 1912 and, after the first seventy volumes, published quarterly. A more convenient form, however, and one used for that reason in quoting passages throughout this thesis, is E. R. Cameron's carefully prepared *The Canadian Constitution as Interpreted by the Judicial Committee of the Privy Council in Its Judgments*, Winnipeg, Butterworth, 1915 and 1930, 2 vols. For cases later than 1930, notice should be taken of the extracts printed, not always with strict accuracy, in the O'Connor Report, or, as it is officially called, Canada, the Senate, Report pursuant to Resolution of the Senate to the Honourable the Speaker by the Parliamentary Counsel Relating to the Enactment of the British North America Act, 1867, any lack of consonance between its terms and judicial construction of them and cognate matters, Ottawa, King's Printer, 1939. Although still unpublished and hence unseen at the time of writing, *The Canadian Constitutional Decisions of the Judicial Committee*, to be produced this year in three volumes by the Queen's Printer, will probably be the best reference of all.

Chapter IV: The Legal Argument

Ottawa, King's Printer, 1935.


Chapters II, III, and IV

Since they cover all three chapters, clarifying the Judicial Committee's interpretation but usually reflecting a distinct bias as well, the following books and articles have been listed together rather than as belonging to either Chapters II and III or Chapter IV. As the titles reveal in most cases, some of them are of a very general nature, others are a little more specific, and still others are concerned with small but vital points.


and Political Science, vol. 8 (1942), pp. 537-556;
Coultee, L. W., "Privy Council Decisions Respecting the
Powers of the Dominion and Provincial Legislatures from
1867 to 1910," Canadian Law Times, vol. 31 (1911), pp. 298-
307; Editor, "Constitution of Canada," Canadian Law Times,
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pp. 153-164; Historicus, "Privy Council and Canada,
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T. B., "The Theory and Practice of the Constitution,
Canadian Law Times, vol. 28 (1908), pp. 114-129; Humphrey,
J. P., "Privy Council as a Legislative Body," Canadian
Forum, vol. 19 (1940), pp. 383-385; Hyde, C. C., "Canada's
Water-tight Compartments," American Journal of Inter-
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"Dominion Legislation and Treaties," Canadian Bar Review,
vol. 15 (1937), pp. 455-463; Jennings, W. I., "Constitu-
tional Interpretation, the Experience of Canada," Harvard
Law Review, vol. 51 (1937), pp. 1-39; Keith, A. B., "Privy-
Council Decisions: a Comment from Great Britain, "Can-
dian Bar Review, vol. 15 (1937), pp. 428-435; Keith, A. B.,
"Recent Cases on the Canadian Constitution," Canadian Law
Times, vol. 34 (1914), pp. 909-947; Kennedy, W. P. M., "The
British North America Act: Past and Future," Canadian Bar
Working of Federal Institutions in Canada," Canadian Law
Chapter V: The Historical Argument

Confederation, Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act, Toronto, Carswell, 1895. The most useful of these are Pope's Confederation Documents and the Confederation Debates, which was reprinted by the Queen's Printer in 1951. A most valuable addition to the Debates is the Index compiled by M. A. Lapin, reviewed by J. S. Patrick, and published by the Queen's Printer in 1951.


Other articles dealing with the problems raised in Chapter V include Beauchesne, "Events which Led to Confederation," Canadian Bar Review, vol. 10 (1932), pp. 101-110; Beauchesne, "Provincial Legislatures Are Not


Chapter VI: The Practical Results

The grand reference for this chapter is Canada, Royal Commission on Dominion-Provincial Relations, Report, Ottawa, King's Printer, 1939-1940, of which these three parts are particularly helpful: Corry, J. A., Difficulties of Divided Jurisdiction (1939), appendix 7; Corry, J. A., The Growth of Government Activities since Confederation

Some books dealing generally with the practical results of the present constitutional situation are The Canadian Constitution, Toronto, Nelson, 1938; Canadian Problems, Toronto, Oxford University Press, 1933; Ollivier, Maurice, Problems of Canadian Sovereignty, Toronto, Canada Law Book Company, 1945; and Scott, F. R., Canada Today, Toronto, Oxford University Press, 1939.


Chapter VII: Summary and Recommendations

Two books must be mentioned in connexion with the question of recommendations. A very clever account of how the federal and provincial governments can side-step many constitutional obstacles will be found in Gouin, L. M., and Claxton, B., Legislative Expedients and Devices Adopted by
the Dominion and the Provinces, Ottawa, King's Printer, 1939, (Canada, Royal Commission on Dominion-Provincial Relations, Report, appendix 8). A study of the manner in which amendments must be passed to the British North America Act, still valid for amendments affecting provincial interests, has been made by Paul Gérin-Lajoie in his Constitutional Amendment in Canada, Toronto, University of Toronto Press, 1950.

Articles relating to Chapter VII are as follows:
This final list of books and articles, whose character can again be generally appreciated by their titles, is not connected with any specific section of this thesis, but is offered with the idea of helping the reader to broaden his understanding of the subject. In view of the strong emphasis placed by the writer on the French-Canadian outlook, particular notice should be taken of the books, all of which deal with this problem. The articles touch on such matters as the composition and history of the Judicial Committee of the Privy Council and the pros and cons of abolishing appeals to this Board. The last question was finally settled, of course, on 10 December, 1949, but the debate still serves to explain how many Canadians feel about the Judicial Committee's interpretation of the British North America Act, 1867.


Powers of the Parliament

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:

1. The Public Debt and Property.
2. The regulation of Trade and Commerce.
3. The raising of money by any mode or system of Taxation.
4. The borrowing of money on the public credit.
5. Postal service.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.
11. Quarantine and the establishment and maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign country or between two Provinces.
15. Banking, incorporation of banks, and the issue of paper money.
17. Weights and Measures.
19. Interest.
20. Legal tender.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and lands reserved for the Indians.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The establishment, maintenance, and management of Penitentiaries.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces:
   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.

Exclusive Powers of Provincial Legislatures

92. 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, --
   1. The amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.
   2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes.
   3. The borrowing of money on the sole credit of the Province.
   4. The establishment and tenure of Provincial offices and the appointment and payment of Provincial officers.
   5. The management and sale of the Public Lands belonging to the Province, and of the timber and wood thereon.
6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province.

7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals.

8. Municipal institutions in the Province.

9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes.

10. Local works and undertakings other than such as are of the following classes,—
   a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province;
   b. Lines of steam ships between the Province and any British or Foreign country;
   c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.

11. The incorporation of companies with Provincial objects.

12. The solemnization of marriage in the Province.

13. Property and civil rights in the Province.

14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.