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## *HODGE* v. *THE QUEEN.*

The people of Canada have exhibited great reserve in dealing with the B. N. A. Act, 1867. The tendency has been to avoid raising constitutional questions in our own courts, and during the sixteen years since the passing of that Act, in only fifteen cases have we sought the arbitrament of the Privy Council as to the meaning of the rules of our written constitution. This reserve is not the effect of indifference, but rather of a desire not to provoke hasty decrees, which, being rendered in unimportant matters, may not receive the attention the principle dealt with deserves. It will readily be admitted that there has been no reason to complain that the Judicial Committee has not given the most careful attention to these questions. In fact, the most perfect confidence exists in this country that "they decide each case as it arises as best they can"; but with all due respect for their opinions, the decisions they come to on these matters are of an importance too vital to us to permit of our accepting them otherwise than subject to the crucial test of scientific and historical criticism. It has been said, no jurisprudence can alter the terms of *Magna Charta*, and, in a like spirit, we must maintain, that no jurisprudence can be recognized which plainly misinterprets the great contract on which the Union of British North America has been based.

Having stated when, and how far we venture to demur to accept each decision of the Judicial Committee as conclusive authority in all similar cases for the future, we shall proceed to discuss, without reserve, two points to which recent decisions have given prominence. The first is the general rule to which we have just referred and which appears to be supported by a *dictum* of Hagarty, C.J., expressed in the following words: "that in all these questions of *ultra vires* it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy." It is as difficult to accept such generalities as it is to contradict them. In order to deal with them it is necessary first to determine their precise meaning. It may safely be assumed that what is meant is, that in interpreting a Statute of the nature of the B. N. A. Act, the courts should specially refrain from generalizing its terms. We contend, with all due deference, that this is a fundamental error; the true principle being that the whole scope of the Act has to be constantly kept in view so as to co-ordain the powers of both governments. This results not only from the nature of the Act but also from its form. Plainly it is an outline, the details of which are to be filled in at the suggestion of practical necessities. That this should be the case is evident to those who remember the circumstances of confederation. The assent of the people of four provinces had to be obtained. Manifestly it would have been impossible to get them to understand, and not less difficult to get them to adopt, a multitude of details. It was comparatively easy to indicate in general terms the powers of each government, and this is what was done. No one ever seriously contended that even the catalogues of Sections 91 and 92 were perfectly conclusive. Therefore there must exist a doctrine resulting from but undeveloped in the words of the Act. In practice, it may be added, the Privy Council has frequently laid down principles of the most abstract kind. It is difficult to conceive how, with any hope of avoiding even by hair-breadth escapes, contradictions, in the last degree unsatisfactory and disquieting to litigants, the courts are to proceed without adopting broad principles.

We next come to what we contend is a serious error of detail. In the case of *Hodge & The Queen*, their Lordships say: "It was contended that the Provincial Legislature had no power to impose imprisonment or hard labour for breach of newly created rules or by-laws, and could confer no authority to do so. The argument was principally directed against hard labour."

It is admitted that the question was not properly raised. Nevertheless, they decided it formally. They say, "under these very