

*Privy Council Appeals*

meaning of sections 91 and 92 of the British North America Act, but in no case do I know of any reference to the constitutional interpretation asked for, except perhaps in the Edwards case. The "living tree" was referred to in that case, and yet there was a particular exception made of sections 91 and 92; the definition of powers has followed definite legal lines. The "living tree" was the other sections of the British North America Act.

Mr. BENNETT: It was a water-tight compartment the last time.

Mr. POTTIER: It is only fair to make these observations in justice to the privy council. I should like to give a quotation now to show the functions of a court as distinct from what some would hold to be the duty of the privy council in interpreting the British North America Act to meet present day social and economic developments. I quote from Doctor O. D. Skelton:

Courts may modify, they cannot replace. They can revise earlier interpretations, as new arguments, new points of view are presented, they can shift the dividing line in marginal cases; but there are barriers they cannot pass, definite assignments of power they cannot reallocate.

I think that has been our difficulty. The British North America Act assigned definite powers to the provinces and to the dominion and all that the Judicial Committee of the Privy Council have attempted to do is to define those powers. It was not their function to legislate; it was their function to interpret, and I submit, Mr. Speaker, that they have done that, following well recognized legal principles. We are going too far when we put on the Judicial Committee of the Privy Council the burden of finding a solution for the difficulties we are in to-day. We need an amendment—not a new court.

I should observe too that there are provisions for members of the Supreme Court of Canada to sit in with the Judicial Committee of the Privy Council, and in one case in which the powers of the provinces were interpreted in a wide sense the present Chief Justice of Canada, Mr. Justice Duff, sat in with the Judicial Committee of the Privy Council and gave the decision of the court.

Mr. BENNETT: That was the reciprocal insurance case.

Mr. POTTIER: Exactly, and in that case the previous decision approved and followed the other cases. I submit that when we say that the Judicial Committee of the Privy Council has interpreted the British North America Act in a wrong way, we would have had on the

[Mr. Pottier.]

whole the same principle towards definitions established if the act had been referred by the Supreme Court of Canada in final resort.

Mr. MARTIN: What was the date of the Edwards case?

Mr. POTTIER: It was in 1924.

Mr. MARTIN: Contrary to the whole tradition of privy council judgments up to that time.

Mr. POTTIER: But the privy council is not bound by previous decisions, and Chief Justice Duff sat in with the judicial committee and gave the decision in that case. Any previous decision could have been reversed by the privy council if it had thought fit to do so. My point is that if the Supreme Court of Canada had been interpreting the British North America Act, they would have done what the privy council did, that is, gathered the intention from the words used.

Mr. BENNETT: As a matter of fact, that decision has been narrowed since. The statement as contained in the decision of the chief justice as to our powers over criminal legislation has been regarded as too wide.

Mr. POTTIER: Exactly. I say that if the present Chief Justice of the Supreme Court of Canada had been interpreting the British North America Act we would have the same condition as we have to-day; changing court is not the remedy.

Some reference has been made this afternoon to opinions given by individuals about appeals. I have here the opinion of Sir Charles Fitzpatrick, an ex-Minister of Justice and afterwards Chief Justice of Canada. Addressing the American Bar Association in 1914, he gave his opinion as follows:

In no part of the King's dominions has greater service been rendered by the judicial committee than in Canada, particularly since confederation.

Since 1867, the judicial committee has been called upon in scores of cases to trace out the line of demarcation between federal and provincial jurisdiction, and it must be truthfully said that the result has been eminently satisfactory. Removed, as the majority of judges are, from all local strifes, desirous as they are to distribute the most impartial justice, it is not surprising that the right of appeal to the King in his privy council is one of the privileges most highly prized by the people of the dominion. I do not mean to say that there has not been exception taken to the freedom with which appeals may be carried to the privy council in ordinary civil matters, but whatever view may obtain in other parts of the empire, so far as Canada is concerned, I think I may safely say that,