Nevertheless, the judicial committee then held that the full scope of the term could not have been intended by those who framed the British North America Act, because, "banking," "Weights and measures," "bills of exchange and promissory notes," "interest,' "bankruptcy and insolvency" were also mentioned in section 91. They seemed oblivious to the fact that these additional subheads were obviously used for greater clarity, inasmuch as "weights and measures" are employed for other than trading transactions; "bills of exchange and promissory notes" are not necessarily restricted to trading and commercial transactions; and "interest" may be payable on loans, advances, or banking credits in respect of matters which are obviously not included in the regulation of trade and commerce.

And thus, in decision after decision, the provision of the British North America Act which enacted that exclusive legislative authority of the parliament of Canada, notwithstanding anything in that act, extends to all matters—note the term—extends to all matters coming within that class of subjects described as the regulation of trade and commerce, has been restricted and circumscribed until, in the final results, the judicial committee have denied to the trade and commerce clause all efficacy as an independent enumerative head of dominion legislative jurisdiction.

The subject matter of the regulation of trade and commerce remains now as originally drafted in the simple, concise and unequivocal terms of section 91 of the British North America Act, and, though the complex activities comprised in that original clause have vastly expanded during the past seventy years, the legal signification of the clause has repeatedly been restricted and circumscribed by judicial interpretation, until almost every vestige of its original authority has been eliminated, with the exception that in the John Deere Plow case (1915 A.C. 330) Lord Haldane placed under the regulation of trade and commerce clause the power to incorporate dominion companies, though on another occasion, in the Great West Saddlery case (1921, 2, A.C. 91) Lord Haldane, true to his predilections for the metaphysics of Hegel, placed the power to incorporate dominion companies under the general power to make laws for the peace, order and good government of Canada.

Neither the ancient sophists, nor the more modern metaphysicians, have ever been so successful as the judicial committee in explaining that reality is a mere illusion of the mind. But in the case of the judicial committee it is unfortunately true that, as Gulliver once said: "If once judges go wrong, they make it a rule never to come right"; and so it has come to pass that Canadian courts are now precluded from reconsidering the original text of the British North America Act and so deciding constitutional issues upon their merits; they are inextricably bound by a series of decisions of the judicial committee that have served to impair the constitution which our courts are presumed to interpret.

A number of the decisions of the judicial committee, which now unfortunately control the discretion of the Supreme Court of Canada, as well as the supreme courts of the provinces, were rendered during the first twenty years of our existence as a dominion.

In 1871, in order to expedite the hearing of appeals from colonial courts, including those from the new Dominion of Canada, an act was passed by the parliament of the United Kingdom providing that four members of the judicial committee should each receive a salary of £5,000 yearly and that these four members might be English judges, or retired East Indian judges from Bengal, Bombay or Madras. Sir Montague Smith, a puisne judge of the Court of Common Pleas, and two other judges from the East Indies, were appointed, but so discredited, at that date, was the judicial committee, that three English judges, to whom it was offered, successively refused an appointment, and finally the Lord Chancellor appointed Sir Robert Collier, who was not and had not been a judge of any court, and who was not, therefore, qualified under the terms of the Judicial Committee Act, 1844. This lack of qualification was overcome by appointing Sir Robert Collier to fill, for three days, a vacant judgeship in the Court of Common Pleas, and then he was appointed a member of the judicial committee.

It is noteworthy that Chief Justice Cockburn of the Queen's Bench, in a letter to Mr. Gladstone, dated November 10, 1871, protested that the colourable appointment of Collier to the judicial committee had seriously compromised the dignity of the judicial office, and he denounced the grievous impropriety of the proceedings as a mere subterfuge and evasion of the terms of the statute. The government of Mr. Gladstone, which made the appointment, only missed censure in the House of Lords by a majority of one, and in the commons by a majority of twenty-seven, after a stormy debate that closed at three o'clock in the morning.

For fourteen years thereafter, these two English judges. Sir Montague Smith and Sir