

*Privy Council Appeals*

erroneous declaration that the words "property" and "civil rights" were used in the statute of 1774 in the largest sense possible, and they erroneously assumed that the same words in section 92 of the British North America Act should receive the widest possible interpretation.

In this complacent manner, they established for all time the widest possible interpretation of the term "property and civil rights in the province," whereas, if the judicial committee had read the address of the Attorney General Thurlow, afterward Lord Chancellor Thurlow, in the House of Commons at Westminster, or had read the evidence of Governor Carleton, Francis Maseres, former attorney general of Quebec, William Hey, Chief Justice of Quebec, and others given before the House of Commons sitting in committee upon the Quebec bill of 1774, no such decision could possibly have been given. And so it happened that the original intention of the framers of the British North America Act was frustrated and set at naught by carelessly considered decisions.

I have time to indicate only one other radical departure from the purpose and intent of the framers of the original act, although many others might be cited. In drafting section 91 of the British North America Act the framers of that act had before them section 8, paragraph 3 of article 1 of the constitution of the United States of America, which, dealing with the powers of congress, reads:

To regulate commerce with foreign nations, and among the several states, and with Indian tribes.

The Canadian draftsmen were not content with the restricted terms of that paragraph of the constitution of the United States, which had then been under review and broadly interpreted and applied by the supreme court of the neighbouring republic for nearly a century before the British North America Act was drafted. The Canadian draftsmen insisted upon vesting in parliament the authority to regulate "trade" as well as "commerce," without any restriction, and without differentiating between foreign trade and commerce, and domestic or interprovincial trade and commerce.

Section 91 of the British North America Act 1867, as then drafted and enacted, contains the following:

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: . . .

2. The regulation of trade and commerce.

[Mr. Cahan.]

It would be difficult to frame a more precise and concise clause respecting trade and commerce. The legislative authority thereby vested in the parliament of Canada was not only declared to be "exclusive" but it was declared to be exclusive, "notwithstanding anything in this act."

In the language then in vogue, "trade" included every mechanical or mercantile employment in which a person might engage for procuring subsistence or for profit. "Trade" did not apply to or include the learned professions, or to the liberal arts which were concerned with all branches of academic learning, or to agriculture, in so far as agriculture was concerned with the cultivation of the earth for the production of vegetable life. But "trade", in the parlance of that day, did include the purchase, sale or exchange of commodities of all kinds, including the products of agriculture as well as the products of every other productive activity, and particularly the products of every organized trade or business, whether such trade was foreign trade or domestic or home trade, whether wholesale trade or retail trade, whether involving sales in large quantities or in small parcels.

Commerce then connoted merchandise of every kind and description in the large and general sense, and included the exchange or sale of goods, wares and products of all trades, and commercial intercourse, by way of trade and traffic, in all its branches. Trade and commerce, under then existing conditions, connoted a continuous flow from primary production, through the various stages of transportation and distribution, until the product reached the consumer, either at home or abroad.

Eleven years after the British North America Act was enacted, Mr. Justice Strong, of the Supreme Court of Canada, admittedly one of the ablest members of that court, (2 S.C.C. 104) said:

That the regulation of trade and commerce in the provinces, domestic and internal, as well as foreign and external, are, by the British North America Act, exclusively conferred upon the parliament of the dominion, calls for no demonstration, for the language of the act is explicit.

In 1880 the judicial committee (7 Appeal Cases, 96) remarked that:

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 foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades.