the provinces. Macdonald and several other Fathers of Confederation voted on two occasions against the resolutions requiring such provincial acquiescence.

In order to show how our constitution was interpreted by the Fathers of Confederation themselves as early as eighty years ago, let me quote an extract from the late Honourable Norman Rogers, as it appears in 9 *Canadian Bar Review,* 410. It is as follows:

> When it was proposed to extend better terms to Nova Scotia in 1869, it was argued very forcefully by Edward Blake that this involved a substantive change in the terms of confederation and ought to be effected by the process of constitutional amendment, and Mr. Holton, on the second reading of the bill, moved as follows:
>
> That in the opinion of this house any disturbance of the financial arrangements respecting the several provinces provided for in the British North America Act, unless assented to by all the provinces, would be subversive of the system of government under which the dominion was constituted. (See Journals of the House of Commons (Canada) 1869, page 260.)
>
> This resolution, which was in effect a formal enunciation of the compact theory of confederation, was rejected by a government presided over by Sir John Macdonald and by a House of Commons which included among its members not a few of the delegates who had represented their provinces at the Quebec Conference. It is interesting to note that the division lists reveal that Macdonald, Cartier, Galt, Tilley and Tupper voted against the acceptance of the doctrine of unanimous consent as set forth in this resolution. (See Journals of the House of Commons (Canada) 1869, page 260.) Two years later the question of provincial consent was revived during the discussion of the draft bill which was proposed to the Imperial Parliament for the purpose of removing doubts as to the competence of the Canadian Parliament to pass the Manitoba Act. On this occasion, Mr. Mills proposed a series of resolutions protesting against the procedure followed by the government. The last of these resolutions was as follows:
>
> That the representative legislatures of the provinces now embraced by the union have agreed to the same on a federal basis, which has been sanctioned by the Imperial Parliament. This house is of opinion that any alteration by Imperial legislation of the principle of representation in the House of Commons, recognized and fixed by the 51st and 52nd sections of the British North America Act, without the consent of the several provinces that were parties to the compact, would be a violation of the federal principle in our constitution, and destructive of the independence and security of the provincial governments and legislatures. (See Journals of the House of Commons (Canada) 1871, page 254.)
>
> This resolution contains the second definite assertion of the compact theory following the creation of the dominion. Once more the government declined to give approval to the principle. The provinces were not consulted. . . .

Again, in 1875, 1886, 1895, 1915, 1916, 1930, 1943, 1946 and 1949, the British North America Act was amended simply at the request of the Canadian Parliament and without any consent being obtained from the provinces. In a series of a dozen of constitutional amendments, the consent of the provinces was obtained only twice. The first time was in 1907, after a Dominion-Provincial conference, when the Imperial Parliament adopted amendments increasing provincial grants. "This example of consultation" occurred, according to Dawson, at page 144, "as a matter of political convenience and has not become a governing precedent". Of the seven subsequent amendments, only one received prior provincial assent; that was the amendment adopted in 1940 for the transfer of jurisdiction to the dominion in the matter of unemployment insurance. Why was the consent of the provinces obtained in 1940? Simply because the courts had decided that unemployment insurance formed part of the provincial matters contained in section 92 of the British North America Act.

The only conclusion which can logically be reached is that the consent of the provinces must be obtained for amending section 92, which deals with the jurisdiction exclusively assigned to the local legislatures. Nobody is now contesting this position. From the ten precedents just enumerated and which extend from 1871 to 1949, it follows that by a long and well-established custom the Canadian Parliament has assumed for almost eighty years the control and custody of our federal constitution, and that the provinces have never exercised nor enjoyed any effective right on our constitution in federal matters.

But it is contended that such precedents are bad precedents; that the British North America Act is a "treaty" or "compact" and should not be changed without the consent of the contracting parties. I will not attempt to add to what has been said on this head by the honourable senator from Vancouver South (Hon. Mr. Farris), but shall examine, from a purely legal point of view, the question whether or not the British North America Act can be called a treaty.

A treaty, in international law, is an agreement between two or more independent states. But, as remarked by Clokie, at page 205:

> Confederation was not based on a contract between individual sovereign states, it arose from political agreements between dependent, though responsible, colonial governments. The terms of these agreements were not incorporated in one document deriving its authority from provincial ratification; they were given legal sanction by a British statute.

Lower, at page 328 he affirms:

> There can be no question of "consenting parties" or a treaty; there were no consenting parties and there could be no treaty; the Crown rearranged its domains. But, according to the genius of the English tradition, it did not do so until it knew that its act would be acceptable to those of its subjects who were affected.

If the so-called Fathers of Confederation had really given birth to a "confederation of states", in the strict sense of that term; if the three colonies had declared their independence and adopted true "Articles of Confederation," as the thirteen American states did in 1781, then the constitution would be