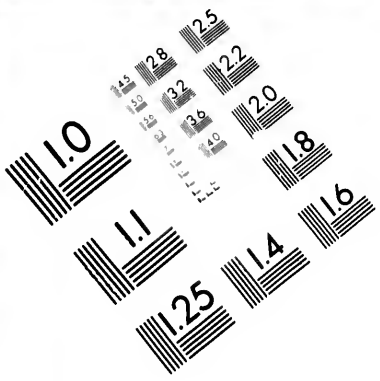

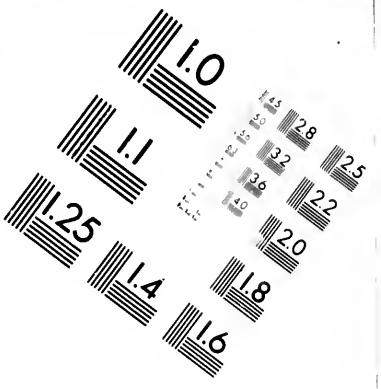

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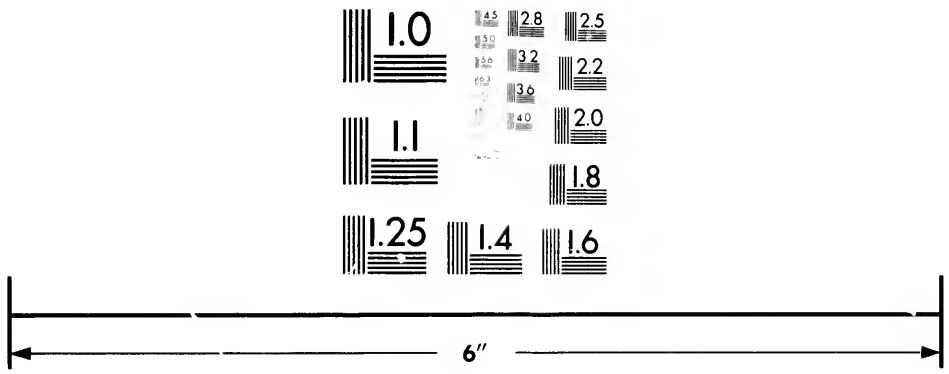

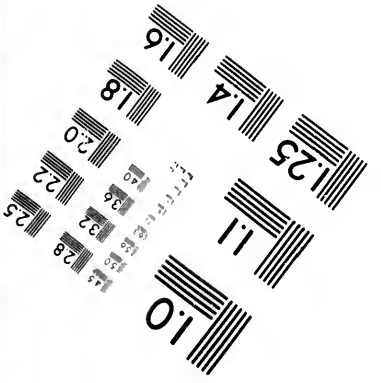

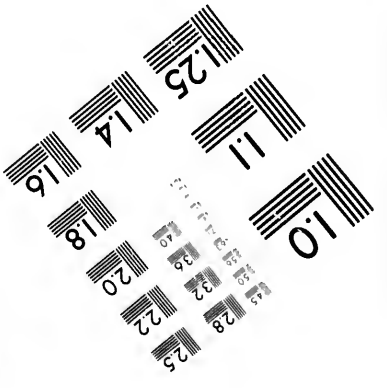

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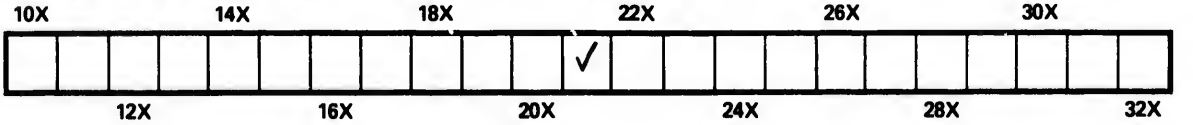

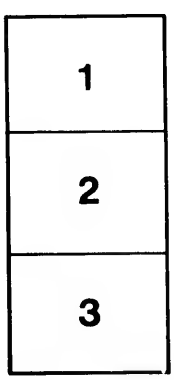

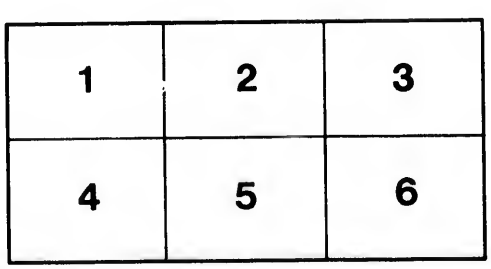

A SKETCH

OF THE

Prerogative of the Crown

IN

COLONIAL LEGISLATION.

BY

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THE PREROGATIVE OF THE CROWN IN COLONIAL LEGISLATION.

'THERE is no Act of Parliament,' says Sir Edward Coke, 'but must have the consent of the Lords and Commons, and the Royal Assent of the King. Whatsoever passeth in Parliament by this threefold consent hath the force of an Act of Parliament.'[1] 'The King has the prerogative of giving his *assent*, as it is called, to such Bills as his subjects, legally convened, present to him,—that is, of giving them the force and sanction of a law.'[2] 'The Sovereign is a constituent part of the supreme legislative power, and, as such, has the prerogative of rejecting such provisions in Parliament as he judges proper.'[3] 'It is, however, only for the purpose of protecting the Royal executive authority that the constitution has assigned to the King a share in legislation; this purpose is sufficiently ensured by placing in the Crown the negative power of rejecting suggested laws. The Royal legislative right is not of a deliberative kind.'[4]

The legislative form of Acts of Parliament would imply that the Sovereign is the sole legislator, subject to the assent of the two Houses of Parliament: 'Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent' of the Lords and Commons; but this form, as other forms in our constitutional system, means that the Sovereign represents the State itself. The power of the Sovereign in name, is the public authority of the nation. All the supreme powers of the state, legislative, executive and judicial, are by the constitution, vested in him; but, in the exercise of all his powers, he is advised, directed and controlled by other state functionaries. He is named as the sole legislator;[5] but he can neither enact nor alter any law, but by and with the advice and consent of his subjects legally convened in Parliament. He is supreme in the administration of the executive functions of the nation, and in his name all treaties are made; but he can perform no act of executive power, nor exercise the Royal prerogatives, nor make a treaty, without the advice and assistance of others, who must assume the entire responsibility of his every act. He is the sole proprietor and universal occupant of all the land in the empire, but he 'cannot touch a blade of grass nor take an ear of corn' without the authority of law. He is supreme in the administration of justice, and in his official capacity is said to be present in all his courts; but though he should be personally present and sit on the high bench of one of his courts,[6] he could not deliver an opinion nor determine any cause or

(1) 4th Inst. 24.
(2) Bacon Abr. Prerogative, 489.
(3) 1 Blackstone, 261.
(4) Chitty on the Prerogative, 3.

(5) In the Statute *Quia emptores*, the King alone speaketh: *Dominus Rex in Parliamento*, &c., *concessit*.

(6) In the Court of King's Bench, the Kings of this realm have sit on the high Bench, and the Judges of that Court on the lower bench at his feet; but judicature only belongeth to the Judges of that Court, and in his presence they answer all motions.—4 Inst. 73.

motion, but by the mouth of his judges.[1]

What are called the Royal Prerogatives of the Sovereign, are those inherent executive powers and privileges with which he is invested as representing the highest public authority of the state, and which may be exercised within limited and defined constitutional usages by and with the advice which the law and the constitution has assigned to the Chief Executive Magistrate of the Empire. These prerogatives, therefore, as part of the executive powers of the State, are the official, not personal, powers of the Crown. They are derived from, and are part of, the grant of sovereignty from the people to the Crown, and are to be exerted for the advantage and good of the people, and 'not for their prejudice, otherwise they ought not to be allowed by the law.'[2] They form part of, and are, generally speaking, as ancient as the law itself, and the statute *De Prerogativa Regis*, is merely declaratory of the common law.[3]

The Prerogatives of the Crown extend to the colonies as an essential part of the constitutional system of government to which the people in the colonies, as subjects of the Crown, are entitled. The Prerogative in the colonies, unless where it is abridged by grants, &c., is that power which, by the common law of England, the Sovereign could rightfully exercise in England.[4] But in the colonies which have different and local laws for their internal government, the minor prerogatives and interests of the Crown must be regulated and governed by the peculiar and established law of the place. Though if such law be silent on the subject, it would appear that the prerogative, as established by the English common law, prevails in every respect, subject, perhaps, to exceptions which the difference between the constitution of the United Kingdom and that of the dependent dominions may necessarily create. By this principle, many of the difficulties which frequently arise as to the Sovereign's foreign or co-

(1) Sir Edward Coke thus rebuked James I. for asserting a prerogative right to judge whatever cause he pleased in his own person, free from all risk of prohibitions or appeals:

Coke, C. J. (all the other judges assenting) —By the law of England, the King, in his own person, cannot adjudge any case, either criminal or betwixt party and party. The form of giving judgment is *ideo consideratum est per curiam;* so the Court gives the judgment. So in the King's Bench the King may sit, but the Court gives the judgment. *Ergo*, the King cannot take any cause out of any of his courts and give judgment on it himself. From a roll of Parliament in the Tower of London, 17 Rich. II., it appears that a controversy of land between the parties having, been heard by the King, and sentence having been given, it was reversed for this—that the matter belongeth to the Common Law.

King James.—My lords, I always thought, and by my soul I have often heard the boast, that your English law was founded upon reason! If that be so, why have not I, and others, reason, as well as you, the judges?

Coke, C. J.—True it is, please your Majesty, that God has endowed your Majesty with excellent science, as well as great gifts of nature; but your Majesty will allow me to say, with all reverence, that you are not learned in the laws of this your realm of England; and I crave leave to remind your Majesty that causes which concern the life, or inheritance, or goods, or fortunes of your subjects, are not to be decided by natural reason, but by the reason and judgment of the law, which law is an art which requires long study and experience before a man can attain to a cognizance of it. The law is the golden met-wand to try the causes of your Majesty's subjects, and it is by the law that your Majesty is protected in safety and peace.

King James (in a great rage).—Then, am I to be *under* the law—which it is treason to affirm?

Coke, C. J.—Thus wrote Bracton: 'Rex non debet esse sub homine, sed *sub Deo et Lege*.'—Lord Campbell's Lives of the Chief Justices v. 1, p. 231; 12 Coke, 63.

(2) The exercise of the Royal Prerogative by the Crown, has been held to be *ultra vires* in the case of Letters Patent under the Great Seal: *Long* v. *Bishop of Capetown*, 1 Moore's P. C. N. S. 411; in the case of an Order of the Queen in Council, *Attorney-General* v. *Bishop of Manchester*, L. R. 3 Eq. 450, and in the case of a Treaty with a Foreign Power, *The Parlement Belge*, L. R. 4 P. D. 129.

(3) Chitty, 4. This statute was repealed in part in 1863. See 1 Rev. Stat. (Imperial) 131. The Imperial Acts, 6 & 7 Vic. c. 94, and 15 & 16 Vic. c. 39, relate to the Prerogative in the Colonies.

(4) Chalmers' Opinions, 240.

lonial prerogative may be readily solved.[1]

In colonies acquired by conquest or cession, the Sovereign, in addition to the ordinary prerogatives, possesses a prerogative power of legislation, which may be exercised with or without the assistance of Parliament. But the Sovereign may preclude himself from this exercise of his prerogative legislative authority, by promising to vest it in a Governor and legislative assembly, and thereafter—even during the interval between the Royal Charter and the meeting of such assembly,—the Sovereign cannot impose a tax on the inhabitants,[2] nor exercise his prerogative power of legislation within the colony.[3]

The authority of the Sovereign in each of the colonies is represented and executed by a Governor to whom are assigned such prerogatives as are essential for the government of the colony. The Governors of colonies are, in general, invested with royal authority. They may call, prorogue and dissolve the colonial assemblies, and exercise other kingly functions; still they are but the servants or representatives of the Sovereign.[4]

A colonial assembly cannot be legally convened without the Sovereign's writ of summons.[5] The Governor has no exclusive authority in this department of his office; the writ of summons for an assembly issues in the Sovereign's name, tested only by the Governor.[6] 'While the Province (Maryland) was in the hands of the Crown, who was *caput, principium et finis* of the General Assembly? the King, or his deputy, the Governor? Not the Governor; upon no principle can he be considered *caput vel principium*, for the assembly was commenced and was held by the King's writ of summons, attested only by the Governor. Nor upon any principle can he be considered *finis* of the General Assembly, for upon the death or removal of a Governor, the assembly did not, in law, cease and determine, but was kept alive by the King's writ and subsisted. Only the King then could have been *caput, principium et finis*; upon his demise a dissolution followed."[7]

The Prerogative of the Crown, in assenting to Acts of a Provincial Legislature, may be legally communicated to the Governor of a colony.[8]

The extent of the exercise of the royal prerogative in the American colonies, prior to the Revolution, will furnish some precedents by which the law of the prerogative in the colonies may be determined. The American colonies were divided into three classes. Eight—Maine, New Hampshire, Massachusetts, New York, New Jersey, Georgia, and the Carolinas—were called Provincial Governments, and derived their governmental functions directly from the Crown, by Royal Charters. In these the Crown appointed the Governors. Three—Pennsylvania, Delaware and Maryland—were called Proprietary Governments, and derived their governmental functions through the grant made by Royal Charters to the proprietors of those colonies. In these the proprietors appointed the Governors, who appear to have exercised, *sub silentio*, their powers as if appointed by the Crown.[9] Two—Connecticut and Rhode Island—were called Charter Governments, and enjoyed, by Royal Charter, the democratic privilege of electing their Governors and assemblies by the votes of the freeholders. But by the statute 7 & 8 William III. c. 22, it was required that all Governors appointed in Charter and Proprietary

(1) Chitty, 26.

(2) A conquered country may be taxed by the authority of the Crown alone.—Chalmers' Opinions, 231.

(3) Per Lord Mansfield, C. J., in *Campbell v. Hall*, 1 Cowper 204. See also *Attorney-General v. Stewart*, 2 Merivale, 158.

(4) Chitty, 34. (5) Chalmers' Opinions, 327.

(6) *Ibid.* 323.

(7) Chalmers' Opinions, 326.

(8) *Ibid.* 310.

(9) Stokes' British Colonies, 23-4.

Governments, before entering upon the duties of their offices, should be approved of by the Crown.[1]

The Governors thus appointed or elected, exercised the power to call, prorogue and dissolve the colonial assemblies. 'The prerogative in relation to their General Assemblies is at least as extensive as ever it was in England. In respect to our Parliament, and this prerogative of the Crown, whatever the extent of it may be, every Governor, by his commission, is empowered to exercise in his particular Province.'[2] They, as the representatives or deputies of the Sovereign, and with the concurrence of the colonial assemblies, made laws suited to the emergencies of the colonies, but 'not repugnant or contrary to the laws of the realm of England.'[3] They, with the advice of the councils,[4] established courts, appointed judges, magistrates, and officers; pardoned offenders; remitted fines and forfeitures; levied military forces for defence, and executed martial law in time of invasion, war, or rebellion.[5] And in the Proprietary Governments, they exercised within their respective colonies all the usual prerogatives which in provincial governments belonged to the Crown.[6]

The form of enacting laws in the various colonies was not uniform. In some the Royal name was not used, and the enactment was declared to be made by the Governor, with the consent of the Council and Assembly.[7] In Maryland (a proprietary government) the form was: 'Be it enacted by the King's most Excellent Majesty, by and with the consent,' &c.[8] In Pennsylvania (another proprietary government) the form was 'Be it enacted by the Honourable —— Lieutenant Governor, and the Honourables Thomas Penn and Richard Penn, Esquires, Proprietors, by and with the advice and consent of the representatives of the freemen of the Province in general assembly assembled.'[9] Several of the Royal Charters and instructions provided that all laws passed in the several colonial assemblies, and assented to by the Governors, should remain in force until the pleasure of the King should be known; and each Governor was required to send to the King for approval, all laws so assented to, immediately after the passing thereof.[1] The laws so sent then received the express assent or disallowance of the Crown by an order of the King in Council.[2] But in the present Parliamentary Colonial Constitutions this course has been considerably varied, generally leaving the Governor power to give the Crown's assent, thereby superseding the necessity of an Order in Council, except for the purpose of disallowing.[3] So long as the prerogative of disallowance was not exercised, the Act continued in force under the assent given by the Governor, on behalf of the

(1) 'This statute was, if at all, ill observed, and seems to have produced no essential change in the colonial policy.'—Story on the Constitution, s. 161.

(2) Chalmers' Opinions, 239.

(3) 7 & 8 William III. c. 22, s. 9, enacted that all laws, by-laws, usages or customs in force in any of the Plantations repugnant to the laws of England, then or thereafter to be made in the Kingdom, 'so far as such laws shall relate to and mention the said Plantations,' are illegal, null, and void to all intents and purposes whatsoever. See also Imperial Acts 26 & 27 Vic. c. 84, and 28 & 29 Vic. c. 63.

(4) The Councils, in some colonies, had legislative as well as executive powers.

(5) Stokes, 155; Story, s. 159.

(6) Stokes, 22; Story, s. 160.

(7) Chalmers' Opinions, 310. In Jamaica, the general form seems to have been: 'May it please your most excellent Majesty that it may be enacted. Be it therefore enacted by the Governor, Council, and Assembly of this your Majesty's Island of Jamaica.' See further, Watson's Powers of Canadian Parliament, 138.

(8) Chalmers' Opinions, 302.

(9) Pennsylvania Archives, 1756-60, p. 121.

(1) Story, s. 171. Maryland, Connecticut, and Rhode Island were not required to transmit their laws for the approval of the Crown.

(2) Chalmers' Opinions, 340.

(3) Mills' Colonial Constitutions, 33.

Crown. But it was at one time a received maxim that the Crown could at any time, however remote, exercise the prerogative of disallowing any Colonial Act which had not been confirmed by an Order in Council. 'This, however, may now be numbered among those constitutional powers of the Crown which have been dormant for a long series of years, and which would not be called into action, except on some extreme and urgent occasion,'[1] and then only in cases where the Imperial Parliament had not placed a limitation upon this exercise of the prerogative. This supervision of the Crown over the legislation of the colonies, appears to have been claimed and exercised by virtue of the prerogative, and by virtue of the dependency of the colony on the Empire, in order that the laws appointed or permitted in the colony might not be extensively changed without the assent of the central authority of the State.[2]

The colonies (says Governor Pownall) had therefore legislatures peculiar to their own separate communities, subordinate to England, in that they could make no laws contrary to the laws of the mother country; but in all other matters and things, uncontrolled and complete legislatures, in conjunction with the King or his deputy as part thereof. Where the King participated in this sovereignty over these foreign dominions, with the Lords and Commons, the colonies became in fact the dominions of the realm.[3] 'These colonial legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were *sovereign* within the limits of their respective territories.'[4]

(1) Howard's Colonial Laws, 26.

(2) This is substantially the judicial opinion affirming the right of appeal from Colonial Courts to the Sovereign in Council.—Vaughan's Reports, 290, 402.

(3) Pownall's Administration of the Colonies, 139.

(4) Story, s. 171.

Whatever constitutional usage may be deduced from these references to the extent and exercise of the Prerogatives of the Crown in the American colonies, it would appear that, although the power to appoint the Governors of these colonies was exercised by the Crown, the Proprietors, and the people, yet as the two latter derived their power primarily from the Crown, their appointments seem to have created no constitutional difficulty in vesting in their appointees, as Governors, the right to exercise the Crown's prerogative, so far as the same was requisite for the legislative function of their government. It seems to have been conceded even in days when Personal Rule was a marked feature in Imperial affairs, that, as the prerogative was vested in the Crown for the benefit of the people,[5] and for the exigencies of good government in the colonial domain of the Empire, that prerogative could be lawfully exercised by the Governor whether communicated to him by direct or indirect grant, or by necessary implication of law, and especially where, as a principle of constitutional law, the assent of the Crown was a pre-requisite to the making of colonial, as it was to the making of Imperial, laws; and thus the prerogative right to give or withhold that assent must have vested in the Governor acting for and as representing the Crown within the colony.[6]

The territory now forming the Provinces of Ontario and Quebec was placed under Provincial Governments from the first; and, although no representative assembly was established for

(5) The recognized modern doctrine is, tha all prerogative rights are trusts for the benefit of the people.—Mr. Mowat's Memorandum Sess. Papers (Can.) 1877, No. 89. p. 95.

(6) A legal and confirmed Act of Assembly has the same operation and force in the colonies that an Act of Parliament has in Great Britain.—Chitty, 37. The legislative bodies in the dependencies of the Crown have *sub modo* the same powers of legislation as their prototype in England, subject, however, to the final negative of the Sovereign.—1 Broom's Commentaries, 122.

the former Province of Quebec, the prerogative in respect to legislation within that territory was maintained in the Quebec Act of 1774, which provided that every ordinance of the Governor and Legislative Council, within six months of the passing thereof, should be transmitted to England and 'laid before His Majesty for his royal approbation, and if His Majesty shall think fit to disallow thereof, the same shall cease and be void' (s. 14). In the Constitutional Act of 1791, 31 George III. c. 31, it was provided that in Upper Canada and Lower Canada, the laws should be enacted by His Majesty, by and with the advice and consent of the Legislative Council and Assembly in each Province; and that all laws passed by such Council and Assembly, and assented to by His Majesty, or in His Majesty's name by the Governor or Lieutenant-Governor of each Province, should be valid and binding (s. 2); and the Governor was empowered 'to summon and call together an Assembly for each Province' (s. 13), and to do other acts 'in His Majesty's name.' By the Union Act of 1840, so much of the former Act of 1791 as provided for constituting a Legislative Council and Assembly, and for the making of laws, within each Province, was repealed, and it was enacted that within the united Provinces Her Majesty should have power, by and with the advice and consent of the Legislative Council and Assembly, to make laws for the peace, welfare and good government of the Province of Canada, such laws not being repugnant to that Act, or to such parts of the Constitutional Act of 1791, as were not then repealed. The Governor was empowered, 'in Her Majesty's name,' to summon and call together the Legislative Assembly, and to assent to, or withhold assent from, or reserve, Bills passed by the Council and Assembly.

The legislation in the former Provinces of Upper and Lower Canada, and Canada (now the Provinces of Ontario and Quebec), was enacted in the name of the Sovereign, by and with the advice and consent of the Council and Assembly; and by 18 Vic. c. 88 (C. S. C. c. 5), it was enacted and declared that the form 'Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows,' should thereafter be used in all Legislative Acts. In the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and British Columbia, prior to Confederation, the Royal name was not used in their Legislative Acts, but their legislation, nevertheless, affected the Crown's Prerogative in these Provinces.

The British North America Act established two separate and independent governments, with enumerated, and therefore limited, parliamentary or legislative powers. These dual legislative sovereignties take the place of, and exercise the functions and powers formerly vested in, what was practically one government. Each of the separate governments derives its legislative powers from the same instrument, and each, in a measure, is dealt with as if it related to a separate territorial government;[1] and the Act, neither expressly nor impliedly, confers upon either government a legislative jurisdiction over the other. The separate power to legislate on certain classes of subjects is declared to be 'exclusive.' 'Where the power to legislate is granted to be exercised exclusively by one body, the subject so exclusively assigned is as completely taken from the others as if they had been expressly forbidden to act on it.'[2] 'Where two legislative bodies exist, each hav-

(1) The Federal Government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. —*Collector* v. *Day*, 11 Wallace, U. S. 113.

(2) Per Ritchie, C. J., *Regina* v. *Chandler*, 1 Hanney (N.B.), 557.

ing distinct and exclusive legislative powers, there must be care exercised by each to avoid encroachments by either body upon the exclusive powers of the other."[1] 'As an abstract proposition it may be affirmed that if the Dominion Legislature were to enact that some of the matters vested in the Parliament—for instance "Bills of Exchange and Promissory Notes"—should be litigated only in a particular local court, and not in any other court whatever, such an enactment would be unconstitutional, because it would be an encroachment on the exclusive powers of the Provincial Legislature.'[2] 'A confirmed Act of a legislature, lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence, and the limits of its jurisdiction, the operation and force of *sovereign legislation*—though subject to be controlled by the Imperial Parliament.'[3] 'But in cases of concurrent authority, where the laws of the State are in direct and manifest collision on the same subject, those of the Union, being the supreme law of the land, are of paramount authority, and the State Laws so far, and so far only, as such incompatibility exists, must necessarily yield.'[4]

In the creation of these dual governments, the statutory powers or prerogatives of the Crown were necessarily divided; some were assigned to the Dominion, and some to the Provincial, Governments, to the extent necessary for the complete and efficient exercise of the 'exclusive' authority of each.

It was not politically necessary, except for a harmless rhetorical purpose, to enact in the British North America Act that 'the Executive Government and authority of and over Canada is hereby declared to continue, and be vested, in the Queen.' Nor was it necessary, except as giving a key to what were to be the Governor-General's functions and jurisdiction in Provincial Legislation, to declare that 'the provisions of this Act, referring to the Governor-General, extend and apply to the Governor-General for the time being, carrying on the Government of Canada *on behalf and in the name of the Queen*.' By constitutional usage, all Governors of colonies carry on their governments 'on behalf, and in the name, of' the Sovereign, as representing the chief executive authority of the State. In Canada, the Governor-General's assent to Bills, his appointment of Lieutenant-Governors, Privy Councillors, Judges and other functionaries, and his other acts of Government, within his jurisdiction, are 'on behalf, and in the name, of the Queen,' by and with the advice which the law and the constitution has assigned to him.[5]

It will, doubtless, be conceded that the Colonial Prerogatives of the Crown, may be vested by statute or Royal Commission, in a Governor-General or in a Lieutenant-Governor; some of such prerogatives *ex necessitate*,

(1) Per Harrison, C. J., *Regina* v. *Lawrence*, 4 Q.B. Ont. 174.

(2) Per Wilson, C. J., *Crombie* v. *Jackson*, 34 Q. B., Ont. 575.

(3) Per Willes, J., *Phillips* v. *Eyre*, L. R. 6 Q. B., 20.

(4) Per Marshall, C. J., *Gibbons* v. *Ogden*, 9 Wheaton, U. S. 130.

(8) 'The distinction drawn in the statute between an act of the Governor, and an act of the Governor in Council, is a technical one, and arose from the fact, that in Canada, for a long period before confederation, certain acts of administration were required by law to be done under the sanction of an Order in Council, while others did not require that formality. In both cases, however, since responsible government has been conceded, such acts have always been performed under the advice of a responsible ministry.'—Sir J. A. Macdonald's Memorandum, H. of C. (Imp.), 1878–9, p. 109. His Excellency's Ministers (whose recommendation is essential to action) are responsible, not merely for the advice given, but also for the action taken. The Canadian Parliament has the right to call them to account, not merely for what is proposed, but for what is done,—in a word, what is done is practically *their* doing.—Mr. Blake's Memorandum, Sess. Papers, (Can.) 1877. No. 89 p. 452. See also Todd's Parliamentary Government in the Colonies, p. 79. 341, 414.

may be held to belong to him by virtue of his office, as in the case of the Governors appointed by proprietors, or elected by the people, before referred to.[1]

But, without discussing this last point, enough may be found in the British North America Act to elucidate the extent of the Prerogative of the Crown in the local legislation of the Provinces.

It has been shown that the Governors and Lieutenant-Governors of the old American colonies exercised the Crown's prerogative of calling together the Legislative Assemblies in the Sovereign's name. In the former Provincial Governments of Canada, the Lieut.-Governors of Upper and Lower Canada, and of Nova Scotia and New Brunswick, and the Governor of Canada, were specially authorized 'in the Queen's name,' to summon the Legislative Assembly of these Provinces; and by section 82 of the British North America Act, this power is expressly conferred upon the Lieutenant-Governors of Ontario and Quebec, and by fair inference, from sections 88 and 129, upon the Lieutenant-Governors of Nova Scotia and New Brunswick. The Imperial Colonial Regulations also provide that the Governor of a colony 'has the power of issuing, in the Queen's name, writs of summons and election to call together the representative assemblies and councils where they exist, and for the election of their members; and also that of assembling, proroguing and dissolving legislative bodies.'

The legislature, so summoned in the Queen's name, has exclusive legislative authority to make laws in certain classes of subjects defined by section 92 of the British North America Act, and which laws by the unrepealed clauses of the Constitutional Act of 1791, are to be 'assented to by Her Majesty,' or to 'be made by Her Majesty by and with the advice and consent' of the local legislature. These laws, which, by the Act of 1791, require the assent of the Crown, are the laws relating to 'the time and place of holding elections' (s. 25), repealing or varying laws then existing, or in so far as the same should thereafter be repealed or varied by temporary laws (secs. 33 and 50), altering the constitution of the Courts of Appeal of Upper and Lower Canada (sec. 34), varying or repealing the provisions of the Act respecting the Clergy Reserves (sec. 41), altering the law then established, with respect to the nature and consequences of the tenure of lands in free and common soccage (sec. 43). The Union Act of 1840, also provided that 'Her Majesty shall have power, by and with the advice and consent of the Legislative Council and Assembly, to make laws for the peace, welfare and good government of the Province of Canada, such laws not being repugnant to this Act, or to such parts of the said Act [of 1791], passed in the thirty-first year of his said late Majesty, as are not hereby repealed . . . and that all such laws, being passed by the said Legislative Council and Assembly, and assented to by Her Majesty, or assented to in Her Majesty's name, by the Governor of the Province of Canada, shall be valid and binding to all intents and purposes.' Of the classes of subjects, specially mentioned in this Act, which are now within the legislative authority of the Provincial Legislatures, are, the establishment of new and other electoral divisions, and alteration of the system of representation (s. 26), laws relating to or affecting Her Majesty's Prerogative touching the granting of waste lands of the Crown within the Province (sec. 42, amended by 17 & 18 Vic. c. 118, s. 6), the constitution of the Courts of Appeal, of the Court of Chancery for Upper Canada, and the place of holding the Court of Queen's Bench of Upper Canada

(1) The Lords Commissioners for Trade and Plantations communicated with the Governors of these colonies; and to the Lieutenant-Governor of Pennsylvania, if not to others, royal instructions were given.—Pennsylvania Archives, 1740, p. 616.

(sec. 43), the revenue and the charges thereon (s.s. 50-57). And it was provided that the words 'Act of the Legislature of the Province of Canada,' in the Act should mean 'Act of Her Majesty, Her Heirs or Successors, enacted by Her Majesty, or by the Governor, on behalf of Her Majesty, with the advice and consent of the Legislative Council and Assembly of the Province of Canada.'

These Imperial Acts were 'laws in force in Canada' prior to the passing of the British North America Act, and are therefore, by the 129th section, continued in Ontario and Quebec, as if the Union had not been made; and being Imperial statutes are not subject to be repealed, abolished or altered, by the Parliament of Canada or by the Legislature of the Province. The same section continued in force in Ontario and Quebec, the Provincial statute to which Her Majesty was an enacting party, under the Union Act of 1840, which declared that the laws should be enacted in the name of Her Majesty; and it also continued all the laws so enacted in the name of Her Majesty relating to the classes of subjects within the legislative authority of the Provinces, subject nevertheless to be repealed, abolished or altered, by the Legislature of the Province, according to the authority of that Legislature under the Act.

The powers, authorities and functions which, under these Acts, were, at the union, vested in or exercisable by the former Lieutenant-Governors of Upper and Lower Canada, and the Governor of Canada, are, by the 65th section, so far as the same are capable of being exercised after the union, in relation to the governments of Ontario and Quebec respectively, vested in, and shall or may be exercised by the Lieutenant-Governors of Ontario and Quebec respectively, with the advice and consent of the Executive Council of these Provinces.[1]

Without considering whether the Governors of the former colonies of America had established a constitutional usage respecting the prerogatives of the Crown,[2] either with or without Royal Instructions, it would appear that, by the express provisions of the B. N. A. Act, the Lieutenant-Governors of Ontario and Quebec are invested with the power to exercise such prerogatives of the Crown as were, by former Imperial and Canadian statutes, possessed and exercisable by the Governors and Lieutenant-Governors of the Provinces which now comprise Ontario and Quebec; and that to the extent to which these statutory prerogatives were vested, these Lieutenant-Governors represent the Crown within their respective Provinces, in a higher and more real sense than the judges represent the Crown in the administration of justice—styled as they are, in legal proceedings and statutes, 'Her

(1) The following is the 65th section of the B. N. A. Act:—'All powers, authorities, and functions which under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the union vested in or exercised by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the union, in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governors of Ontario and Quebec respectively, with the advice, or with the advice and consent of, or in conjunction with the respective Executive Councils, or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be abolished or altered by the respective Legislatures of Ontario and Quebec.'

(2) Usage is, according to the British system, as obligatory as express enactment, where there is no express enactment to govern. Many constitutional rules have no other foundation than precedents.—Mr. Mowat's Memorandum, Sess. Papers (Ont.) 1874, No. 19, p. 3.

Majesty's Judges;' the 'Queen's Justices,' or 'Judges of Her Majesty's Courts."[1]

In defining the legislative authority of the Parliament of Canada, the Act in effect prescribes that the legislative form of enactment shall be the Queen, by and with the advice and consent of the Senate and House of Commons; and it was proper so to prescribe, for the Legislatures which preceded it, had no uniformity in their enacting forms. But in the Provinces each Legislature was left to the form of enacting laws which the prior constitutions had either prescribed or allowed.[2]

The provisions of s. 54 of the B. N. A. Act, as made applicable by s. 90 to the Legislature, read as follows: It shall not be lawful for the Legislative Assembly to adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue, or of any tax or impost to any purpose that has not been first recommended by Message of the Lieutenant-Governor.

This clause might read as a rule of procedure, but for the recognition which it gives to a constitutional doctrine in Parliamentary Government,—'that no moneys can be voted in Parliament, for any purpose whatsoever, except at the demand, and upon the responsibility, of Ministers of the Crown.' The reason of this doctrine has been thus stated: 'The Crown, acting with the advice of its responsible Ministers, being the Executive power, is charged with the management of all the revenues of the country, and with all payments for the public service. The Crown, therefore, in the first instance, makes known to the Commons the pecuniary necessities of the Government, and the Commons grant such aids or supplies as are required to satisfy these demands; and provide by taxes, and by the appropriation of other sources of the public income, the ways and means to meet the supplies which are granted by them. Thus the Crown demands money, the Commons grant it, and the Lords assent to the grant. But the Commons do not vote money unless it be required by the Crown; nor impose or augment taxes unless they be necessary for meeting the supplies which they have voted, or are about to vote, for supplying general deficiencies of the revenue. The Crown has no concern in the nature or distribution of taxes; but the foundation of all Parliamentary taxation is—its necessity for the public service as declared by the Crown, through its constitutional advisers."[4]

Thus there is directly introduced in-

(1) It is evident, therefore, that in a modified, but most real sense, the Lieutenant-Governors of the Canadian Provinces are representatives of the Crown.—Todd's Parliamentary Government in the Colonies, 402.

(2) A distinction is said to exist between the terms 'Parliament' and 'Legislature,' in the British North America Act, by which some undefined superiority in power or privilege belongs to the former over the latter. But the Crown is the same in both, and appoints the Upper House in each; and the House of Commons of the one, and the Legislative Assembly of the other, are called into existence by the same instrument; and they represent, for separate powers of legislation, the same authority—the people. And by the judgment of the highest Court of Appeal, binding on the colonies, it has been decided that colonial legislative bodies have not the inherent Parliamentary powers and privileges of the Imperial Parliament; and that, in the absence of express grant, the *lex et consuetudo Parliamenti*, which is inherent in the two Houses of the Imperial Parliament, does not belong to colonial legislatures—nor even the power to punish for contempt, which is inherent in every court of justice as a Court of Record. But by the 18th section of the B. N. A. Act, amended by the Imp. Act, 38 & 39 Vic. c. 38, the Parliament of Canada may by statute clothe itself with Parliamentary powers and privileges.—See *Doyle* v. *Falconer*, L. R. 1 P. C. 328; *Landers* v. *Woodworth*, 2 Sup. Ct. Can. 158; Chalmers' Opinions, 265. See also as to the terms 'central legislature' and 'local legislature,' Imp. Acts, 32 Vic. c. 10; 33 & 34 Vic. c. 52; 37 & 38 Vic. c. 27.

(3) 1 Todd's Parliamentary Government, 428. 'It is clear that every petition and motion for a grant of public money should, on the ground of economy, and for the safety of the people, be initiated by the responsible Ministers of the Crown.'—182 Hans. 598.

(4) May's Privileges of Parliament, 584.

to the Provincial Legislative procedure, the well recognized Prerogative of the Crown is asking from the people in their Assembly, the supplies necessary to carry on the Executive Government of the Crown in the Province, in the same manner as supplies are demanded in the Imperial and Dominion Parliaments.

In view of the express enactment, that the Executive Government and authority of and over Canada is vested in the Queen, and that the Governor-General carries on that Government on behalf and in the name of the Queen, it cannot be contended that his assent to Bills in Canada, or the Lieutenant-Governor's assent to Bills in the Governor-General's name in the Provinces, is other than the Queen's assent. The Queen cannot be personally present in the Imperial as well as the Colonial Legislatures, to give the Crown's assent to Bills; nor can the Governor-General be personally present, to represent the Queen, in the Dominion as well as in the Provincial Legislatures, to give the Crown's assent. Whatever might be the contention as to the position and functions of the Lieutenant-Governors if the section, making him a part of the Provincial Legislature, stood alone,[1] that position is made a delegated or representative one by the construction which has been given to the clause (s. 56 with s. 90), which reads that when the Lieutenant-Governor assents to a Bill in the Governor-General's name, he is to transmit such Bill to the Governor-General. In no other place in the Act is the official assent of the Governor-General referred to; and it is introduced there more as regulating procedure than as conferring an independent right; and from that consideration, as well as from the express words of the statute, which show that the Governor-General has only derivative or representative, and not absolute, powers and functions in legislation, it may fairly be conceded that the common law of the Prerogative respecting the Crown's assent to Bills—and without which it is admitted, they can have no validity[2]—has not been abrogated in respect of the legislation of the Provincial Legislatures.

This right of the Crown to give or withhold the Royal assent to Acts of Parliament is possessed by the Crown as part of the Royal Prerogative. The Imperial Parliament therefore in dealing with that prerogative, in respect of colonial legislation, provided that that assent should be required to Acts of the former Legislatures of Upper and Lower Canada, and Canada, and impliedly and expressly has placed the same condition on Provincial legislation, and has thus continued that prerogative in the Provinces. 'It is a well established rule that the Crown cannot be divested of its prerogative, even by an Act of Parliament passed by the Queen, Lords and Commons, unless by express words or necessary implication. The presumption is that Parliament does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible.'[3]

It might also be urged that the classes of subjects which are within the legislative authority of the Provincial Legislatures necessarily make the Crown a part of those legislatures. They have power to alter the terms of the Confederation Act as to their own

(1) There shall be a Legislature for Ontario, consisting of the Lieutenant-Governor, and one House styled the Legislative Assembly of Ontario (s. 69). In Quebec there is a similar provision, but giving two Houses (s. 71). In Nova Scotia and New Brunswick, the constitution of their Legislatures is continued subject to the provisions of the Act (s. 88).

(2) No Acts of Colonial Legislatures have force until they have received either the assent of the Governor in the Queen's name, or the Royal assent when reserved and transmitted for consideration.—Cox's British Commonwealth, 525.

(3) Per Gwynne, J., *Lenoir* v. *Ritchie*, 3 Sup. Court Can. 633.

constitution—an exercise of sovereignty, heretofore exercisable by Imperial statute or Royal Charter. They can exercise the power of taxation, which is an incident of sovereignty.[1] They control the sale of the Crown domain—lands, timber, mines, minerals and royalties,—the revenue from the sales of which were supposed to form part of the hereditary revenues of the Crown,[2] and they possess that right of eminent domain which is defined to be one of the reserved rights of sovereignty.[3] They have power to pass laws affecting property and civil rights in the Province 'to the same unlimited extent that the Imperial Parliament have in the United Kingdom.'[4] They also establish Courts of Civil and Criminal Jurisdiction, one of which, now within their legislative jurisdiction, was called 'His Majesty's Court of King's Bench.' in an Imperial statute,[5] and from which Courts all writs issue in the name of the Queen; and their criminal courts have the right to try the subjects of the Crown for their life or liberty.[6] 'The jurisdiction of the colonial judicatures, in point of law, invariably emanates from the King under the modifications of the colonial assemblies.'[7] And it may be said that they are called 'Her Majesty's Courts,' in the Imperial Act, 25 Vic. c. 20, which prohibits writs of *Habeas Corpus* to issue out of England to any colony where *Her Majesty has a lawfully established court or courts of justice* having authority to issue writs of *Habeas Corpus*. The power to abolish these 'Queen's Courts' or to alter their titles or jurisdiction, rests with the Provincial Legislature.

The conclusions from the foregoing review would seem to be: (1) That to the extent of the powers and prerogatives of the Crown, capable of being exercised in relation to the Government of the Provinces, by virtue of the express or implied grant of such powers and prerogatives by the Imperial and Canadian statutes, the Lieutenant-Governors represent the Crown in their respective Provinces. (2) That to give the force of law to the enactments of the Provincial Legislatures, the Crown's assent is requisite. (3) That the Crown, in calling their Assemblies and assenting to their laws, is a constituent part of the Provincial Legislatures.

The discussion of the question involved in this paper might be pursued further, and take a wider scope than has been accorded to it. But what has been here suggested may lead to a more accurate and thorough review of our constitutional system, and of the extent of the Prerogatives of the Crown—exercisable as 'the will of the people,'[8]—in each of the Governments established by the Confederation Act.

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(1) *McCulloch* v. *State of Maryland*, 4 Wheat. U.S., 316; *Leprohon* v. *City of Ottawa*, 2 App. Ont. 522.

(2) The Imperial Act 15 & 16 Vic. c. 39, recites doubts that the revenues from the sale of Crown Lands in the colonies were part of the revenues surrendered by their Majesties King William IV. and Queen Victoria, on the passing of the Civil List Bills of 1830 and 1837; and recites that the *lands of the Crown* in the colonies have been hitherto granted and disposed of, and the moneys arising from the same, whether on sales or otherwise have been appropriated by and under the authority of the Crown, and by and under the authority of the several colonies. The Act then provides that the appropriations of such revenues to public purposes within the colonies shall be valid, provided that the surplus of such hereditary casual revenues not applied to such public purposes, shall be carried to and form part of the Consolidated Fund. See also the Union Act of 1840, ss. 42 and 54.

(3) Bump's Notes of Constitutional Decisions, 179.

(4) Per Strong, J., *In re Goodhue*, 19 Grant, Ch. (Ont.) 452.

(5) Union Act of 1840, s. 42; and see C.S. U. C., c. 10.

(6) The (Provincial) Courts are the tribunals of Her Majesty charged with the execution of all laws to which she has given her sanction, in virtue of the new constitution.—Per Fournier J., *Valin* v. *Langlois*, 3 Sup. Ct. Can. 59.

(7) Chitty, 33.

(8) In a democracy, the exercise of sovereignty is the declaration of the people's will.—Plowden's *Jura Anglorum*, 232.

It has been justly remarked that the erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. Time alone can mature and perfect so composite a system; explain the meaning of all the parts; and adjust them to each other in a harmonious and consistent whole.[1]

(1) The Federalist, No. 82.