THE LAW

OF THE

CANADIAN CONSTITUTION

BY

The Hon. W. H. P. CLEMENT, B.A., LL.B. (Tor.)

JUDGE OF THE SUPREME COURT OF BRITISH COLUMBIA

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PREFACE.

The second edition of this work appeared eleven years ago. A great part of the present edition consists of entirely new matter, and the whole book has been recast and rewritten. It is much enlarged and, it is hoped, improved. The end aimed at, however, has always been, as expressed in the preface to the first edition, "to exhibit, in as compact a form as the wide scope of the subject permits, the Law of the Canadian Constitution in reference as well to our position as a Colony of the Empire as to our self-government under the federal scheme of the British North America Act."

W. H. P. CLEMENT.

15th November, 1915.

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THE LAW

OF THE

CANADIAN CONSTITUTION

PART I

IMPERIAL LIMITATIONS

THE

LAW OF THE CANADIAN CONSTITUTION

PART I—IMPERIAL LIMITATIONS.

CHAPTER I.

OUTLINE SKETCH.

The Colonial Status: Consequent Limitations:—In the study of the Canadian Constitution the first fact which challenges attention is that the Dominion of Canada is a British colony; possessed, it is true, of large powers of self-government, but holding those powers under a statute passed by the Parliament of the United Kingdom of Great Britain and Ireland. This statute is "The British North America Act, 1867," under which Canada (as it stood under the Union Act, 1840), Nova Scotia and New Brunswick were federally united into one Dominion under the Crown of the United Kingdom. It was no part of the scheme of Confederation to alter in any essential respect the colonial relationship or to weaken the Crown's headship; and there is nothing in the Act to indicate a surrender in any degree by the British Parliament of that cardinal principle of the Constitution, the supreme legislative authority of the British Parliament over and throughout the British Empire. Our colonial position suggests at once two lines of limitation upon Canada's powers of self-government: First, that she cannot legislate as to the Imperial Constitution; and, secondly, that she has no power to change the

essential framework of her own as provided in the British North America Act, unless, indeed, power to that end is conveyed to her by the Act itself.

Imperial Constitution: — Attention, therefore, must first be given to the Imperial Constitution. What are the essential parts of the frame-work provided by the constitution for the government of the Empire?

The Crown:—First, there is His Majesty the King, who, by and with the advice and consent of the two Houses of the British Parliament and by the authority of the same, may make laws binding in all parts of his dominions; who is also the executive head and chief executive magistrate by whom or in whose name are performed the most important acts of government throughout those dominions, and, indeed, throughout the world; and who, in all relations with foreign powers, represents and embodies the British nation. Acting, as always, under the advice of the British Ministry, he constitutes the Crown in Council and controls the executive government of the Empire in due subordination to the sovereign legislature, the Crown in Parliament. Clearly no colonial legislature has authority to interfere with the position of the Crown in its relation in either of these aspects to the government of the Empire.

The British Parliament:—This naturally leads to an examination of the nature and extent of the legislative power lodged in the King in Parliament, or, to use the common phrase, the British Parliament. It will appear that for the whole British Empire legislative sovereignty resides in the Parliament of the United Kingdom. No power, not even its own, can tie its hands. No Court within the Empire can pronounce its Acts *ultra vires*.

A Constituent Assembly:—And, first, it is the only constituent assembly in the full sense within the Empire. That unwritten growth of the ages, the British Constitution, confides to the King in Parliament power to alter the Constitution itself. That principle, it will appear, can have no place in the written constitution of a colony except as given a place there by the same power which gave the constitution. And this fact calls for a careful study of the question: To what extent have constituent powers been bestowed upon Canadian legislatures?

Supreme throughout the Empire:—The Parliament of the United Kingdom is a body possessed of a dual character. It is at once a local Parliament for the United Kingdom (as its name, indeed, implies), and an Imperial Parliament. As will appear, its enactments are *primâ facie* for the United Kingdom only, and when it would legislate for the Empire it must make its purpose clear by "express words or necessary intendment." No one doubts, however, that it may make laws to operate in the colonies. How far it should do so is a matter of Imperial policy and statesmanship, and not, therefore, matter for discussion in a work of this character, dealing with legal limitations and not with conventional restrictions. How far it has done so is a practical question of great importance.

Resulting Limitations on Colonial Powers:—It naturally follows that no colonial legislature can make laws repugnant to Imperial Acts extending to the colony. This constitutes a third limitation upon the power of Canadian legislatures, and it will be at once apparent that the extent to which Canadian legislative power is limited along this line depends upon the answer to the question: What Imperial Acts extend *proprio vigore* to Canada? The British North

America Act is itself one of such Acts, and most of the cases touching the question of legislative jurisdiction in Canada, particularly as between the Parliament of Canada on the one hand and the provincial legislatures on the other, fall logically within this branch of our subject. But for obvious reasons those cases which touch the question of the distribution among Canadian legislatures of Canada's rights of self-government and which raise no practical question of competing Imperial legislation, will stand for discussion later,[1] as one of the main topics of this book.

Imperial Acts Extending to Canada: — Apart then from the British North America Act, it will be shewn that with reference to various matters of great moment the law in force in Canada is to be found in Imperial statutes. There are British Acts of Parliament wholly or partially in force here relating to (1) Naturalization of Aliens, involving questions as to British, Canadian, and Imperial citizenship; (2) The Army and Navy, involving questions as to Canadian participation in the wars of the Empire and the right of self-defence; (3) Navigation and Shipping, involving questions as to the position or even existence of a Canadian mercantile marine, as to admiralty jurisdiction, and as to Canadian control over the "territorial waters" which for many thousands of miles wash the Canadian coast: (4) Copyright, involving questions of interest to Canadian publishers of books, to say nothing of their readers; (5) Fugitive Offenders, forming with Canadian and other colonial legislation an extradition code within the Empire; besides many other Acts of a miscellaneous character which in matters, some of great, others of trifling moment, give law to Canadians. With regard

[1] See Part II.: "Self-government."

to all these Acts it must not be understood that they entirely debar Canadian legislatures from making any laws in relation to these subjects. As will appear, Canadian laws may well stand side by side with Imperial laws upon the same subject matter; they are void only to the extent of their repugnancy to such Imperial laws but not otherwise.

Territoriality:—Turning next to consider territorial limitations upon legislative power, it may, it is conceived, be said with strict propriety that there is no such limitation capable of judicial enforcement in British Courts in the case of the British Parliament, but that the weight of authority at present favours the proposition that there are legal limitations of which the Courts must take cognizance which prevent the making of laws by Canadian legislatures in relation to persons, property, and acts beyond the limits of the Dominion or the enacting province, as the case may be. What those limitations are is manifestly a question of great practical importance in Canada, calling for careful study. To solve the problem as to colonial or Canadian legislation generally where no express words of limitation along this line appear in the colony's charter, Imperial Act or other, will doubtless aid in arriving at the true meaning and effect of certain express words of limitation which occur in the British North America Act as touching provincial legislation.

Part I. of this book will deal with *Imperial Limitations* upon Canadian powers of self-government. Some of those limitations are matters of principle arising from the fact that Canada is not a nation entitled to international recognition, but is a British colony; while others are, in a sense, accidental, arising from the existence of British statutes extending to Canada.

Part II. will deal with Canadian *Self-Government* under the scheme of the British North America Act, 1867, and its various amendments, with particular reference to the division of the field as between the Dominion Government on the one hand and the various provincial governments on the other.

CHAPTER II.

The Crown Imperial.

The British form of government is monarchical. The common law of England, the basis of our constitutional law, recognizes only one person as exercising authority without commission from any other within or without the realm. That one person is the wearer, for the time being, of the Crown of the United Kingdom of Great Britain and Ireland. Who at any moment of time may wear that Crown is now determined by statute. By the Act of Settlement[1] (as it is usually styled), passed in 1700, the Crown was settled upon the Electress Sophia of Hanover and the heirs of her body, being Protestant. The descent is hereditary but the title is statutory. The right to our allegiance "rests wholly on the Act of Settlement and resolves itself into the sovereignty of the legislature."[2]

The law makes the King.[3] The legal theory of British jurisprudence is that further back than any Court will look there was, as part of the common law of England, a fundamental law of the constitution governing the kingship: "the original right of the Kingdom and the very natural constitution of our state and policy."[4] The King is the head of the nation both for purposes of legislation and administration, but in the eye of the law he never acts alone. In legislating he is the King in Parlia-

[1] 12 & 13 Wm. III. c. 2 (Imp.).

[2] *Hallam*, Const. Hist. (Ed. 1884), Vol. III., 181. See *post*, p. 166.

[3] *Bracton*, L. 1, c. 8.

[4] *Per* Yelverton, *arg.* 2 St. Tr. 483.

ment; in executive government the King in Council.[5]

The law governs the King. The British Monarchy is a limited monarchy. The duty of the King as expressed in the coronation oath is "to govern the people of this United Kingdom of Great Britain and Ireland and the dominions thereto belonging according to the statutes in Parliament agreed on and the respective laws and customs of the same"; and the power is commensurate with the duty. The King, therefore, as has been said, is not above the law, but under it and bound by it equally with the meanest of his subjects. No mandate from him would carry authority to act otherwise than according to law.[6] There is no power in the Crown to dispense with the obligation resting upon all to obey the law.[7]

In order to the due performance of the duties of the kingly office the common law of England clothed the head of the nation with certain attributes, rights, privileges, and powers, collectively known as the prerogatives of the Crown; some having regard to the King's position in relation to Parliament, others to his position as head of the executive government.

Power to alter the law of the land was no part of these prerogatives.[8] That power rested exclusively with Parliament; and the *lex et consuetudo parliamenti* was as much a part of the common law

[5] "It has been a marked and important feature in our constitutional history that the King has never in theory acted in matters of state without the counsel and consent of a body of advisers." *Anson*, Law and Custom of the Constitution, 2nd Ed., pt. II., 7; citing *Stubbs*.

[6] *Chitty*, Prerog. of the Crown, 5; *Bracton*, L. 1, c. 5; *Walker* v. *Baird* (1892), A. C. 491; 61 L. J. P. C. 92.

[7] Bill of Rights, 1 Wm. & Mary, st. 2, c. 2 (Imp.).

[8] *Royal Proclamations*.—The reign of Henry VIII. has been said to represent the high-water mark of kingly power; but

of England as the law which made the King. By the fundamental law were determined (1) what should be the constituent parts of Parliament; (2) their relation to each other; (3) the rights, privileges and immunities of each branch; and (4) their legislative power working in combination. By this fundamental law, in short, the relations of the King to Parliament and of each to the government of the kingdom were regulated. Parliament consisted of the King and the three estates of the realm, Lords spiritual, Lords temporal, and Commons; and its enactments were promulgated as the Acts of the King in Parliament. In theory, it would seem that defects in the law would be discovered by the King in the course of the administration of public affairs; whereupon, in the exercise of the prerogative right vested in him by the common law to summon the

even he—content to waive the form so long as he enjoyed the substance of despotism—took care to procure an Act of Parliament (31 Hen. VIII. c. 8), to give his Royal Proclamations the force of law. Even this statute, however, provided that no man should by virtue thereof suffer in his estate, liberty, or person, and that the laws and customs of the realm should not be subverted thereby; and it was repealed in the next reign (1 Ed. VI. c. 12). But as long as the Star Chamber continued to exercise its indefinite jurisdiction to fine and imprison for breach of royal orders, so long proclamations continued to issue. The judgment of Lord Coke and his brethren in the *Case of Proclamations* (12 Co. Rep. 74), in the time of James I., had real effect after the abolition of the Star Chamber. It was recognized as undoubted law that a Royal Proclamation cannot of itself make a new or alter an old law. When in 1766, Chatham, by Order-in-Council without statutory authority, proclaimed an embargo upon the export of wheat in order to ward off an apprehended famine, the time which elapsed until Parliament met was called a "forty days' tyranny." Parliament, indeed, passed an Act of indemnity, but it explicitly recited that the Order-in-Council "could not be justified by law." See further on this subject *Anson*, Law & Custom of the Const., 2nd ed., pt. I., 291, *et seq.; Broom*, Const. Law, 2nd ed., 371, *et seq.; Forsyth*, 180.

The power of the Crown in Council, without Parliament, to make laws for conquered or ceded territory, or for the "plantations," must be considered later: see *post*, p. 15.

three estates of the realm, he would cause Parliament to assemble in order that the law might (if all agreed) be altered and the defect remedied. Parliament, however, once assembled, might address itself, not merely to the alteration desired, but to the alteration of the law upon other matters; and every alteration in the law agreed upon by the King and the three estates was thereafter part of that law of the land in accordance with which the King swore to govern. As it is sometimes, but not very intelligibly, expressed, the King's authority as executive head of the nation is subordinate to his authority as *caput et finis parliamenti*. The same idea may be expressed in more modern terms by saying that the power which makes the law must of necessity be supreme over the power which simply carries out the law when made.

The monarchical principle stands good throughout the Empire. The expansion of England and the consequent necessity for adapting the British Constitution to the government of dominions beyond the seas is a comparatively modern matter.

"In the last years of Queen Elizabeth England had absolutely no possessions outside Europe, for all schemes of settlement, from those of Hore in Henry VIII's reign to those of Gilbert and Raleigh, had failed alike. Great Britain did not yet exist; Scotland was a separate kingdom, and in Ireland the English were but a colony in the midst of an alien population still in the tribal stage. With the accession of the Stuart family commenced at the same time two processes, one of which was brought to completion under the last Stuart, Queen Anne, while the other has continued without interruption ever since. Of these the first is the internal union of the three kingdoms which, though technically it was not completed till much later, may be said to be substantially the work of the seventeenth century and the Stuart dynasty. The second was the creation of a still larger Britain comprehending vast possessions beyond the

sea. This process began with the first Charter given to Virginia in 1606. It made a great advance in the seventeenth century; but not until the eighteenth did Greater Britain in its gigantic dimensions and with its vast politics first stand clearly before the world."[9]

This passage emphasizes the modern character of what may be termed colonial constitutional law; and the reference to the Charter of Virginia draws attention to the fact that at first and for many years the colonies were the care of the Crown in Council. Parliament in fact, though it grumbled at times,[10] did not seriously question the right of the Crown to settle the form of government for the colonies.[1] But the claim put forward by the Stuart kings to private ownership of the overseas dominions was successfully contested and it was settled doctrine in 1774 that such dominions were held by the King in right of his Crown and were therefore necessarily subject to the legislative power of the Parliament of Great Britain.[2] They belonged not to the King but to the Kingdom as expressed in the Coronation oath.

That the King of the United Kingdom is King also of all British Possessions abroad has never been doubted. But in the self-governing colonies the Crown is associated, both in the work of legislation and administration, with persons and bodies entirely distinct from those with which the King co-operates in the United Kingdom. The colonial legislatures, of which he is the head, are in some cases modelled more or less upon the British Parliament. Some again have only a single chamber. And throughout the Empire the qualifications both

[9] *Seeley*, Expansion of England, p. 11.

[10] *Egerton*, "A Short History of British Colonial Policy," pp. 17, *et seq.*

[1] See *post*, p. 15.

[2] *Campbell* v. *Hall*, Cowp. 204.

for electors and members are of a varying character. All colonial legislatures however are locally elected or selected and they constitute, with the Crown, distinct legislative entities. The same is true of the colonial councils, with whose consent and advice the local executive government is carried on: they are of a different and distinct composition from the British ministry. In this view there are many governmental bodies throughout the Empire with varying spheres of authority, but the Crown is an essential part of them all; and they form an organic whole under the Imperial Crown.

The Crown, to put it shortly, is the one and only common factor in government, Imperial and colonial. The British sovereign takes part in the work of legislation in all legislative bodies, properly so called, within the confines of the Empire; and he is also the recognized head of the Executive government as well of all British possessions as of the United Kingdom. The Crown, it has been said, is one and indivisible,[3] "the highest and ultimate source of all executive authority throughout the Queen's dominions"; [4] and, it should be added, of all legislative authority as well throughout the colonies.

A recent case strongly illustrates this oneness of the Crown throughout the Empire.[5] One Howarth had served in the Boer war in South Africa in the New South Wales forces. It had been agreed between him and the government of New South Wales that he was to receive pay at the rate of 10s. a day. He received from the Imperial Government 4s. 6d. a day while on active service, and his conten-

[3] *Per* Strong, J., in *R.* v. *Bank of Nova Scotia*, 11 S. C. R. 1; 4 Cart. 391.

[4] *Per* Higinbotham, C.J., in *Musgrove* v. *Chun Teeong Toy*, 14 Vict. L. R. 349; 5 Cart. 573.

[5] *Williams* v. *Howarth* (1905), A. C. 551; 74 L. J. P. C. 115.

tion was that this sum should not be held as part payment of the larger sum which the colonial government had agreed to pay. The Supreme Court of New South Wales upheld his claim, but on appeal to the Privy Council this judgment was reversed.

"The plaintiff," said Lord Halsbury, delivering the judgment of the Board, "was in the service of the Crown and his payment was to be made by the Crown. Whether the money by which he was to be paid was to be found by the colony or the mother-country was not a matter which could in any way affect his relation to his employer, the Crown. The learned Acting-Chief Justice, in giving judgment in this case said, 'The King has no concern with payments for services rendered in this colony; the obligation is with the Government of New South Wales;' and, so far as their Lordships can understand, this is the ground upon which the judgment rests. But, with great respect to the learned judge, this is entirely erroneous. The Government in relation to this contract is the King himself. The soldier is his soldier, and the supplies granted to His Majesty for the purpose of paying his soldiers, whether they be granted by the Imperial or the colonial legislature, are money granted to the King; and the Appropriation Act, whenever an Appropriation Act is passed, simply operates to prevent it being applied to any other purpose. Under these circumstances the money paid was money paid for the service rendered to the King and no other payment could possibly be due upon the contract declared on."

In an earlier case Bacon, V.C., held that a conviction for felony in New South Wales operated to forfeit to the Crown in England property of the felon situate in England.[6] The property consisted of moneys in Court and the Attorney-General of England applied for payment out. It was suggested by counsel for English relatives that the forfeiture would enure solely to the government of the colony;

[6] *In re Bateman's Trusts* (1873), L. R. 15 Eq. 355; 42 L. J. Ch. 553.

but, although the point is not expressly noticed in the judgment, the order was made for payment out as asked.

In another case,[7] where in English winding-up proceedings a colonial government claimed the benefit of the Crown's prerogative right to priority of payment in respect of Crown debts incurred in the colony, effect was given to the claim as against the English creditors.

As between the Dominion of Canada and its various provinces the same question arises and must be dealt with more in detail later. Here it will suffice to say that the principle that the Crown is one and indivisible throughout the Empire has been steadily maintained.

Caution, however, must be observed in assigning too literal a meaning to the word "indivisible." Although, as said by Chancellor Boyd,[8] "the sovereign power is a unity and, though distributed in different channels and under different names, it must be politically and organically identical throughout the Empire"—that is to say, the Empire is one political and organic whole—the fact remains that the Crown in Parliament and the Crown in Council in Great Britain and the self-governing colonies respectively are not one and the same political organ operating in one and the same sphere. In Canada, indeed, and in Australia there are still further divisions of the sphere of authority and it is often a legal question not only where legislative power over a given subject matter resides, but also where in particular cases executive power is lodged and by whom exercisable. Questions arise too as to which government has the right

[7] *Re Oriental Bank* (1885), 28 Chy. D. 643; 54 L. J. Ch. 330. See *post*, p. 99, for further reference to this case.

[8] *The Pardoning Power Case*, 20 Ont. R., at pp. 249-50.

of appropriation over particular public moneys or of administering particular public properties. The result is, as will appear later, that the various governments throughout the Empire have often and necessarily been treated in the Courts as distinct and separate entities, as witness the frequent litigation between the federal and provincial or state authorities.

It may be said that from the earliest days of colonial history British policy has favoured the principle of local self-government. Of necessity the Crown's executive authority has been lodged with officers, usually styled Governors, resident for the time in the respective colonies, and acting as a rule by and with the consent and advice of a local council. The assent of this officer on behalf of the Crown has invariably been required in order to the valid enactment of laws in the colony. Local assemblies were authorized by the earliest charters and Governors' commissions, and in 1619 the first colonial assembly "broke out" in Virginia.[9] That this grant of legislative power might come from the Crown in the first instance was, as already mentioned, not seriously questioned in Parliament, and is distinctly affirmed in a well-known judgment of the Exchequer Chamber in 1870[10]:—

"We consider these doubts as to the powers of the Crown and of the local legislature to be unfounded. There is

[9] "Hutchinson speaks of it as 'breaking out,' and Professor Seeley has repeated the expression. But, in fact, it was duly summoned by Yeardley according to the instructions he had received from home": *Egerton*, p. 32. The phrase is, nevertheless, very suggestive of something in the blood of Britons.

[10] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 20; 40 L. J. Q. B. 28. The validity of an Act of Indemnity passed by the Assembly of Jamaica was in question. The Assembly was constituted under a Governor's commission, and not by any Imperial Act. It was assumed, but not decided, that Jamaica was a colony by settlement.

even greater reason for holding sacred the prerogative of the Crown to constitute a local legislature in the case of a settled colony where the inhabitants are entitled to be governed by English law than in that of a conquered colony where it is only by grace of the Crown that the privilege of self government is allowed, though where once allowed it cannot be recalled."

The right of the Crown in Council to legislate generally for a conquered or ceded colony until the establishment therein of a local assembly has never been matter of serious doubt, subject, of course, to the observance of the terms of the capitulation or cession.[1] But it is very doubtful if the Crown in Council could do more than grant a constitution to a colony acquired by settlement and provide it with Courts to administer the law;[2] for it has been considered that the law of England which emigrating Englishmen carry with them to their new homes could not be altered by the Crown alone, but only by a local assembly or by the Imperial Parliament.[3]

But when once the right to a local assembly has been bestowed upon a colony it cannot be recalled

[1] See the judgment of Lord Mansfield in *Campbell* v. *Hall*, Cowp. 204; with which compare the valuable note (*a*) to *Leith & Smith's* Blackstone, at p. 19: "It has been said that, in case of territory acquired by Great Britain by conquest, inasmuch as the government is not absolutely monarchical, but the authority to impose laws is vested in the Sovereign conjointly with the two houses of Parliament, the King therefore alone can exercise no prerogative right to impose such laws as he pleases, and consequently that the mode . . . by which the British laws were introduced into Canada after the treaty of Paris was of no effect. See the opinion of C. J. Hey, 2 L. C. Jur., appendix in *Wilcox* v. *Wilcox*, and J. C. Jur., vol. I., 2nd part, pp. 38-48. See also the various judgments in *Stuart* v. *Bowman*, 2 L. C. R., and in appendix to 2 L. C. Jur." See also *Forsyth*, 12, *et seq.*

[2] *Phillips* v. *Eyre*, *ubi supra*, lays down no wider proposition than this.

[3] The question, though interesting, is of no practical importance since the British Settlements Act, 1887. See *Anson*, Law and Custom of the Const., 2nd ed., pt. II., p. 274.

otherwise than by Imperial legislation; the Crown in Council can no longer legislate for the colony. It was so held in 1774 by the King's Bench presided over by Lord Mansfield.[4] An Imperial Order-in-Council imposing a duty upon exports from the island of Grenada was held void because

"by the two proclamations and the commission to Governor Melville the King had immediately and irrevocably granted to all who were or should become inhabitants, or who had or should have property, in the island of Grenada—in general to all whom it might concern—that the subordinate legislation over the island should be exercised by an assembly." [5]

The commission to the Governor ante-dated the Order-in-Council imposing the export duty by a scant three months.

And, again, in 1865 the Privy Council laid it down:—

"After a colony or settlement has received legislative institutions the Crown (subject to the provisions of any Act of Parliament) stands in the same relation to that colony or settlement as it does to the United Kingdom."[6]

The King, then, is as much a component part of every colonial legislature properly so called as he is of the British Parliament, and he is equally the head of the executive government of the British Isles and of every colony. For purposes both of legislation and administration, the Crown is represented in a colony by the chief executive officer of the colony by whatever title he may be designated.[7]

The next enquiry must be: How is the monarchical principle dealt with by our constitutional charter, the British North America Act, 1867?

[4] *Campbell* v. *Hall*, Cowp. 204.

[5] The earlier of the two proclamations referred to followed the Treaty of Paris (1763), and is the proclamation which made provision for the government of the new British colony of Quebec. It will, therefore, appear again in this book.

[6] *Re Lord Bishop of Natal*, 3 Moo. P. C. (N.S.), 148.

[7] See B. N. A. Act, 1867, sec. 10.

CHAPTER III.

The Crown in Canada.

The Crown as the one common factor in government throughout the Empire, was the subject of the last chapter. Confining attention now to Canada: the position of the Crown in reference to the government of Canada and its provinces, including the arrangement adopted for the Crown's representation, so to speak, upon the ground, is definitely set out in the British North America Act, 1867. This Imperial Act opens with a preamble which recites that Canada, Nova Scotia and New Brunswick had "expressed their desire[1] to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom." It recites further that "it is expedient, not only that the constitution of the legislative authority in the Dominion be provided for, but also that the nature of the executive government therein be declared."

Canada's future extension to the Pacific coast was anticipated; and sec. 146[2] made provision for

[1] In addresses to the Crown based upon the Quebec Resolutions: see Appendix.

[2] **146.** It shall be lawful for the Queen, by and with the advice of Her Majesty's most honourable Privy Council, on addresses from the Houses of Parliament of Canada, and from the Houses of the respective legislatures of the colonies or provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those colonies or provinces, or any of them, into the Union, and on address from the Houses of the Parliament in Canada to admit Rupert's Land and the North-western Territory, or either of them, into the union, on such terms and conditions in each case as are in the addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any order-in-council in that behalf shall have effect as if they had been enacted by the parliament of the United Kingdom of Great Britain and Ireland.

Newfoundland has not yet taken advantage of this provision.

carrying into effect, by Order-in-Council, any arrangements to that end. British Columbia joined the Union in 1871, and Prince Edward Island in 1873, and the Orders-in-Council [2] uniting them to Canada are, in effect, Imperial statutes. Rupert's Land and the North-Western Territory were united to Canada in 1870,[3] and the Province of Manitoba was established therein by an Act of the Parliament of Canada [4] which was subsequently validated by an Imperial Act.[5] This Imperial statute also provided for the future creation of other provinces within the territory by Canadian enactment,[6] and in 1905 the provinces of Alberta and Saskatchewan were duly so established.[7]

To aid in the study of those clauses of the British North America Act, of the Orders-in-Council, and of the Canadian enactments above referred to, which make provision for what may be called the machinery of government, in Canada as well as in the provinces, they are here grouped together.

But, first, it may be pointed out that Canada, as constituted under the British North America Act, was divided into four provinces, Ontario, Quebec, Nova Scotia and New Brunswick.[8] Canada as it existed under the Union Act, 1840, was to be taken

[2] These are printed in full in the appendix.

[3] The order-in-council is printed in appendix.

[4] 33 Vict., c. 3 (Dom.) See appendix.

[5] "The British North America Act, 1871," (34 & 35 Vict., c. 28, Imp.), sec. 5. In appendix.

[6] **2.** The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

[7] 4 & 5 Ed. VII., caps. 3 & 42, in force 1st Sept., 1905.

[8] Sec. 5.

as severed; what had formerly been Upper Canada was now to form the new province of Ontario, while Lower Canada was to constitute the new province of Quebec.[9] Nova Scotia and New Brunswick retained their former limits.[10] The necessity for new machinery, so to speak, for the new provinces of Ontario and Quebec, as well as for the newly constituted Dominion, is to be borne in mind in reading the sections.

Part III. of the British North America Act, under the heading "*Executive Authority*," contains the following clauses:—

9. The Executive Government and Authority of and over Canada[1] is hereby declared to continue and be vested in the Queen.[2]

10. The provisions of this Act referring to the Governor-General extend and apply to the Governor-General for the time being of Canada, or other the chief executive officer or administrator for the time being carrying on the government of Canada on behalf and in the name of the Queen, by whatever title he is designated.

11. There shall be a council to aid and advise in the government of Canada, to be styled the Queen's Privy Council for Canada; and the persons who are to be members of that council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and members thereof may be from time to time removed by the Governor-General.

* * * * * * * *

[9] Sec. 6.

[10] Sec. 7.

[1] **4.** . . . unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act.

[2] **2.** The provisions of the Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

13. The provisions of this Act referring to the Governor-General in Council shall be construed as referring to the Governor-General acting by and with the advice of the Queen's Privy Council for Canada.

* * * * * * * *

Constitution of Parliament of Canada.

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

* * * * * * * *

V. Provincial Constitutions.

Executive Power.

58. For each province there shall be an officer, styled the Lieutenant-Governor, appointed by the Governor-General-in-Council by instrument under the Great Seal of Canada.

* * * * * * * *

62. The provisions of this Act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the time being of each province or other the chief executive officer or administrator for the time being carrying on the government of the province, by whatever title he is designated.

63. The Executive Council of Ontario and of Quebec shall be composed of such persons as the Lieutenant-Governor from time to time thinks fit, and in the first instance of the following officers, namely:—

* * * * * * * *

Executive Government of Nova Scotia and New Brunswick.

64. The constitution of the executive authority in each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act.

* * * * * * * *

66. The provisions of this Act referring to the Lieutenant-Governor in Council shall be construed as referring to

the Lieutenant-Governor of the province acting by and with the advice of the Executive Council thereof.

* * * * * * * *

Legislature for Ontario.

69. There shall be a Legislature for Ontario, consisting of the Lieutenant-Governor and of One House, styled the Legislative Assembly of Ontario.

* * * * * * * *

Legislature for Quebec.

71. There shall be a Legislature for Quebec, consisting of the Lieutenant-Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

* * * * * * * *

Legislatures of Nova Scotia and New Brunswick.

88. The Constitution of the Legislature of each of the provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act; and the House of Assembly of New Brunswick existing at the passage of this Act shall, unless sooner dissolved, continue for the period for which it was elected.

* * * * * * * *

VI. DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces; . . .

* * * * * * * *

Exclusive Powers of Provincial Legislatures.

92. In each province, the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say,— . . .

* * * * * * * *

British Columbia.

The Imperial Order-in-Council [1] admitting British Columbia into the Union contains these clauses:

10. The provisions of the "British North America Act, 1867," shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to and only affect one and not the whole of the provinces comprising the Dominion, and except so far as the same may be varied by this minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if the colony of British Columbia had been one of the provinces originally united by the said Act.

14. The constitution of the executive authority and of the legislature of British Columbia shall, subject to the provisions of the "British North America Act, 1867," continue as existing at the time of the Union until altered under the authority of the said Act, it being at the same time understood that the government of the Dominion will readily consent to the introduction of responsible government when desired by the inhabitants of British Columbia, and it being likewise understood that it is the intention of the Governor of British Columbia, under the authority of the Secretary of State for the colonies, to amend the existing constitution of the legislature by providing that a majority of its members shall be elective.[2]

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[1] 6th May, 1871 (Imp.), printed in appendix.

[2] Before the Union took effect, British Columbia had made the intended alteration referred to in item 14, above—by Act of the colonial legislature (No. 147 of 34 Vic.). This statute recites an Imperial Order in Council of 9th August, 1870, which established in the colony a legislative council, consisting of nine elective and six non-elective members, and which gave power to the Governor of the colony, with the advice and consent of the legislative council, to make laws for the peace, order, and good government of the colony; it recites also the Colonial Laws Validity Act, 1865, as sufficient warrant for the contemplated change in the colonial constitution; and then proceeds to abolish the legislative council and to establish in its stead a legislative assembly of wholly elective members.

Prince Edward Island.

The Imperial Order-in-Council [3] admitting Prince Edward Island contains these clauses:—

That the constitution of the executive authority and of the legislature of Prince Edward Island, shall, subject to the provisions of the "British North America Act, 1867," continue as at the time of the Union, until altered under the authority of the said Act, and the House of Assembly of Prince Edward Island existing at the date of the Union shall, unless sooner dissolved, continue for the period for which it was elected;

That the provisions in the "British North America Act, 1867," shall, except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to, and only to affect one and not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by these resolutions, be applicable to Prince Edward Island, in the same way and to the same extent as they apply to the other provinces of the Dominion, and as if the colony of Prince Edward Island had been one of the provinces originally united by the said Act.

Manitoba, Alberta, Saskatchewan.

The provisions of the statutes which created these provinces and provided for their constitution need not be set out here in detail.[4] The language employed in each case as to the Lieutenant-Governor and his Executive Council, and as to the Assembly and its legislative power, closely follows the language of the British North America Act, 1867.

The sections above set out or referred to, it may be said, indicate the constitution of Canada and its provinces in its essential outline. The details as

[3] 26th June, 1873 (Imp.), printed in appendix.
[4] The Acts are printed in full in the appendix.

to the powers and privileges of the Crown both statutory and prerogative in connection with what may be called the every-day work of government, as to the legislative and executive machinery of government, and as to the Crown's assets both federal and provincial, must be filled in later. Only the fundamental fact of the Crown's headship in Canada is now under consideration.

And it will have been noticed that the British North America Act does not create that headship; it simply declares it as to the new entity, the Dominion of Canada. The constitution of the legislative and executive authority of Nova Scotia and New Brunswick is continued; subject of course to the provisions of the Act which diminish the provincial sphere of authority; and the same is true as to British Columbia and Prince Edward Island upon their admission. And for the other new provincial entities, Ontario and Quebec, the headship of the Crown is, as it were, properly taken for granted.

The lack of specific reference to the Queen in the section (58) which provides for the appointment of Lieut.-Governors for all the provinces, in section 62[5] and in the sections (69 and 71) which provide for the composition of the legislatures of Ontario and Quebec respectively, was formerly much utilized in argument to belittle the standing of the provinces of Canada, but the controversy was set at rest by a judgment of the Privy Council in 1892, which affirmed the full autonomy, under the Crown, of the provinces in relation to all matters committed to them by the British North America Act.[6] By this judgment provincial government both in its legislative and executive departments was authoritatively

[5] With which compare sec. 10.

[6] *Liquidators of Maritime Bank* v. *Receiver-Gen. of New Brunswick* (1892), A. C. 437; 61 L. J. P. C. 75; commonly cited as the *Liquidator's Case.*

established as the King's government. The precise point involved was as to the right of the provincial executive of New Brunswick to enforce the Crown's prerogative right to priority over other creditors in the winding-up of a bank. The contention put forward against the right is clearly stated in their Lordships' judgment and is emphatically held erroneous:

"The appellants . . . conceded that, until the passage of the British North America Act, 1867, there was precisely the same relation between the Crown and the province which now subsists between the Crown and the Dominion; but they maintained that the effect of the statute had been to sever all connection between the Crown and the provinces, to make the government of the Dominion the only government of Her Majesty in North America, and to reduce the provinces to the rank of independent municipal institutions. For these propositions their Lordships have been unable to find either principle or authority. . . .

"It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share. In asking their Lordships to draw that inference from the terms of the statute, the appellants mainly, if not wholly, relied upon the fact that whereas the Governor-General of Canada is directly appointed by the Queen, the Lieutenant-Governor of a province is appointed, not by Her Majesty, but by the Governor-General, who has also the power of dismissal. If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument, which, if pushed to its logical conclusion, would prove that the Governor-General, and not the Queen, whose viceroy he is, became the sovereign authority of the province whenever the Act of 1867 came into operation. But the argument ignores the fact that by section 58 the appointment of a provincial Governor is made by the 'Governor-General in Council, by instrument under the Great Seal of Canada,' or,

in other words, by the executive government of the Dominion which is by section 9 expressly declared 'to continue and be vested in the Queen.' There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no power and no functions except as representatives of the Crown. The act of the Governor-General and his council in making the appointment was, within the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, was as much the representative of Her Majesty for all purposes of provincial government, as the Governor-General himself was for all purposes of Dominion government."

The British North America Act, it should further be noted, makes no express provision for the appointment of a Governor-General. It is, as will appear later,[7] one of the Crown's imperial prerogatives to appoint governors for the various British possessions, and the British North America Act does not purport to interfere with this prerogative so far as concerns the Dominion, although it does largely, if not entirely, determine the duty of the Governor-General when appointed; of which later. But the Act does take from the Crown in Council (Imperial) the power to appoint the Lieutenant-Governors of the provinces and vests that power in the Crown in Council (Canadian); or, to express it less technically, the appointment rests with the Dominion Government and not with the British Ministry. But a Lieutenant-Governor is the Crown's representative for all purposes of provincial government. The Crown, in short, is at the head of all our governments, both federal and provincial.[8]

[7] *Post*, p. 148.

[8] Compare the Commonwealth of Australia Constitution Act (63 & 64 Vict. c. 12, Imp.): "Chap. I, Part 1.—1. The legislative power of the Commonwealth shall be vested in a Federal Parliament which shall consist of the Queen, a Senate, and a House

The Crown acting in conjunction with the British Parliament is the supreme power in legislation throughout the Empire and cannot, acting in conjunction with any colonial legislature, make laws repugnant to Imperial legislation. The position therefore of the British Parliament in the constitutional system of the Empire and the consequent limitations upon colonial powers must first be considered.

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of Representatives, . . Chap. II.: The Executive Government. —61. The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative, . . . Chap. V.: The States.—106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth." . . . Nothing appears in the Act as to the appointment of State Governors. They are still Imperial appointments.

CHAPTER IV.

The British Parliament as a Constituent Assembly.

In the last legal analysis the Parliament of the United Kingdom of Great Britain and Ireland is the supreme power in the government of the British Empire. Its legislation may, for the purposes of this present enquiry, be classified as constitutional (or constituent) and ordinary. Along both lines it is at once a local assembly for the British Isles and an Imperial assembly hampered by no legal restrictions in legislating for the Empire as a whole or for any of its parts, as it may deem fitting. And, first, as to the nature and extent of its powers as a constituent Assembly. It is

The Supreme Constituent Assembly for the British Isles.

We know, of course, that the will of the electorate of the United Kingdom expressed through their representatives in the House of Commons is the ultimate power in the government of the British Isles; but from a legal standpoint it is quite accurate to say that all the powers of the British electorate are by the British Constitution lodged unreservedly with the British Parliament.[1] Nothing is so fundamental in the British Constitution that Parliament may not change it; and change it, too, in the same way as it changes the law as to any other, the least important matter, namely, by Act of Parliament.

[1] The difference in this respect between the British Parliament and the legislatures of the United States of America, both Federal and State, is discussed at some length in a later chapter. See *post*, Part II., Chap. XVII.

"It can regulate or new model the succession to the Crown; as was done in the reigns of Henry VIII. and William III. It can alter the established religion of the land; as was done in the reigns of Henry VIII. and his three children.[2] It can change and create afresh even the Constitution of the Kingdom and of Parliaments themselves; as was done by the Act of Union and the several statutes for triennial and septennial elections. It can, in short, do anything that is not naturally impossible."[3]

The power of Parliament to legislate in reference to the Crown is distinctly affirmed in 6 Anne, c. 7, which adjudges traitors all who affirm "that the Kings or Queens of this realm with and by the authority of Parliament are unable to make laws and statutes of sufficient force and validity to limit and bind the Crown and the descent, limitation, inheritance and government thereof." But though the validity of the Act of Settlement[4] was thus affirmed and the theory of divine right explicitly denied, and though the title to the Crown is now a purely statutory title, the monarchical principle still obtains in all its essential features. Nevertheless the attributes, rights and powers of the King as recognized at common law have in the great majority of cases been the subject of legislation. They have largely ceased to be the prerogatives of the Crown at common law and have become statutory powers.

Coke mentions no instance of legislation by Parliament in reference to the constitutional position of the House of Lords; but recent legislation, as is well known, has greatly curtailed its powers, and

[2] As will appear later, this is not a matter of direct concern in the colonies. There is no religion established by law in them: *Re Lord Bishop of Natal*, 3 Moo. P. C. (N.S.), 115.

[3] *Coke*, 4th Inst. 36, p. 8.

[4] 12 & 13 Wm. III. c. 2 (Imp.). See *ante*, p. 7.

under certain conditions its assent is no longer essential to the passing of an Act of Parliament.

The Septennial Act, by which a Parliament elected for three years extended its life to seven, strikingly illustrates the supremacy of Parliament and makes clear that it is not in point of law an agent or trustee for the electors in the sense that its departure from or neglect to procure what is popularly called " a mandate from the people " would invalidate its Acts.

The Union Acts both for Scotland and Ireland contain provisions which at the time of their passage were settled by treaty and might well therefore have been considered so fundamental as to be unalterable by subsequent legislation. They have nevertheless been altered in several such particulars.[5]

As the British Parliament is truly an Imperial Parliament, any legislation as to itself, its component parts and their relation to each other, the electoral franchise, the duration of Parliament, and kindred topics, is in a sense Imperial legislation, while from a narrower standpoint it might well be considered local British legislation. The important point is that whether viewed as an Imperial or as a local assembly the British Parliament is in law its own sole master. But it is more; it is also

The Supreme Constituent Assembly for the Colonies.

Parliament never doubted its own power to legislate for the colonies.[6] There was, in fact, from the earliest colonial times much legislation about trade and navigation of express colonial application[7]—

[5] See *Anson*, Law and Custom of the Const., 2nd ed., Pt. I., 35-6.

[6] See *post*, p. 52.

[7] *Egerton*, Short Hist. of Col. Policy, 60, 70, *et seq.*

some of it with dire results—but, as already noticed,[8] Parliament long left it to the Crown in Council to prescribe the form of local government to be set up in the colonies. The first British statute conferring a Constitution upon a colony was the Quebec Act, 1774.[9]

The legislative power of the Crown in Council over the colonies was always, as has been said, subordinate to Parliament;[10] and a Constitution once granted could not be recalled by the Crown.[1] But as the Constitution of Canada rests now upon an Imperial statute it is unnecessary to pursue further here the question as to the relation between the Crown in Council (Imperial) and the colonies.[2]

With the acquisition of overseas dominions the British Parliament took on a dual character. It continued to be the local Parliament for England,[3] but it assumed also and without any effective dissent the character of an Imperial Parliament, the supreme law-making power in and for the Empire. It provides by statute for the form of government to be established in a colony, as well as for all matters which it deems to be of Imperial concern. It is as the constitution-maker for the colonies that we here regard it.

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[8] *Ante*, p. 11.

[9] 14 Geo. III. c. 83 (Imp.) The proclamation of 1763 and the commission to Gov. Murray provided for a local assembly. To substitute for this a Crown appointed council required an Act of Parliament. See *ante*, p. 16.

[10] *Campbell* v. *Hall*, Cowp. 204; ante, p. 17.

[1] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 20; 40 L. J. Q. B. 28. See *ante*, p. 15.

[2] The question as to the existence and extent of Imperial prerogatives, exerciseable upon the advice of the British Ministry, in relation to colonial government, is dealt with in Chapter VIII., *post*, p. 116.

[3] Expanding soon into the Parliament of Great Britain and later into the Parliament of the United Kingdom of Great Britain and Ireland.

The constitution of the law-making body in a colony, the method of election or selection of its members, the privileges and powers other than legislative of the assembly and its members, and the range of its legislative powers, all depend upon the charter of government bestowed by the Imperial authorities, whether that charter take the form of a Governor's commission as in earlier times, or an Act of the British Parliament as is now usual.

It would seem to follow that a colonial legislature does not inherently possess constituent powers in the proper sense. It must work along the lines prescribed and with the machinery provided by its charter of government. If that charter itself or any other Imperial enactment convey constituent powers the position is different; and the question is: to what extent have constituent powers been given?

CHAPTER V.

Constituent Powers of Canadian Legislatures.

It would seem hardly necessary to quote authority for the proposition that a colonial legislature cannot alter the Constitution conferred upon it unless power to that end has been given by its charter or by other Imperial enactment.

Range of legislative power:—And, first, as to the general range of the legislative power of a colonial assembly: One must always refer to the colonial charter—proclamation, commission or Imperial Act—containing the grant of legislative power, to ascertain its extent. Beyond the limits therein laid down power cannot extend, although within those limits it is supreme; as will appear later.

"The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it and it can, of course, do nothing beyond the limits which circumscribe these powers."

This is the language of the Privy Council in 1878 [1] and it has been repeated several times since in reference to colonial legislatures. The latest statement perhaps is that of Farwell, L.J., in 1910. Speaking of legislative assemblies in colonies, he says:

"Such assemblies derived their powers from the Imperial Act creating them and had no powers beyond those given expressly or by implication by such Act." [2]

The Privy Council has had occasion several times to consider the position of colonial legislatures in

[1] *R.* v. *Burah*, L. R. 3 App. Cas. 889; 3 Cart. 409.
[2] *R.* v. *Crewe* (1910), 2 K. B. 576; 79 L. J. K. B. 874, 888.

reference to their privileges and powers other than legislative;[3] and the restrictive view taken by their Lordships in reference to colonial legislation upon these topics, which might well be considered incidental, would apply *a fortiori* to the more substantial question as to the range of legislative power conferred. In view of the fact that the power conferred upon colonial legislatures is usually of the most ample kind, namely, "to make laws for the peace, order, and good government of the colony,"[4] this phase of the subject is not of great practical importance in colonies in which the entire legislative power of the colony is lodged in one legislature;[5] but in Canada, where legislative power (of the most ample kind, viewed as a whole) [5a] is distributed between a central Parliament on the one hand and provincial assemblies on the other, the obligation to keep within the bounds assigned is imperative. It is, indeed, the fundamental principle of a federal form of government.

It would seem an equally clear proposition that a colonial legislature cannot, without permissive Imperial enactment, alter the legislative machinery provided for the colony or change the method prescribed for the selection or election of the members of the colonial law-making body. No question has been raised in any court of law as to the proposition so far; but as to the powers other than legislative of colonial assemblies, their privileges and immunities, much debate has

[3] See *post*, p. 37.

[4] See *Riel* v. *R.* (1886), 10 App. Cas. 675; 55 L. J. P. C. 28.

[5] See, however, the chapter on Exterritoriality, *post*, p. 65.

[5a] "It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada": *per* Lord Loreburn, L.C., in delivering the judgment of the Privy Council in *Atty.-Gen. (Ont.)* v. *Atty.-Gen. (Can.)*; the *References Case* (1912), A. C. 571; 81 L. J. P. J. C. 210.

taken place. As, however, the Colonial Laws Validity Act, 1865,[6] has dealt in one section with the whole wide question as to the "constitution" as well as the "powers and procedure" of colonial assemblies, it is not easy to entirely separate these topics.

Constitutional changes: — When, in the early 'fifties, it was considered desirable to make the Legislative Council of (Old) Canada elective, it was thought that nothing short of Imperial legislation could effect the change; that any colonial legislation to that end would be repugnant to the provisions of the Imperial Act (the Union Act, 1840) which prescribed the form of political organization in the province. Accordingly, an Imperial Act was passed[7] authorizing the Parliament of Canada to make the desired change. When, in the early 'sixties, the Legislature of South Australia desired to alter the Constitution of the Legislative Council and Assembly of that colony, Imperial intervention was not sought. Doubts were, in consequence, raised as to the validity of the colonial Acts by which the desired change had been effected, and, to set the matter at rest, an Imperial Act was passed in 1863 validating all colonial legislation of like description,[8] but this Act, though applicable to all the colonies of the

[6] 28-29 Vict. c. 63 (Imp.). See Appendix.

[7] 17 & 18 Vict. c. 118.

[8] "All laws heretofore passed or purporting to have been passed by any colonial legislature with the object of declaring or altering the constitution of such legislature, or of any branch thereof, or the mode of appointing or electing the members of the same, shall have, and be deemed to have had, from the date at which the same shall have received the assent of Her Majesty, or of the Governor of the colony on behalf of Her Majesty, the same force and effect for all purposes whatever as if the said legislature had possessed full powers of enacting laws for the objects aforesaid, and as if all formalities and conditions by Act of Parliament or otherwise prescribed in respect of the passing of such laws had been duly observed." (26 & 27 Vict. c. 84).

Empire, was retrospective, merely, in its operation. Two years later was passed the Colonial Laws Validity Act, 1865,[9] to be referred to more particularly in a moment.

Privileges, etc., of Parliament:—The law which defines the privileges, immunities, and powers of the British Parliament, and of the members thereof, is largely part of the ancient law of England. The branch of English common law which deals with this subject is known as the *lex et consuetudo parliamenti*, and the Privy Council, on appeals from the colonies, has uniformly held that it is strictly local in its application; that it refers not to a supreme legislature in the abstract, but to the Parliament of Great Britain in the concrete; and that therefore it was a branch of the common law which emigrating colonists would not carry with them. The grant, therefore, of a legislature to a colony did not, without more, invest such body and its members with those privileges, immunities, and powers which were possessed by the British Parliament and its members.[10] The powers, other than legislative, of a colonial legislature (unless expressly extended by the terms of the charter, commission, or Imperial Act [1] constituting such legislature), are such only as are incident to or inherent in such an assembly, viz., "such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute." [2]

"Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For this purpose, protective and self-defensive powers only are necessary, and not punitive. If the question is to be elucidated

[9] 28 & 29 Vict. c. 63 (Imp.). See Appendix.

[10] See extract from *Fielding* v. *Thomas*, quoted *post*, p. 45.

[1] See *Speaker* v. *Glass*, L. R. 3 P. C. 560; 40 L. J. P. C. 17.

[2] *Kielley* v. *Carson*, 4 Moo. P. C. 88.

by analogy, that analogy is rather to be derived from other assemblies not legislative, whose incidental powers of self-protection are implied by the common law (although of inferior importance and dignity to bodies constituted for purposes of public legislation), than from the British Parliament, which has its own peculiar law and custom, or from courts of record, which have also their special authorities and privileges recognized by law."[3]

The Privy Council has also held that without express authority from the Imperial Parliament a colonial legislature could not confer on itself the privileges of the British "Commons' House" or the power to punish the breach of those privileges by imprisonment or committal for contempt.[4] This power, however, was conferred by the Colonial Laws Validity Act, 1865,[5] in unrestricted terms.

Colonial Laws Validity Act:—The fifth section of that Act provides:

5. Every representative Legislature[6] shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act

[3] *Barton* v. *Taylor*, 11 App. Cas. 197; 55 L. J. P. C. 1. See *Anderson* v. *Dunn*, 6 Wheat, 204, and *Kilbourn* v. *Thompson*, 103 U. S. 168, as to the position of Congress. See also *Payson* v. *Hubert* (1903), 44 S. C. R. 400; *Harnett* v. *Crick* (1908), A. C. 470; 78 L. J. P. C. 38.

[4] *Fielding* v. *Thomas* (1896), A. C. 600; 65 L. J. P. C. 103; 5 Cart. 398. In the first edition of this book the view, erroneous it now appears, was expressed (p. 327), that the power to make laws for a colony carries with it the power to legislate as to the privileges, etc., of the law-making body, citing *Barton* v. *Taylor*, *ubi supra*, and *Ex p. Dansereau*, 2 Cart. 165; 19 L. C. Jur. 210. Upon this matter, therefore, the Colonial Laws Validity Act is more than declaratory; it is enabling and retroactive.

[5] 28 & 29 Vict. c. 63 (Imp.). See Appendix.

[6] "Representative legislature" is defined in sec. 1. See Appendix.

of Parliament, letters patent, Order-in-Council, or colonial law for the time being in force in the colony.

This section, however, though a notable milestone in the march of the colonies to fuller powers of self-government, has largely ceased to operate in Canada. The British North America Act, 1867,[7] contains clauses which cover nearly, if not quite, the entire ground. That Act was passed, as everybody knows, to carry into effect a plan for the federal union of Nova Scotia, New Brunswick, and Canada as it existed under the Union Act of 1840.[8] Out of the last named, two provinces were to be formed, Ontario and Quebec, corresponding with Upper Canada and Lower Canada respectively as they existed under the Constitutional Act of 1791.[9] This, of course, necessitated new legislative machinery for Ontario and Quebec as well as for the new Dominion. The legislatures of Nova Scotia and New Brunswick were simply continued,[10] their sphere of legislative authority being, of course, diminished.

Provincial Constitutions:—Power to alter the provincial constitutions is given to the provincial legislatures by sec. 92 of the Act, which, so far as is material, reads as follows:

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

1. The amendment from time to time, notwithstanding anything in this Act, of the constitution of the province, except as regards the office of Lieutenant-Governor.

This provision, it is hardly necessary to state, applies to all the Canadian provinces as they exist to-day.

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[7] 30-31 Vict. c. 3 (Imp.).
[8] 3 & 4 Vict. c. 35 (Imp.).
[9] 31 Geo. III. c. 31 (Imp.). See B. N. A. Act, 1867, sec. 6.
[10] B. N. A. Act, 1867, sec. 88.

Federal Constitution:—There is no similar provision, at least in express terms, with reference to the Parliament of Canada. The legislative machinery for the Dominion is provided for in Part IV. of the Act, sections 17 to 57 (both inclusive), and a perusal of these sections discloses in many instances a rather minute attention to details. A few sections are prefaced by the phrase "until the Parliament of Canada otherwise provides," and this has been held to impliedly confer full power to legislate upon the matters covered by such sections.[12] The question arose in connection with the trial of election petitions. Sections 40 and 41 continued the old electoral districts, and the existing law as to elections, qualifications for members and voters, election trials, etc., "until the Parliament of Canada otherwise provides." The Parliament of Canada has long since otherwise provided and these two sections are now therefore effete[1] except in so far as they confer power to legislate upon the various matters referred to in them. That they do impliedly confer such power was held by the Privy Council in 1880:

"That other clause, the 41st, expressly says that the old mode of determining this class of questions was to continue until the Parliament of Canada should otherwise provide. *It was, therefore, the Parliament of Canada which was otherwise to provide.* It did otherwise provide by the Act of

[12] To the other sections not so prefaced the maxim *mentio unius*, etc., would appear to apply in denial of the power of the Parliament of Canada to alter their provisions.

[1] In *Willett* v. *De Grosbois* (2 Cart. 332; 17 L. C. Jur. 293), certain pre-Confederation laws of the old province of Canada in respect to election matters were held to be still in force in Quebec. An Act of 1860 (23 Vict. c. 17) made void any contract referring to or arising out of a parliamentary election, even for payment of lawful expenses. The Dominion Parliament, after Confederation, passed an Act respecting Dominion elections, but not containing this or any like provision, and it was held that this provision never having been repealed was in force in Quebec as to Dominion elections (under this section 41, and section 129)

1873, which Act it afterwards altered and then passed the Act now in question. So far, it would appear to their Lordships very difficult to suggest any ground upon which the competency of the Parliament of Canada so to legislate could be called in question."[2]

The provisions as to the Senate are contained in sections 21 to 36, both inclusive; and the only one of these with which the Canadian Parliament is expressly empowered to deal is the provision in sec. 35 as to the number of Senators necessary to form a quorum.[3] When it was thought desirable that a Deputy Speaker should be appointed for the Senate, an Act to that end passed by the Parliament of Canada was validated by an Imperial Act.[4] No such difficulty arose in reference to a Deputy Speaker for the House of Commons and that office was created

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and that therefore a promissory note given as a contribution to the expenses of a subsequent Dominion election was void. In 1874, however, this old statute was repealed so far as it affected Dominion elections (37 Vict. c. 9, s. 133), and it was expressly enacted that thereafter pre-Confederation provincial laws touching elections should not apply to elections to the House of Commons.

[2] *Valin* v. *Langlois*, 5 App. Cas. 115; 49 L. J. P. C. 37; 1 Cart. 158. The legislative jurisdiction of the Dominion Parliament with respect to the election of members of that body has been said by the Court of Appeal for Ontario to be "beyond dispute." See *Doyle* v. *Bell*, 11 O. A. R. 326 (affirming 32 U. C. C. P. 632), in which the provisions of the Dominion Controverted Elections Act for the prevention of corrupt practices at elections, and for their punishment either criminally or by the forfeiture of money to be sued for and recovered by an informer, were upheld as the exercise of power necessarily "incident to the power to regulate the mode of election of members of Parliament." The contention of the defendant was, that the giving of a right of action to an informer was legislation as to "civil rights in the province," and therefore *ultra vires*.

[3] **35.** Until the Parliament of Canada otherwise provides, the presence of at least fifteen Senators, including the Speaker, shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

[4] 59 Vict. (Sess. 2), c. 3 (Imp.). See Appendix.

by a Canadian enactment [5] under the power conveyed by the opening clause of sec. 47.[6]

Redistribution:—Under sec. 51 the decennial readjustment of representation as between the different provinces is in the hands of the Parliament of Canada.[7] The section seems to contemplate that the readjustment should be undertaken by some authority outside Parliament, but the practice is otherwise.

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[5] 48 & 49 Vict. c. 1 (Dom.).

[6] **47.** Until the Parliament of Canada otherwise provides, in case of the absence for any reason of the Speaker from the chair of the House of Commons for a period of forty-eight consecutive hours, the House may elect another of its members to act as Speaker, and the member so elected shall during the continuance of such absence of the Speaker have and execute all the powers, privileges, and duties of Speaker.

[7] **51.** On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four provinces shall be readjusted by such authority, in such manner and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:—

(1) Quebec shall have the fixed number of sixty-five members.

(2) There shall be assigned to each of the other provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained).

(3) In the computation of the number of members for a province a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall be disregarded; but a fractional part exceeding one-half of that number shall be equivalent to the whole number.

(4) On any such re-adjustment the number of members for a province shall not be reduced unless the proportion which the number of the population of the province bore to the number of the aggregate population of Canada at the then last preceding re-adjustment of the number of members for the province is ascertained at the then latest census to be diminished by one-twentieth part or upwards.

(5) Such re-adjustment shall not take effect until the termination of the then existing Parliament.

Nothing appears in the Quebec Resolutions, or in the debates thereon, in reference to the question of delegating the power of distribution to an authority independent of Parliament; but in 1892 the question was raised in the Dominion Parliament, and two of the "fathers of Confederation" are reported to have stated that section 51 was deliberately framed to take from Parliament this dangerous power—dangerous in the hands of any majority—and to secure its exercise by an independent authority. If such was the intention it has been persistently ignored, and the various redistributions have been effected by Acts of the Dominion Parliament in the exercise of its ordinary legislative functions. As a legal proposition, the power of the Dominion Parliament to constitute itself the authority by which the re-adjustment is to be effected cannot be doubted, whatever may be said of the propriety of so doing. Under section 40 the power of the Dominion Parliament to alter electoral districts is clearly established. Section 51 applies only to the re-adjustment of the representation of the provinces *as between themselves*, and has no reference to the boundaries of the electoral districts in each province, and it would appear therefore that the re-adjustment under this section is a mere matter of mathematics. The wording of section 52 [s] bears out this construction, indicating as it does that the essential thing in the scheme of representation is the *proportionate* representation of the province. The electoral districts may be altered at any time (section 40), and the total number of members increased (section 52) by the Parliament of Canada, "provided the proportionate representation of the provinces prescribed by this Act is not thereby disturbed."

[s] **52.** The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the provinces prescribed by this Act is not thereby disturbed.

It has been contended that the Canada referred to in sub-sec. 4 is the Canada of 1867, and that this sub-section cannot operate to deprive one of the four original provinces of any part of its numerical strength in Parliament unless the proportionate diminution has relation to the aggregate population of these four provinces alone; but this view has been negatived by the Privy Council. "The aggregate population of Canada" includes that of all provinces admitted since 1867.[9] And Prince Edward Island, though subsequently admitted, has suffered loss in her representation.[10]

Parliamentary Privileges, etc. (*Federal*): — Power to define the privileges, immunities and powers (other than legislative) of the Senate and House of Commons and their respective members is conveyed by sec. 18, as enacted in 1875:

[**18.** The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons and by the members thereof respectively shall be such as are from time to time defined by Act of Parliament of Canada, but so that any Act of Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those *at the passing of such Act* held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the members thereof.]

In the section as it originally stood the phrase in italics was "at the passing of this Act," so that the Parliament of Canada could not go beyond the privileges, etc., of the British House of Commons as they stood in 1867.[1]

[9] *Re Representation* (1905), A. C. 37; 74 L. J. P. C. 9; 33 S. C. R. 475.

[10] *Ib.*, 33 S. C. R. 594.

[1] In 1873, the Parliament of Canada passed an Act (36 Vict. c. 1) "To provide for the examination of witnesses on oath by

The Privy Council having held that a colonial assembly cannot legislate as to its own privileges without express authority from the Imperial Parliament,[2] it follows that the power of the Parliament of Canada along this line cannot extend beyond what is conveyed by this sec. 18 of the British North America Act.

Privileges, etc. (*Provincial*):—In this respect provincial assemblies have really wider powers as they either retain the full power bestowed upon them in 1865 by the Colonial Laws Validity Act,[3] or have full powers along this line under item No. 1 of sec. 92[4] of the British North America Act. The position is thus stated by their Lordships of the Privy Council in the latest case on the subject:[5]

"According to the decisions which have been given by this Board there is no doubt the provincial legislature could not confer on itself the privileges of the House of Commons of the United Kingdom or the power to punish the breach of those privileges by imprisonment or committal for con-

committees of the Senate and House of Commons in certain cases." At the date of the passage of the British North America Act, the committees of the Imperial "Commons' House" had no power to examine witnesses upon oath, and for this reason the Dominion statute was disallowed by the Queen in Council. The Act had been passed in order to facilitate enquiries into what was popularly known as the "Pacific Scandal," and its disallowance created some excitement. The result of negotiations with the Imperial authorities was the passage of "The Parliament of Canada Act, 1875" (38 & 39 Vict. c. 38, Imp.), which substituted the section, as above printed, for the original section 18. It also expressly validated 31 & 32 Vict. c. 24 (Dom.), "An Act to provide for oaths to witnesses being administered in certain cases for the purpose of either house of Parliament," as to the validity of which doubts had been expressed. "The Parliament of Canada Act, 1875," contains no further legislation than as above noted, and it is therefore not thought necessary to reprint it in full.

[2] See *ante*, p. 38.

[3] See *ante*, p. 38.

[4] See *ante*, p. 39.

[5] *Fielding* v. *Thomas* (1896), A. C. 600; 65 L. J. P. C. 103.

tempt without express authority from the Imperial legislature. By section 1 of 38 & 39 Vic. c. 38, which was substituted for s. 18 of the British North America Act, 1867, it was enacted. . . . There is no similar enactment in the British North America Act relating to the House of Assembly of Nova Scotia, and it was argued, therefore, that it was not the intention of the Imperial Parliament to confer such a power on that legislature. But it is to be observed that the House of Commons of Canada was a legislative body created for the first time by the British North America Act, and it may have been thought expedient to make express provision for the privileges, immunities, and powers of the body so created, which was not necessary in the case of the existing legislature of Nova Scotia. By s. 88 the constitution of the legislature of the Province of Nova Scotia was, subject to the provisions of the Act, to continue as it existed at the Union until altered by authority of the Act. It was, therefore, an existing legislature, subject only to the provisions of the Act. By s. 5 of the Colonial Laws Validity Act it had at that time full power to make laws respecting its constitution, powers and procedure. It is difficult to see how this power was taken away from it, and the power seems sufficient for the purpose.

"Their Lordships, however, are of opinion that the British North America Act itself confers the power (if it did not already exist) to pass Acts for defining the powers and privileges of the provincial legislature" (citing section 92, No. 1, 'the amendment from time to time, notwithstanding anything in this Act, of the constitution of the province except as regards the office of Lieutenant-Governor'). "It surely cannot be contended that the independence of the provincial legislature from outside interference, its protection, and the protection of its members from insult while in the discharge of their duties, are not matters which may be classed as part of the constitution of the province, or that legislation on such matters would not be aptly and properly described as part of the constitutional law of the province."

Federal Constitution:—In the view of their Lordships the word "constitution" covers powers and procedure; but it could hardly be argued that the

words " privileges, immunities and powers," as used in sec. 18 above set out, are wide enough to authorize changes in the constitutional machinery, properly so called, of the Parliament of Canada. The word " powers " has reference, of course, to powers other than legislative; such, for example, as the power to commit for contempt, to compel the attendance of witnesses and the production of papers, etc., etc., which may be described as punitive and inquisitorial powers in aid of intelligent legislation.[6]

It would appear, therefore, that the aid of sec. 5 of the Colonial Laws Validity Act is required only by the Parliament of Canada, and it may perhaps be contended that it cannot apply to that body as the Dominion Parliament was not in existence in 1865. But the Act seems clearly to be one of those statutes described as always speaking, and sec. 5, therefore, it is conceived, would apply to every representative legislature throughout the Empire to-day.

So far, however, as the British North America Act, 1867, makes provision, express or implied, in reference to the matters covered by the 5th section of the Colonial Laws Validity Act, such provisions would govern. No colonial legislature, it is submitted, can under this section enlarge the sphere of its legislative jurisdiction, and, *a fortiori*, no such authority is conveyed by it to any legislative body in Canada, where the field for the exercise of colonial legislative power is divided in such express terms by the British North America Act. The section relates to the organization of the legislative bodies throughout the colonies, their powers *other than legislative*, and the mode in which their functions

[6] The Canadian statute on this subject is R. S. C. (1906), c. 10.

are to be performed, and has no relation to their sphere of authority.[7]

As already pointed out[8] no general power is expressly given to the Dominion Parliament to alter the Federal Constitution, while power to amend Provincial Constitutions is expressly conveyed by item No. 1 of sec. 92. The maxim *expressio unius exclusio est alterius*[9] may therefore be invoked in denial of the power of the Parliament of Canada along this line. The argument does very strongly negative any power in the Federal Parliament to alter the Federal Constitution, that being a matter fixed by the agreement of the federating provinces and exhaustively dealt with by the British North America Act. But, it is submitted, the Parliament of Canada may by virtue of the Colonial Laws Validity Act legislate as to its own procedure and powers (other than legislative) except where express or implied limitation upon such power is imposed by the Act; as, for example, by sec. 18.[10] The difficulty, perhaps, is to distinguish between what is constitutional legislation properly so called and what relates to "procedure." Lord Davey is reported to have said during the argument in *Fielding* v. *Thomas*[1] when the point was mooted: "That is a big question that it would be unwise to express any opinion upon. There is 'peace, order and good government.' "—the reference being, of course, to those words in sec. 91 in which the legislative power of the Parliament

[7] Section 92, item No. 10 (*c*), enables the Parliament of Canada to enlarge its sphere of authority as to the works therein specified: a marked and oft-criticized exception to the general rule.

[8] *Ante*, p. 40.

[9] See *Colquhoun* v. *Brooks* (1888), 19 Q. B. D. 406; 21 Q. B. D. 65; 57 L. J. Q. B. 70, 439.

[10] See *ante*, p. 44.

[1] See *ante*, p. 45.

of Canada is defined. It must be remembered, however, that those are the words used in very many commissions and Imperial Acts to define the legislative power of the colony concerned. Nevertheless, as stated indeed in the judgment in this very case,[2] the decisions of the Board have been uniformly in denial of the power of a colonial legislature to pass laws as to the privileges, etc., of the colonial assembly; *a fortiori* the power to alter the machinery provided or the sphere of authority prescribed must be denied.

That the British North America Act does not contemplate Canadian legislation in disturbance of the federal scheme is accentuated by the prohibition in sec. 92, No. 1, against provincial legislation in reference to the office of Lieutenant-Governor.[3] An Act of the Ontario Legislature conferring upon the Lieutenant-Governor of that province power to remit by Order-in-Council any fine or penalty to which any person might have become liable through breach of any provincial law, was held not to offend against the exception—not being an amendment of the constitution "as regards the *office* of Lieutenant-Governor.[4] Boyd, C., speaking of this exception, puts the matter thus:[5]

"That veto is manifestly intended to keep intact the headship of the provincial government, forming, as it does, the link of federal power; no essential change is possible in

[2] See *ante*, p. 45.

[3] Part II. of this book will deal more fully with the question as to provincial executive power and the position of the Lieut.-Governors as depositaries of the Crown's prerogatives in reference to provincial government.

[4] *Pardoning Power Case*, 23 S. C. R. 458; 19 O. A. R. 31; 20 O. R. 222; 5 Cart. 517. See also the *Q. C. Case* (1898), A. C. 247; 67 L. J. P. C. 17.

[5] 20 O. R. at p. 247; 5 Cart. at p. 548.

the constitutional position or functions of this chief officer, but that does not inhibit a statutory increase of duties germane to the office."

On a literal interpretation of item No. 29 of sec. 91, power to legislate as regards the office of Lieutenant-Governor is with the Parliament of Canada.[6] Such legislation, however, would seem to be repugnant to the spirit of the British North America Act. The office of Lieutenant-Governor is, as frequently said, a link in the chain of Imperial connection and the whole spirit of the British North America Act is that this is one of those fundamental matters in the Canadian political organization which is matter of Imperial concern.[7]

[6] This was, apparently, the view of Sir John Thompson when, as Minister of Justice, he recommended the disallowance of a Quebec statute making the Lieut.-Gov. a corporation sole: see *Hodgins'* Provincial Legislation, Vol. II., 58.

[7] See the *Liquidator's Case* (1892), A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1, in which their Lordships say that the Dominion Government is, in relation to a Lieut.-Governor, "a governing body who have no powers and no functions except as representatives of the Crown."

CHAPTER VI.

Imperial Legislation and Consequent Colonial Limitations: General Principles.

The power of the British Parliament to legislate for the colonies does not stop short with provision made for the local legislative machinery and its range of legislative power. Whether legislating as the local Parliament of the United Kingdom or in its Imperial character, the British Parliament is a legislative body with power absolutely unlimited. Other nations may ignore its Acts and persons abroad may disregard them; but for the Empire and the Empire's Courts they are the laws which bind. No executive officer, Judge or other, can treat as *ultra vires* an Act of the British Parliament. For them "an Act of Parliament can do no wrong, though it may do several things that look pretty odd."[1] All suggested limitations have been swept away and there is no modern case in which a British Act has been refused operation as a void attempt at legislation. The question will come up in a practical form in a later stage of this book in reference to the extra-territorial operation of statutes, Imperial and colonial.[2] Here the narrower question is as to the power of the British Parliament to legislate generally, so far as she may see fit, for all British possessions.

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[1] *City of London* v. *Wood*, 12 Mod. 687: Holt, C.J. There is a valuable review of the old cases in "Judicial Power & Unconstitutional Legislation" by *Brinton Coxe*, published after his death, Philadelphia, 1893: (Kay & Brothers).

[2] See Chap. VII., *post*, p. 65.

British View.

The British Parliament has often affirmed its legislative supremacy over the colonies, both by direct declaration [3] and by statutes making void repugnant colonial legislation.[4] Apart from legislative affirmance, however, the principle is now thoroughly established in the constitutional law of the Empire.

The view of the English Courts may be taken as expressed by Lord Cranworth in the House of Lords in 1868:

> "It is certainly within the power of Parliament to make laws for every part of Her Majesty's dominions."[5]

Or in the language of the Privy Council in 1891:

> "How far the Imperial Parliament should pass laws framed to operate directly in the colonies is a question of policy more or less delicate according to circumstances. No doubt has been suggested that if such laws are passed they must be held valid in colonial Courts of law."[6]

Colonial View.

Colonial recognition of the principle has been ample. The only serious question raised has been as to the power of the British Parliament to tax the internal trade of the colonies; but even Franklin admitted the strict legality of the tax, though stoutly contending that it was unconstitutional in the British sense of that term, namely, contrary to the spirit of the British Constitution under which taxation and

[3] *E.g.*, 6 Geo. III. c. 11, 12; and see *May* "Const. Hist. of England," 7th ed., vol. iii., p. 349.

[4] 7 & 8 Wm. III. c. 22; 6 Geo. IV. c. 114; 28-29 Vict. c. 63 (the Colonial Laws Validity Act, 1865; see Appendix).

[5] *Routledge* v. *Low*, L. R. 3 E. & I. App. 113; 37 L. J. Ch. 454.

[6] *Callendar* v. *Col. Secy. Lagos* (1891), A. C. 460; 60 L. J. P. C. 33.

representation should go hand in hand.[7] By the celebrated Renunciation Act of 1778, the British Parliament declared its abandonment of the tax for revenue purposes; and although this Act was powerless to tie the hands of a Supreme legislature, it represents a rule of policy never since ignored.

No doubt upon the question has ever been expressed in Canadian cases,[8] although, as will appear, claims have been put forward to the effect that our Constitutional Acts of 1791, 1840, and 1867, did justify Canadian legislation repugnant to Imperial Acts of earlier date than those Acts respectively. Many cases will necessarily come under review in dealing, later on, with specific matters governed or effected by Imperial legislation extending to Canada; it will suffice to quote here some passages from a very able judgment of the late Mr. Justice Burbidge, of the Exchequer Court of Canada, in which the general principle is stated:[9]

"The supremacy of the Parliament of the United Kingdom of Great Britain and Ireland is not questioned by any one. All powers exercisable by the Parliament of Canada

[7] *Egerton*, Short Hist. of Brit. Col. Policy, 198. "As late as 1758 the Massachusetts Assembly, in defending themselves against the charge of ignoring British statutes, said: 'The authority of all Acts of Parliament which concern the colonies and extend to them are ever acknowledged in all Courts of law, and made the rule of all judicial proceedings'": *Ib.*, 200.

[8] See (*e.g.*), *Ex p. Renaud*, 1 Pug. (N.B.), 273; 2 Cart. 445; *R.* v. *Coll. of Physicians* (1879), 44 U. C. Q. B. 564; 1 Cart. 761; *Smiles* v. *Belford* (1876), 1 Ont. App. 436; 23 Grant, 590; 1 Cart. 576; ——— v. *Irving*, 1 P. E. I. 38 (Peters, J.).

[9] *Algoma Cent. Ry. Co.* v. *The King* (1901), 7 Ex. Ct. R., at p. 253, *et seq.* This judgment passed in review before the Supreme Court of Canada (32 S. C. R. 277), and the Judicial Committee (1903, A. C. 478; 72 L. J. P. C. 108) and no doubt was suggested as to the soundness of Mr. Justice Burbidge's conclusions on the constitutional question, although his judgment was reversed on the construction and effect of the Canadian legislation in question in the case.

or by the legislature of any province of Canada are subject to the Sovereign authority of that Parliament. It has been contended by some, that since the British North America Act, 1867, was passed the Parliament of Canada and the legislature of a province of Canada could, in respect of matters within their authority respectively, repeal the provisions of an Act of the Imperial Parliament extending to Canada, but passed prior to 1867; that to that extent at least the Colonial Laws Validity Act,[10] must be taken to be repealed or modified by the British North America Act, 1867. . . . The argument by which this view is supported is entitled to great consideration, but the view has not found favour with the law officers of the Crown. But even those who hold this view must strongly concede that the Colonial Laws Validity Act applies in the case of an Act of the Parliament of the United Kingdom, extending to Canada, and passed after the British North America Act, 1867; and that any Canadian legislation on the subject repugnant thereto is void. . . . As long ago as 1778, it was declared by an Act of Parliament [1] that thereafter the King and Parliament of Great Britain would not (with an exception not now material), impose any duty, tax or assessment whatever, payable in any of His Majesty's colonies in North America or the West Indies. And the policy of the Imperial authorities has been to leave the self-governing colonies free and uncontrolled in matters relating to taxation within such colonies respectively. . . . But the practical independence of the Parliament of Canada and of the provincial legislatures in that respect, rests upon no unalterable constitution or statute, but upon the wisdom of those who control the destinies of the Empire. In reality the power of the Imperial Parliament is as great and its supremacy as absolute over the subject of taxation within Canada as it is over any other subject committed by the British North America Act, 1867, to the Parliament of Canada or to the provincial legislatures."

As then the British Parliament may legislate Imperially, that is to say, may extend its enactments to

[10] 28-29 Vict. c. 63 (Imp.), printed in Appendix.
[1] 18 Geo. III. c. 12 (Imp.).

the colonies generally or to some one or more of them in particular, it is important to know when a British Act does so extend. *Primâ facie* the British Parliament must be taken to legislate for the United Kingdom only,[2] and there must be manifest indication of its intent in that respect if a statute is to be read as extending to a colony. This was until 1865 a question of construction merely, unaided by legislative enactment. In that year, however, was passed the Colonial Laws Validity Act, to which frequent reference has already been made.[3] It provides that

> "an Act of Parliament or any provision thereof shall . . . be said to extend to a colony when it is made applicable to such colony by the express words or necessary intendment [3a] of any Act of Parliament;"

that is to say, of the Act itself, as is the usual case, or of some other Imperial Act. This, however, is really no new rule, as the cases decided before the Act laid down the same rule of construction.

A note of warning should perhaps be here sounded. There are in force in the various Canadian provinces and in other colonies many English and British statutes, which as part of the law of England were carried by emigrating colonists to their new homes across the seas, or which by the action of the home authorities or by colonial adoption have been established as the basic law of the colony.[4] These

[2] See cases noted, *post*, p. 69, *et seq.*

[3] 29 & 30 Vict. c. 63 (Imp.); printed in Appendix. See *ante*, p. 38, *et seq.*

[3a] On the question of "necessary intendment," see *Callendar v. Col. Secy. Lagos* (1891), A. C. 460, referred to *post*, p. 248.

[4] In this book statutes of this kind will be indicated thus: (Br.). Strictly speaking, statutes of date prior to the Union with Scotland, should be called English statutes, and those passed since 1800, statutes of the United Kingdom. But (Imp.) and (Br.), will suffice to distinguish those statutes which are truly Imperial from those which, when passed, were intended to have local operation merely in the British Isles.

are not Imperial statutes in the true sense. They were passed as local English laws with no intended reference to the colonies. They are necessarily of date anterior to the introduction of English law into the particular colony concerned. They are in force only by the sufferance of the colonial legislature which may freely repeal or amend them either directly or by repugnant legislation so far as relates to their operation in the colony. In other words, they constitute no limitation upon colonial legislative power. For this reason they must be left for discussion at a later stage.[4a] At present the enquiry is as to limitations upon colonial legislative power arising out of the legislative sovereignty throughout the Empire of the British Parliament acting with intent as an Imperial Parliament.

An Act which is truly Imperial, that is to say, which is made applicable to a colony by express words or necessary intendment, is in force in such colony *proprio vigore* as an enactment of the Sovereign legislature of the Empire. Its date is immaterial, so long as it is not repealed. It cannot be repealed or amended by the colonial legislature;[5] and any colonial legislation repugnant to it is, to the extent of such repugnancy, absolutely void and inoperative.

It necessarily follows that any colonial legislation inconsistent with an Imperial statute extending to the colony must be inoperative. In the old colonial charters,[6] and the earlier Constitution Acts[7] for

[4a] See *post*, chap. XIV.

[5] As will appear, there are suggestions to the contrary: see *post*, p. 60 *et seq.*

[6] See *Egerton's* "Short Hist. of Brit. Col. Policy," pp. 17, 27, etc.; *Phillips* v. *Eyre* (*infra*).

[7] *E.g.*, 5 & 6 Vict. c. 76, s. 29 (New South Wales). Compare the Constitutional Act (Canada) of 1791, 31 Geo. III., c. 31, and the Union Act (Canada) of 1840, 3 & 4 Vict. c. 35.

some of the colonies, the legislative power conferred was hedged about with some such proviso as that no law passed by the colonial assembly should be repugnant or contrary to the law of England,[8] or (affirmatively) that the laws should be "as near as may be agreeable to the laws and statutes of this our Kingdom of Great Britain." And the earlier Imperial Acts on the subject of repugnancy declared void "to all intents and purposes whatsoever"[9] colonial legislation repugnant to Imperial statutes extending to the colonies. These very general and sweeping expressions would, if applied literally, confine colonial legislative power within very narrow limits;[10] a statute might be held inoperative as contrary to the spirit of English law, statutory or common, and repugnancy in one portion even would render a whole statute void. To remove these difficulties the Colonial Laws Validity Act, 1865,[1] enacts:

"II. Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

"III. No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to

[8] See *Becquet* v. *McCarthy*, 2 B. & Ad. 951; and *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 20; 40 L. J. Q. B. 28, in both of which cases colonial legislation was attacked on the ground of repugnancy to "natural justice." The same limitation has been suggested as applying even to Imperial legislation: 12 Rep. 76. See *Dicey*, "Law of the Const.," p. 59, note 1; also *post*, p. 87.

[9] 7 & 8 Wm. III. c. 22; 6 Geo. IV. c. 114.

[10] *Reg.* v. *Marais* (1902), A. C. 51; 71 L. J. P. C. 32; and see the argument of defendant's counsel in *Phillips* v. *Eyre* (*ubi supra*).

[1] 28 & 29 Vic. c. 63 (Imp.). See Appendix.

the law of England unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation, as aforesaid."

These sections are retrospective and their effect is : (1) The repugnancy to the law of England which is to make void a colonial Act must be repugnancy to an Imperial statute extending to the colony or an Order-in-Council passed under the authority of such an Imperial statute, and (2) a colonial Act repugnant in part only is to be void "to the extent of such repugnancy and not otherwise."

Commenting on this Act, Willes, J. (delivering the unanimous judgment of the seven Judges of the Exchequer Chamber in a case[2] involving the validity of an Act of Indemnity passed by the assembly of Jamaica), said:

"It was further argued that the Act in question was contrary to the principles of English law,[3] and therefore void. This is a vague expression and must mean either contrary to some positive law of England or to some principle of natural justice. . . . It is clear that the repugnancy to English law which avoids a colonial Act means repugnancy to an Imperial statute, or order made by the authority of such statute, applicable to the colony by express words or necessary intendment; and that, so far as such repugnancy extends and no further, the colonial Act is void."

And, in 1902, Lord Halsbury (in delivering the judgment of the Privy Council in a case involving the validity of an Act of the legislature of Natal, which took away, in certain cases, the right to trial by jury), used much the same language,[4] adding:

"The obvious purpose and meaning of that statute"—the Colonial Laws Validity Act—"was to preserve the right

[2] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 20; 40 L. J. Q. B. 28.
[3] Because *ex post facto* legislation.
[4] *R.* v. *Marais* (1902), A. C. 51; 71 L. J. P. C. 32.

of the Imperial legislature to legislate even for the colony although a local legislature has been given, and to make it impossible, when an Imperial statute has been passed expressly for the purpose of governing that colony, for the colonial legislature to enact anything repugnant to an express law applied to that colony by the Imperial legislature itself."

As colonial legislation which runs counter to an Imperial statute extending to the colony is to be read subject to the Imperial enactment, and is void to the extent of its repugnancy thereto "but not otherwise," it follows that Canadian legislatures, each within its sphere, may legislate upon the subject matter of Imperial statutes so long as the Canadian Acts are not inconsistent with the Imperial.[5] For example, it was held by the Supreme Court of Canada, that a Canadian statute, giving jurisdiction in revenue cases to a Vice-Admiralty Court, sitting in Canada but constituted under Imperial legislation, was not repugnant to such legislation.[6] Fournier, J., after quoting sec. 2 of the Colonial Laws Validity Act, 1865 (as above) puts the matter thus:

"Does not this provision which applies to future as well as to existing legislation clearly recognize the power of colonial legislatures to implement or add to (*ajouter*) the provisions of Imperial enactments? Does it not also declare that such added provisions shall have their full effect so long as they are not contradictory of the Imperial enactment? To the enumeration of the powers mentioned in the Act of 1868,[7] the Federal Parliament has added another subject of jurisdiction. This provision not being in conflict with any of those of the Imperial Act, neither altering nor modifying

[5] *Atty.-Gen.* v. *Flint* (1884), 16 S. C. R. 707; 4 Cart. 288, *per* Fournier, J.: *Allen* v. *Hanson* (1890), 18 S. C. R. 667; 4 Cart. 470; *The Farewell*, 7 Q. L. R. 380; 2 Cart. 378; *Smiles* v. *Belford*, 1 O. A. R. 436; 1 Cart. 576.

[6] *Atty.-Gen.* (*Can.*) v. *Flint*, 16 S. C. R. 707.

[7] This is evidently a misprint for 1863. The reference is to 26 & 27 Vict. c. 24 (the Vice-Admiralty Courts Act, 1863).

any of them, should be held within the competence of the Federal Parliament under the above cited clause of the Colonial Laws Validity Act, 1865." [8]

This phase of the subject will, however, appear again when some of the specific matters governed or affected by Imperial legislation are under discussion.

A colonial legislature cannot repeal or amend Imperial Acts extending to a colony[9] unless empowered so to do by express permissive Imperial legislation.[10] This would appear to be the clear result of the authorities. But it is remarkable that at each step in Canada's constitutional progress it has been contended that the Imperial Parliament in legalizing such step had surrendered, so far as related to Canada, some portion of its paramount legislative authority; that, at least so far as concerns Imperial Acts of express colonial application but of date anterior to the " constitutional " Act then in force, the power to amend or repeal had been conferred upon Canadian legislatures. To this extent the contention has received the support of individual Judges,[1] but the decisions of the Courts have been uniformly adverse.

In the Maritime Provinces, where Imperial Acts relating to navigation were frequently invoked in the

[8] This is a translation, a little free at times but precise in the material points.

[9] *Algoma Central Ry. Co.* v. *Reg.* (1902), 7 Exch. Ct. R. 239; *Metherell* v. *Coll. of Phys.* (1892), 2 B. C. 189; *Ex p. Renaud*, 1 Pug. (N.B.) 273; 2 Cart. 445; *Reg.* v. *Coll. of Phys.* (1879), 44 U. C. Q. B. 564; 1 Cart. 761; *Smiles* v. *Belford* (1876), 1 O. A. R. 436; 23 Grant 590; 1 Cart. 576; *Craw* v. *Ramsay*, Vaugh. 292.

[10] *E.g.*, 9 & 10 Vic. c. 94 (empowering the colonies to repeal Imperial Tariff Acts), and the various Admiralty and Merchant Shipping Acts.

[1] Macaulay, J., in *Gordon* v. *Fuller*, *infra*; Draper, C.J., in *Reg.* v. *Taylor*, *infra*. See also the judgment of Gwynne, J., *In re* Bigamy sections of the Criminal Code, 27 S. C. R. 461.

Vice-Admiralty Courts, a clearer view seems to have prevailed as to the operation, within the colonies, of such Acts; and numerous cases are to be found in which, without question, effect was given to their provisions. The view, however, was pressed in argument there, just as it was in the Courts of the upper province, that a provincial Act assented to by the Crown was of equal validity with an Imperial Act and, if later in point of time than an Imperial Act with which it might appear to clash, should be given effect in preference to such Imperial Act.[2] But no judicial utterance supports such a view.

In a case[3] in the Courts of Upper Canada an affidavit was tendered in proof of a debt sued for by a British merchant, and reliance was placed on an Imperial statute of Geo. II., expressly providing for such method of proof in colonial actions. It was contended that the Upper Canadian assembly had repealed the Imperial Act by legislation inconsistent with it. The legislative power of the assembly rested then upon the Constitutional Act, 1791, which provided that all laws passed by the assembly should be valid and binding if not repugnant to the Act itself. Macaulay, J. (afterwards C.J.), upheld this contention, saying, "I cannot but regard the provincial statute, when duly passed, of equal force within the province with British statutes." The question in his view, therefore, would be one of date as between the two conflicting statutes, an Imperial and a provincial; whichever was the later would prevail.[4] The Imperial "repugnancy" statute then in force[5] declared null and void to all intents and purposes

[2] *The Bermuda*, Stewart, 245.

[3] *Gordon* v. *Fuller* (1836), 5 U. C. Q. B. (O.S.) 174.

[4] See *Reg.* v. *Sherman*, 17 U. C. C. P. 167; *Reg.* v. *Slavin*, *ib.* 205.

[5] 6 Geo. IV. c. 114; passed, it will be noticed, after the Constitutional Act, 1791.

whatsoever all colonial laws repugnant to Imperial Acts "made or to be made" extending to the colonies. This statute, Macaulay, J., thought, applied only to laws passed in the old colonies under government by commission or charter, and not to the Acts of a legislative assembly created by Imperial legislation. The majority of the Court, however, held otherwise. Adopting the view that the "repugnancy" Act just mentioned applied to all colonial legislation, Robinson, C.J., pointed out that nothing could be more repugnant to an Imperial Act than an attempted repeal of it.

Again, it was seriously argued[6] that, in spite of express words extending it to all parts of the Empire, the Imperial Foreign Enlistment Act of 1819 was not in force in Canada, because Canada had at the date of its passage a local legislature. This view was negatived by the judgment of the Court and the enlistment in Canada of recruits for the American army held to be unlawful.

Somewhat the same views have been advanced since the British North America Act became law. The word "exclusive" in the section (91) declaring the legislative power of the Dominion Parliament has been adverted to[7] as "intended as a more definite or extended renunciation on the part of the Parliament of Great Britain than was contained in the Renunciation Act of Geo. III,[8] or the Colonial Laws Validity Act of 1865."[9] But this view has not met with support in later cases.[10] The same word

[6] *Reg.* v. *Schram* (1864), 14 U. C. C. P. 318. See also the ineffectual argument of counsel in *Bartley* v. *Hodges*, 1 B. & S. 375; 30 L. J. Q. B. 352.

[7] By Draper, C.J., in *Reg.* v. *Taylor*, 36 U. C. Q. B. at p. 220.

[8] 18 Geo. III. c. 12. See *ante*, p. 54.

[9] See *ante*, p. 57. The Act is in the Appendix.

[10] *Smiles* v. *Belford* (1876), 1 O. A. R. 436; 1 Cart. 576; *Reg.* v. *Coll. of Phys.* (1879), 44 U. C. Q. B. 564; 1 Cart. 761; *Tai Sing*

occurs in sec. 92, which sets forth the matters for provincial legislation, and it is used in both sections to describe the Dominion and provincial spheres as mutually exclusive.

It has, however, been strongly urged officially that the British North America Act, 1867, has so far modified the Colonial Laws Validity Act, 1865, in its application to Canada that Imperial Acts extending to Canada, but of date prior to 1867, may be, in effect, repealed or amended by Canadian legislation,[1] but this view has not met with favour at the hands of the Imperial law officers of the Crown,[2] and seems to be entirely opposed to the strong current of English and Canadian authority.

As late, however, as 1905, the Supreme Court of Canada intimated that:

> "It is still open for discussion as to whether the Parliament of Canada, having been given exclusive jurisdiction to legislate upon the subject of copyright, may not by virtue of that jurisdiction be able to override Imperial legislation antecedent to the British North America Act, 1867. . . . We wish to leave the question open so far as this Court is concerned." [3]

If open as to copyright, then it must also be open to all subjects specifically enumerated in secs. 91

v. *McGuire* (1878), 1 B. C. 107; *Metherell* v. *Coll. of Phys.* (1892), 2 B. C. 189. In *Smiles* v. *Belford*, Moss (Thos.), J.A.— afterwards C.J.O.—expressed his belief that Draper, C.J., had not deliberately entertained the view indicated above, but had merely thrown out a suggestion in that direction. See also opinion of Sir Roundell Palmer and Sir Farrer Herschell: Dom. Sess. Pap., 1890, Vol. 15, No. 35.

[1] Report of Sir John Thompson, Minister of Justice, in Dom. Sess. Pap., 1890, Vol. 15, No. 35, on the copyright question. See also Dom. Sess. Pap., 1892, Vol. 12, No. 81, and 1894, No. 5.

[2] *Ib.* See also *Algoma Central Ry. Co.* v. *Reg.* (1902), 7 Ex. Ct. Rep. 239; passage quoted *ante*, p. 54.

[3] *Imp. Book Co.* v. *Black* (1905), 35 S. C. R. 488. This judgment was affirmed in the Privy Council, but with no reference to the question mooted in the Supreme Court of Canada.

and 92 of the Act, for the word "exclusive" is used in both.[4]

It would seem almost needless to add that the repeal by the British Parliament of an Imperial Act extending to a colony is operative in such colony. It was so decided in an old case[5] in which an effort was made to subject the Bank of Upper Canada to the disabilities imposed by the English Bubble Acts. The earlier Act had been expressly repealed in 1825, thus wiping out both Acts as the later Act was "a mere supplement" to the earlier. By reason of such repeal the Acts were held to be no longer in force in Canada. A more recent and striking authority[6] held that where an Imperial Act extending to a colony has been amended by a subsequent Imperial Act, not directly but by implication, such amendment is operative in such colony.

This chapter deals only with the general principles as to the operation of Imperial Acts extending to a colony and their effect in limiting the field open to the colonial legislature. In later chapters specific topics covered or affected by existing Imperial legislation will be dealt with.

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[4] See *ante*, p. 62.
[5] *Bank of U. C.* v. *Bethune*, 4 U. C. Q. B. (O.S.), 165.
[6] *R.* v. *Mount* (1875), L. R. 6 C. P. 283; 44 L. J. P. C. 58.

CHAPTER VII.

EXTERRITORIALITY.

Application of the Doctrine.

(*a*) *To British legislation.*
(*b*) *To colonial legislation.*

The modern conception of a State is of an organized society identified with, occupying, and controlling a defined portion of the earth's surface; and under normal conditions no State may execute its laws within any other than its own territory, except by permission of the sovereign authority of such other territory. "By treaty, capitulation, grant, usage, sufferance, and other lawful means," the British Crown has jurisdiction within divers foreign countries, chiefly Oriental, and the exercise of this jurisdiction is regulated by an Imperial statute, the Foreign Jurisdiction Act, 1890.[1] And where foreign territory such, for example, as in parts of the African continent, is not subject to any regular government with which a treaty might be made, the Crown is given jurisdiction by that Act "over His Majesty's subjects for the time being resident in or resorting to that country."[2]

In addition to this exercise of jurisdiction in Oriental states and barbarous lands, Great Britain has assumed to exercise jurisdiction to a limited extent upon the high seas, both over British subjects and foreigners, even when not upon British

[1] 53 & 54 Vict. c. 37 (Imp.). The phrase quoted in the text is taken from the recital to this Act.

[2] See *R.* v. *Crewe* (1910), 2 K. B. 576; 79 L. J. K. B. 874.

ships.[3] Again, modern diplomacy recognizes that it is just that a State should exercise some measure of protection and control over its members when abroad, not only in their interest, but in its own; and accordingly international usage, often crystallized in treaties, permits certain agents of a State—ambassadors, consuls, etc.—to exercise jurisdiction and perform executive acts within the limits of another State; such, for example, as the maintenance of discipline upon British ships in foreign ports, the celebration of marriages under the Foreign Marriage Act, 1892,[4] and the performance of various consular duties.

But, except as above indicated, there can be no exterritorial execution of the laws of any State; and if the phrases " exterritoriality of a law " and " exterritorial operation of a law " are to be limited to the idea of executive action abroad, the subject would be one of comparatively narrow range so far as the government of Canada or of any other British colony is concerned. Except as to the exercise of jurisdiction upon the high seas or in barbarous lands without settled government, the matter is one of arrangement, express treaty or tacit understanding, with foreign powers worked out by Imperial legislation and executive action; and even as to those excepted matters, the ground is largely covered by Imperial treaty and legislation.

The word " exterritoriality " is commonly used, however, to characterize the operation of laws which purport to determine the effect to be given in the Courts and within the territory of the enacting State as against persons without the State or in respect to property situate or transactions happening abroad.

[3] Her jurisdiction over British ships is, of course, a recognized territorial jurisdiction.

[4] 55 & 56 Vict., c. 23 (Imp.).

In this sense, international law recognizes that extraterritorial effect should often be given to the laws of a State in reference to foreign persons and property and to many acts done and suffered abroad; and to a greater or less extent the municipal laws of England and her colonies embody the same principle. To take a familiar example: a conveyance of land in any Canadian province must conform to the laws of that province wherever the owner of the land may reside or wherever the documents may be executed; in other words, one generally recognized rule of international law is that the *lex rei situs* should govern all transactions about land. And so as to succession: the *lex domicilii* of the deceased governs, speaking generally, the distribution of his personal estate, no matter where he may have died or where the assets may be. British jurisprudence, again, treats crime and the jurisdiction over crime as local, and considers that the nature and quality of an act, so far as penal consequences are to follow, should be determined by the law of the place where the act is done; and British legislation in the main has been framed upon this principle. Even as to British subjects the British Parliament has very seldom undertaken to affix criminal character to acts committed by them within foreign territory;[5] and still less frequently, as will appear, has legislation of that character been attempted in regard to foreigners without the realm.

The constitutional problems which arise may be shortly stated: (1) Is there any limitation upon the

[5] England and the United States differ in this respect from those continental states of Europe governed by the principles of the civil law. In these latter, subjection to the home law is treated as a matter of race-nationality; and because they themselves undertake to punish their citizens for crimes done abroad, they object to extraditing them: *Wheaton*, International Law, 4th Eng. ed., 183.

power of the Parliament of the United Kingdom to determine as she will the operation to be given within the Empire to her laws as they may regard persons, property, and acts without the Empire? If there be any such limitation, it would naturally follow that a colonial legislature would lie under the same disability. (2) If there be no such limitation in the case of the British Parliament, does the converse proposition hold good? or, on the contrary, is a colonial legislature subject to some constitutional disability along this line arising from the colonial *status?*

To clear the ground: the operation within the colonies of Imperial legislation has nothing to do with exterritoriality so far as concerns the question as to the existence of a constitutional limitation upon the power of the British Parliament; for the territory within the ken of the Parliament of the United Kingdom when legislating Imperially is the Empire. The question now is as to legislation which purports to determine what results shall follow within the Empire or colony as to persons, property, and transactions beyond the geographical bounds of the Empire or colony, as the case may be.

Then again, the distribution of legislative power in Canada between the Federal Parliament on the one hand, and the provincial legislatures on the other, may be here disregarded. In principle, the question is the same as to each: Is the Parliament of Canada, or is a provincial legislature, making laws each in relation to the subjects committed to its jurisdiction, debarred wholly or in part from enacting what results shall follow in Canada or in the particular province from acts done, or as to persons and property, without their respective boundaries?

To still further clear the ground, certain recognized canons of construction, which are applied to

Acts of Parliament in determining their territorial scope should be, strictly speaking, eliminated; because the subject under discussion is as to constitutional limitations and not as to restrictive interpretation. But a consideration of these canons of construction will, it is conceived, disclose that as regards Imperial legislation, they are not founded upon any real constitutional limitation of legislative power, but that they are based upon considerations of policy, of what should be taken to be the intention of a legislature presumably desirous of paying due regard to recognized principle of international law, and of being fair and reasonable toward foreigners. And if this should appear to be the true position as to the British Parliament, is there something inherent in the colonial *status* which as to all or some of these canons of construction makes them constitutional limitations upon colonial legislative power?

Territorial Scope of Statutes: Canons of Construction:

The question as to the territorial area within which a statute is to have application, the persons, property and acts to be affected thereby, is one to be decided upon the construction of the Act itself, read in the light of certain well established presumptions against undue extension. As between Great Britain and her colonies, as has already been pointed out, the Parliament of the United Kingdom must be taken, *primâ facie*, to legislate only for the United Kingdom.[6] An Act of that Parliament does not extend to a colony unless "made applicable to such colony by the express words or necessary intendment" of the Act itself, or of some other

[6] *Routledge* v. *Low* (1868), L. R. 3 E. & I. App. 113; 37 L. J. Ch. 454.

Imperial statute;[7] and not less express, one would naturally infer, should be the words or not less clear should be the necessary intendment to warrant the application of a British statute to persons, property, and acts beyond the precincts of the Empire.

Laws, then, enacted by the Parliament of the United Kingdom are *primâ facie* territorial; that is to say, the presumed intent is that general words should apply only to persons, both British subjects and foreigners, within the Kingdom; only to property situate within its geographical boundaries; only to acts done or conditions existing within those boundaries; and only to rights of action to be enforced therein. But when statutes come to be examined it is not often that they can readily be classified along any such simple clear-cut lines. The one statute may prescribe acts to be done by certain or all persons in reference to certain or all property and may define and regulate the rights of action (civil or criminal) which are to arise if the law be broken. Another statute may cover only some one or more of these elements. For this reason it is difficult to segregate the authorities along these simple lines; but it will be well to keep in view these various aspects which Acts of Parliament may present. It will, it is hoped, become clear as the review of the leading cases progresses that the presumption against the exterritorial application of a statute is strong as to the real subject matter of the legislation, whether persons, property, acts, or rights of action, but weak or altogether absent as to ancillary or, as it were, accidental results.

Running through all the cases this doctrine will be found, that the British Parliament may legislate freely as to the conduct abroad of British subjects.

[7] "Colonial Laws Validity Act, 1865" (28 & 29 Vict. c. 63, s. 1). See *ante*, p. 55.

The executive enforcement of such laws must, of course, take place within British territory; but it has always been considered that a foreign power has no legitimate ground for complaint should England see fit to punish one of her own subjects for a crime (or what would be considered a crime in England), committed within the territory of such foreign power. And the same idea pervades legislation as to British ships. The presumption, therefore, in favour of strict territoriality gives way easily before language reasonably indicative of Parliament's intention to apply its enactment to British subjects or British ships wherever they may be.

Personal Laws.

Not many statutes can be found dealing with persons in a sense detached from all considerations of property, conduct, and rights. Perhaps the nearest approach to such legislation which has been before the Courts upon a question as to its territorial operation is the English Bastardy Act of 1844,[8] passed with the object of preventing parishes from being burdened with the support of illegitimate children. It gave power to justices on summons duly served to adjudge a man to be the putative father of a bastard child, and to order him to pay a weekly sum towards its support. The words were general, "any single woman who may be delivered of a bastard child," but it was held that the Act did not apply to a child born out of England, though the putative father was an Englishman, and the illicit connection had all taken place in England.[9] Where, however, the child was born in England, the fact that the putative father was an Irishman and that the illicit connection had taken place only in

[8] 7 & 8 Vict. c. 101 (Eng.).
[9] *R.* v. *Blane* (1849), 18 L. J. M. C. 216.

Ireland did not relieve him from liability, if duly served with a summons within the justices' jurisdiction.[10] The aim of the statute was not punitive as to the man, but in relief of the mother and, through her, of the parish; and Cockburn, C.J., thought no question of exterritoriality was involved.

Copyright.

Under what circumstances a foreign author could take the benefit of the British Copyright Acts, was the question before the House of Lords in two well-known cases. In the first[1] it was held that under the statute of Anne,[2] an alien friend not actually in England at the date of the first publication there of his work was not entitled to British copyright; in the second,[3] thirteen years later, it was held that mere presence in any part of the Empire at the time of the first publication in England was sufficient under the Copyright Act of 1842,[4] to entitle an alien friend to the benefit of the Act. The words used to designate those entitled to copyright were general, "author" "assignee" and "assigns," in both Acts. The precise point decided in each case was a very narrow one, but the discussion ranged over the entire field, and in the judgments will be found many statements of the general principles which should govern the interpretation of British statutes alleged to extend to foreigners abroad. It may be added that the judgments in the later case throw

[10] *Hampton* v. *Rickard* (1874), 43 L. J. M. C. 133.

[1] *Jefferys* v. *Boosey* (1855), 4 H. L. Cas. 815; 24 L. J. Ex. 81. The action was for infringement of the copyright in Bellini's "La Sonnambula."

[2] 8 Anne c. 19 (Imp.).

[3] *Routledge* v. *Low* (1868), L. R. 3 E. & I. App. 113; 37 L. J. Ch. 454. "Haunted Hearts," by Maria Cummins, an American authoress, who crossed to Montreal and stayed there a few days until her book was published in England.

[4] 5 & 6 Vict. c. 45 (Imp.).

strong doubt upon the correctness of the view taken by the majority in the earlier case—the minority, individually counted—as to the principles underlying the legislation as to copyright. Those who looked upon the Acts as creative of a monopoly at the expense of the reading public of England, limited that monopoly to British subjects, including in that term all who by their bodily presence within England owed temporary allegiance to British law; while those who considered that the Acts were framed for the advancement of learning and that to this end authors should be encouraged to publish their works in England by being given a species of property in them after publication there, placed no territorial limit upon the general words. Given the right of property created for the public good there was no reason why an alien friend, complying with the terms of the Acts, should not be as free to acquire such right as to acquire any other personal property though not resident or even present in England. Or to express the same idea in its relation to exterritoriality, the territorial object of the Act, namely publication in England for England's good, being satisfied, there was no reason why regard should be had to the fact that benefits might accrue to alien authors abroad.

"The plaintiff," said Erle, C.J.,[5] "being such assignee, publishes in England, and after publication in England, claims the operation of the statute in England to protect his right there; and in so doing he claims only an intra-territorial effect."

Maule, J., says:

"By the common law of England aliens are capable of holding all sorts of personal property and exercising all sorts of personal rights. Their disabilities in respect of real property arise out of special laws and considerations

[5] 24 L. J. Ex., at p. 87.

applicable to property of that particular kind. So that when personal rights are conferred and persons filling any character of which foreigners are capable are mentioned, foreigners must be comprehended unless there be something in the context to exclude them." [6]

In the later case Lord Cairns, L.C., speaks of the Act as intended

"to obtain a benefit for the people of this country by the publication to them of works of learning, of utility, and of amusement. . . . There is or may be a benefit to the author; but it is a benefit given not for the sake of the author, but for the sake of those to whom the work is communicated;" [7]

and Lord Westbury lays it down[8] very emphatically that as to the incidental results of an Act of Parliament there is really no presumption against exterritorial effect:

"The benefit of the foreign author is incidental only to the benefit of the English public. Certainly the obligation lies on those who would give the word 'author' a restricted significance to find in the statute the reasons for so doing. . . . By the common law of England the alien friend (*ami*) though remaining abroad may acquire and hold in England all kinds of pure personal property; and when a statute is passed which creates or gives peculiar protection to a particular kind of property, which it declares shall be deemed personal property, and does not exclude the alien, why is he to be deprived of his ordinary right of possessing such property or being entitled to such protection?"

On the other hand, the view of those who looked upon the Act as an Act for the benefit of authors,

[6] *Ib.*, p. 88. The idea expressed in this passage appears in the judgment of Phillimore, J., in *Davidsson* v. *Hill* (*infra*): "Our Courts are not only open, but open equally to foreigners as to British subjects, and foreigners who have the benefit of the English common law have also the benefit of English statutes."

[7] 37 L. J. Ch., at p. 458.

[8] *Ib.*, p. 463.

may be taken from the judgment of Lord Cranworth, L.C., in the earlier case:[9]

"*Primâ facie* the legislature of this country must be taken to make laws for its own subjects exclusively; and where, as in the statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving that privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community for the general advantage of which the enactment is made. When I say that the legislature must *primâ facie* be taken to legislate only for its own subjects, I must be taken to include under the word 'subjects' all persons who are within the Queen's dominions and who thus owe to her a temporary allegiance."

Tax Acts.

There are a number of cases in which the question involved was as to the incidence of taxation under Acts respecting Probate Duty, Legacy Duty, Succession Duty, and Income Tax; and it will be found that in all these cases when the real object intended to be taxed was determined, whether that object was a person, some species of property, or some transaction, the presumption as to territorial operation fixed that real object when stated in general terms as intended to be within or associated with the realm.[10] That the taxation might in its actual incidence fall upon persons, or be measured by property, without the realm of itself raised no

[9] 24 L. J. Ex., at p. 97. He was the only Judge who sat in both these cases. His judgment is a practical summing up of the views of the four Judges, the minority out of ten who advised the House.

[10] The constitutional limitation of the taxing power of a province to "direct taxation within the province," has frequently raised the question, in Canadian cases, as to the real object aimed at by provincial tax Acts and as to its *situs* within the province: see the chapter on Taxation in Part II.

presumption against it. If the tax were a tax upon residents there was no very strong presumption against its being measured by the possessions, both at home and abroad, of the tax-payer; if the tax were a property tax the presumption would be that the property struck at was within the realm, but there would be no presumption that its owner should be a resident. As was intimated by the House of Lords in 1889[1] it involves no breach of international duty to tax a resident of England on the basis of his income from all sources both at home and abroad and whether he chooses to have that income sent home to him or not; and the decision of the Court of Appeal[2] was affirmed upon a consideration of the context and not upon the ground taken by Lord Esher, M.R., in the Court of Appeal that the general words of the schedule to the Income Tax Act ought to be limited by applying strictly the presumption against exterritorial operation.

And so with regard to Legacy, Probate, and Succession duties, the presumption in favour of territorial limitation might fix the real objective of the Act —legacies under the will of a person domiciled in England, the property to which English probate gives title, and succession under English law—but would not prevent the tax from having its due effect because it might perchance bear on persons out of England or be paid in respect of property abroad.[3]

[1] *Colquhoun* v. *Brooks* (1889), 59 L. J. Q. B. 53: *per* Lord Herschell, at p. 58; *per* Lord Macnaghten, at p. 62: and see *Blackwood* v. *R.* (*infra*).

[2] 58 L. J. Q. B. 439.

[3] *Arnold* v. *Arnold* (1887), 6 L. J. Ch. 218 (legacy duty): *Thompson* v. *Advocate General*, 12 Cl. & F. 1 (legacy duty); *Atty.-Genl.* v. *Napier* (1851), 20 L. J. Ex. 173 (legacy duty); *Wallace* v. *Atty.-Genl.* (1866), 35 L. J. Ch. 124 (succession duty); *Atty.-Genl.* v. *Campbell* (1872), 41 L. J. Ch. 611 (succession duty); *Blackwood* v. *R.* (1883), 52 L. J. P. C. 10 (estate duty in Victoria): and see *R.* v. *Cotton* (1912), 45 S. C. R. 469.

Where provision was made for an abatement from income tax of the amount of any premium paid on life insurance effected "in or with any insurance company," it was held that an English company only was meant[4]; but the question was really determined by other words of limitation, though Lord Esher, M.R., was prepared to put his judgment on a strict application of the canon of construction.[5] The Act, it may be noticed, was in case of the tax-payer and was not in any sense an Act to regulate insurance companies.

Navigation and Shipping:—How far the Imperial Merchant Shipping Acts were intended to affect foreign ships and how far the Acts applied to ships whether British or foreign in respect of their navigation upon the high seas beyond the territorial boundaries of the Kingdom has been considered in a series of cases. The legislation was intended primarily for British shipping. "If we were simply dealing with legislation relating to shipping the clear conclusion would be that in the first instance it referred simply to the ships of the nation whose legislature was passing the Act in question."[6] But some of the provisions of the Acts considered in these cases were as to the rules to be observed for the avoidance of collision, and others were in limitation of the liability for damages suffered in collision to an amount less than the general maritime law of Europe as recognized in British Courts would give to the innocent ship.

[4] *Colquhoun* v. *Heddon* (1890), 59 L. J. Q. B. 465 (C.A.).

[5] Lord Esher, it may be noted, was a strong exponent of the view that general words in a statute should always be read in a strictly territorial sense, as his judgment in this case shows; but in *Colquhoun* v. *Brooks* (*ubi supra*), the House of Lords did not adopt his extreme view and thought it was necessary to look for a limiting context. See *ante*, p. 76.

[6] *Per* Wood, V.C. (afterwards Lord Hatherley, L.C.), in *Cope* v. *Doherty* (1858), 27 L. J. Ch., at p. 601; 2 DeG. & J. 614.

As to the regulations for the avoidance of collision (commonly known as the "rules of the road," prescribing the course to be steered, the lights to be exhibited and the signals to be given under varying conditions) it was held that though they purported to apply in all cases, they could not be taken as intended to govern the navigation of a foreign ship except, perhaps, within strictly territorial waters. Therefore, where a British and a foreign ship met upon the high seas, even within the three-mile belt off the English coast, the British statutory regulations would bind neither ship; the decision in such case had to be based upon what the Privy Council described as "the ordinary rules of the sea," i.e., the rules laid down by maritime law as recognized in Admiralty Courts in England.[7]

Prior to 1862, the clauses limiting liability for damages done by collision (*e.g.*, to the value of the ship at fault and its freight, or to a certain sum per ton of its tonnage) applied in terms to "the owner of any sea-going ship." It was held not to apply at all in the case of a collision on the high seas between two foreign ships;[8] nor to the case of a collision there between a British and a foreign ship so as to limit the liability of the foreign ship or (as intimated *obiter*) of the British ship, because the Act should not be construed as intended to either favour or prejudice the foreign ship.[9] But where the collision had taken place within three miles of the British coast between a British and a foreign ship, the British ship being at fault was held entitled to the benefit of the Act; the position of the foreign ship had

[7] *The Saxonia* (1862), 31 L. J. Adm. 201 (P.C.). As is well known, there are now "International Rules of the Road" adopted by agreement among maritime powers. See *post*, p. 221.

[8] *Cope* v. *Doherty* (*supra*).

[9] *The Wild Ranger* (1862), 32 L. J. Adm. 49.

she been to blame being left in doubt.[10] In 1862 the Act was amended by substituting for the words in the Act of 1854 the words "the owners of any ship, whether British or foreign;" and it was held that the Act so amended applied to collisions everywhere and enured to the benefit equally and, conversely, to the detriment equally of British and foreign ships;[1] and where both ships are foreign the Act applies if the case is properly before the Court.[2] The view taken before the amendment of 1862 is summed up by Turner, L.J., in *Cope* v. *Doherty*: "This is a British Act of Parliament and it is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners." But the course of legislation shows that the attention of Parliament was fixed not so much upon the fact that the transactions might happen without the realm as upon the question, a strictly territorial one, as to the remedy British Courts should afford when properly seized of the controversy.

And it may further be remarked that the British Parliament has, apparently, felt little difficulty about legislating in respect of the doings upon the high seas, the common ground of all the nations, of British subjects or even foreigners upon foreign ships.[3] British ships upon the high seas are, of course, British territory.

[10] *The General Iron, etc., Co.* v. *Schurmanns* (1860), 29 L. J. Ch. 877. The three-mile belt was held to be "territorial waters" for the purposes of such legislation; but see *R.* v. *Keyn* (1876), L. R. 2 Ex. D. 152; 46 L. J. M. C. 17.

[1] *The Amalia* (1863), 32 L. J. Adm. 191 (P.C.).

[2] "Actions for collision are said to be *communis juris* and the Admiralty Court has never refused to entertain an action merely because both ships were foreign or their owners not British subjects, or because the collision occurred in foreign waters": *Marsden*, "Collisions at Sea," 5th ed., 198. See "*The D. C. Whitney*," 38 S. C. R. 303; 10 Ex. Ct. R. 1.

[3] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, Imp.), sec. 686, *et seq.* See *post* p. 227.

Workmen's Compensation Acts:—Certain cases in which the territorial scope of these Acts was considered serve, it is conceived, to emphasize that territoriality is to be presumed as to the real objective of a statute, but that the presumption against its ulterior or incidental results affecting persons or property or transactions abroad is weak or non-existent. In one case [4] it was held that the British Act has regard to labour conditions in England and does not cover the case of an accident happening out of the United Kingdom, although the contract of employment had been made in England. The general presumption against exterritorial operation was, it was considered, fortified by an express provision in favour of seamen upon ocean voyages in British ships, affording room for the application of the maxim *expressio unius exclusio est alterius*. In another case [5] it was held by the Privy Council on appeal from British Columbia that the Workmen's Compensation Act of that province (the same in general tenor as the British Act) enured to the benefit of alien dependants, resident abroad, of a workman killed by accident in the course of his employment in the province. *Tomalin* v. *Pearson* was approved but distinguished. The view of the Board is thus put [6] by Lord Atkinson:

"Here it is not insisted that the provincial statute shall operate extra-territorially. It is insisted that by its express words it imposes on the employer a liability to compensate his workmen for personal injuries by accident arising out of and in the course of the employment which he carries on, and in which they work. Where that employment is carried on in the province of British Columbia, one of the results of this intra-territorial operation of the statute may pos-

[4] *Tomalin* v. *Pearson* (1909), 2 K. B. 61; 78 L. J. K. B. 863.

[5] *Krzus* v. *Crow's Nest Pass Coal Co.* (1912), A. C. 590; 81 L. J. P. C. 227.

[6] 81 L. J. P. C., at pp. 230-1.

sibly be that in some cases a non-resident alien may derive a benefit under it. . . . The employer is, by the terms of the statute, made liable to pay the compensation in accordance with the First Schedule. When one turns to that schedule one finds that in cases where death results from the injury, and the workman leaves behind him dependants . . . the amount of the compensation . . . is to be paid."

This seems to support the view of the Judge of first instance [7] that the Act was in the nature of compulsory insurance at the expense of employers for the benefit of workmen within the province, the prescribed "compensation" representing, as it were, the insurance fund distributable among the dependants of the deceased regardless of their place of abode.

Lord Campbell's Act:—Again Lord Campbell's Act has been held to enure to the benefit of the widow and children, resident in Norway, of a Norwegian sailor whose death had been caused by the negligent navigation of a British ship upon the high seas.[8]

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[7] See *Varesick* v. *B. C. Copper Co.*, 12 B. C. 286.

[8] *Davidsson* v. *Hill* (1901), 2 K. B. 606; 70 L. J. K. B. 788. The action was brought by the widow for the benefit of herself and her children, there being no administrator. This seems to be the only difference between this case and two cases decided by the Court of Appeal of Manitoba: *Couture* v. *Dominion Fish Co.* (1909), 19 Man. L. R. 65; *Johnson* v. *Can. North. Ry.*, *ib.*, 179. The plaintiff in the first case was administratrix under a grant of letters of administration from the Manitoba Court, and the action was founded upon the death of the husband in the North West Territories through the negligence there of the defendants. It was held that any right of action must rest on the law of the Territories; that such law, namely, the similar statute there, vested the right of action in an administrator, who, the Court held, must be taken to mean an administrator appointed by the Courts of the Territories; and the action in Manitoba was accordingly dismissed. In the second case, the accident and death

Penal Laws: Status.

The presumption against exterritorial extension has been perhaps most rigidly enforced in the construction of statutes of a criminal or penal character, or statutes which, like the English Bankruptcy Acts, affect the *status* of individuals. Acts committed by foreigners are not taken to be covered by such legislation unless the language of the Act is absolutely intractable. Perhaps the strongest statement of the general rule is that of Lord Russell of Killowen in a case arising out of the famous "Jameson Raid" into the Transvaal Republic and involving the construction of the Foreign Enlistment Act, 1870:[9]

"Another general canon of construction is this—that if any construction otherwise be possible an Act is not to be construed as applying to foreigners in respect of acts done by them outside the dominions of the sovereign power enacting. That is a rule based upon international law, by which one sovereign power is bound to respect the exclusive jurisdiction in its own territory of every other sovereign power and not to attempt to legislate by law for any portion of that territory."

In the end it was unnecessary to consider the application of the Act to foreigners as no evidence

occurred in Ontario, and the plaintiff sued in Manitoba as administrator under a Manitoba grant; and the action was dismissed upon the same holding as in the earlier case.

It is difficult to reconcile these two decisions with the principle upon which *Davidsson* v. *Hill* rests, namely, that, given a right in the deceased, had he lived, to bring action in an English Court, the widow though an alien non-resident may sue in such Court. It is true that the right of the deceased, had he lived, to bring an action in an English Court, might depend on the law of Norway, the place where the cause of action was assumed to have arisen, as Mr. Justice Phillimore points out; but if the law of such place gave a right of action, that action could be brought in England if the defendants could properly be served with process there. And so, it is submitted, the deceased Couture, had he lived, could have sued in the Manitoba Courts, and, if so, his administratrix could sue there on the Manitoba statute.

[9] *R.* v. *Jameson* (1896), 2 Q. B. 245; 65 L. J. M. C. 219.

was tendered to show that any of the accused were other than British subjects. But the case bears out what has been insisted upon in earlier paragraphs of this chapter that, given a local territorialized subject matter for a statute to operate upon, the presumption against its having exterritorial effect in ancillary matters is weak. This particular statute provided that if a person without the Queen's license should in a place within Her dominions prepare or fit out a hostile expedition against a friendly state "the following consequences shall ensue," namely, that every person engaged in such preparation or fitting out or assisting in it or aiding or abetting, counselling or procuring it and every person employed in any capacity in such expedition should be guilty of an offence under the Act. The aim of the Act was to prevent British territory being made the base for hostile invasion of the territory of a friendly power and the Act was in terms limited to a preparation or fitting out within the Queen's dominions. But it was held by Lord Russell of Killowen (Pollock, B., and Hawkins, J. concurring) that a person might commit the offence of engaging in the preparation of the expedition or assisting in it, or aiding or abetting it, although he himself might not be within the Queen's dominions when he so engages, or assists, etc.; and that a person, also, may commit the offence of taking employment in such an expedition although he accepts employment in it outside the limits of the Queen's dominions; in each case at all events if he were a British subject.

Bankruptcy Acts.

In a series of cases under the Bankruptcy statutes it has been held that the act of bankruptcy necessary to give the English Courts jurisdiction must have taken place in England, and in 1901 these

cases were reviewed and affirmed in the House of Lords.[10] The legislation was treated as of a penal character, affecting the *status* of the trader declared a bankrupt under the Act. So far did the presumption extend that although the statute expressly made certain things acts of bankruptcy " when committed out of England," namely, an assignment for the benefit of creditors or a fraudulent conveyance, it was held that these instruments must be instruments intended to have operation under English law, as for example an assignment executed abroad by a domiciled Englishman or a conveyance of property in England fraudulent by the law of England. The case which went to the House of Lords was of a trader, non-resident in England but trading there through agents, who executed in America an assignment for the general benefit of his creditors. It was held that he could not be adjudged a bankrupt under the English Acts.

Criminal Law.

Referring again to criminal law, the doctrine of English law is that crime and its punishment is a local matter and that the nature and quality of an act is to be determined by the law of the place where the act was committed. " What takes place abroad cannot, in the eye of our law, be an offence against our law (unless indeed made so by statute) except in the one well-known case of piracy *jure gentium*." [1] Acting on this view the Full Court of British Columbia held that to counsel in Canada the commission of an act abroad which, if committed in Canada,

[10] *Cooke* v. *Chas. A. Vogeler Co.* (1901), A. C. 102; 70 L. J. K. B. 181.

[1] *R.* v. *Walkem* (1908), 14 B. C. 1: citing Stephen's History of the Criminal Law (1883), Vol. II., p. 12, where the point is dealt with as "a question of the greatest importance and delicacy which has never yet been judicially decided."

would be a crime is not to counsel the commission of an offence against the law of Canada, to which alone the general language of our criminal code is directed.

In a case from New South Wales the Privy Council had to consider a statute of that colony which provided that "whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude." Their Lordships held that the word "wheresoever" must be read "wheresoever in this colony;" that to give the word the wider unlimited range, which the statute upon the bare words would have, would be "inconsistent with the most familiar principles of international law."[2]

In an earlier case[3] it was held that the statute[4] which imposes a penalty upon persons selling by "any denomination of measure other than one of the Imperial measures" did not apply to a sale, though made in England, where the measuring was to take place upon delivery abroad. The object of the Act was to establish a system of measures for use in England.

Doctrine of exterritoriality not a constitutional limitation upon the power of the British Parliament.

To the modern lawyer familiar with his Dicey it may seem time wasted to labour further the question of the legislative sovereignty of the British Parliament, its power to make laws which British Courts

[2] *Macleod* v. *Atty.-Genl. (N.S.W.)* (1891), A. C. 455; 60 L. J. P. C. 55. Their Lordships also held that, read in its wider sense, the statute would be "inconsistent with the powers committed to a colony"; as to which the case must be discussed later. See *post*, p. 101.

[3] *Rosseter* v. *Calhman* (1853), 22 J. J. Ex. 128.

[4] 5 & 6 Wm. IV., c. 63, s. 6.

must recognize and enforce as in very truth the law of the land, no matter how heedless of the rights of other nations or of generally recognized principles of international law such British enactments may be, or how subversive, it may be, of principles usually recognized by British law itself as based upon natural justice. But the question as to the position in this regard of Canadian and other colonial legislatures is one of such moment to the well-being of the colonies that it is necessary to get to the bottom of the matter, if that be possible. Is this doctrine as to the territoriality of the law of a modern state a matter of mere restrictive interpretation when applied to a British statute and a matter of real constitutional limitation when applied to a Canadian enactment? Is a colonial legislature, entrusted with power to make laws for the peace, order, and good government of the colony (in so far as that is not provided for by Imperial Acts of express application to the colony) powerless to punish the misconduct of its people abroad? May the British Parliament ignore the well-established doctrine of English law that crime and the jurisdiction over crime is local, and provide for the trial and punishment in England for acts done abroad even though the act were no breach of the law of the land where it took place?[5] and may not a colony do the same? May it not with a view to excluding undesirables provide that they will have to answer in the colony[6] for the misdeeds which perhaps may have caused their migration to the colony? And as to civil rights accrued abroad, as for example, upon a contract between foreigners made abroad to be performed abroad, may the British Parliament, for reasons touching perhaps the conscience of Englishmen but

[5] As in *R.* v. *Russell* (1901), 70 L. J. K. B. 998.

[6] Exclusion or deportation penalizes for acts done abroad just as clearly as would imprisonment within the colony.

not affecting the validity of the contract abroad, say that no recovery shall be had in a British Court?[7] And may not a colony say the same?

Dr. Dicey is perhaps the best known modern exponent of the doctrine of the omnipotence of the British Parliament;[8] to this extent at least, that no Court in the Empire can properly decline to enforce its enactments. Another eminent authority, Sir Fitzjames Stephen, says that Judges "could not refuse to put in force" an Act, if one were passed, applying the criminal law of England to the doings of Frenchmen in France, and giving the Central Criminal Court jurisdiction in such cases;[9] while, on the other hand, another well known writer, Chief Justice Piggott of Hong Kong, puts the case of an Act making gambling at Monte Carlo by German subjects a crime punishable in England, and says that "such an Act would be beyond the powers of Parliament, and further that the Court of Crown Cases Reserved would not be slow to say so."[10] He cites certain old cases,[1] but discards them as based on "too high flown" appeals to natural justice and the immutable laws of nature; but, nevertheless, he strongly affirms the existence of a real constitutional limitation of the power even of the British Parliament.[2]

But it will be found that there is no reported decision in modern times in which a British Court

[7] As for example under the Slave Trade Acts: see *Dicey*, Conflict of Laws, Amer. Ed., 556, *et seq.*; or the Acts regarding gambling debts: see *Moulis* v. *Owen*, 76 L. J. K. B. 406.

[8] *Dicey*, Law of the Const. There is little reference in it to reported cases.

[9] Hist. of the Crim. Law, II., 37.

[10] "Exterritoriality," p. 42.

[1] *Day* v. *Savage* (1623), Hobart, 87; *The Fox*, Edward's Adm. R. 311 (Lord Stowell).

[2] He relies upon the opinions of Cotton, L.J., and Lopes, L.J., in *Russell* v. *Cambefort* (1889), 58 L. J. Q. B. 498.

has disregarded a British statute as a void attempt to make law in a matter beyond the jurisdiction of the legislature.[3] British statutes, as we have seen, have often been held not to apply in a particular case by reason of the presumption against undue extension; and individual Judges have used expressions as to the "right," the "power," and even the "jurisdiction" of the British Parliament which, taken alone, would support an argument in favour of a constitutional limitation upon the power of that body. But it will be found upon careful examination of these dicta that either the words were used loosely in reference to unsupposable cases or were used in reference to the executive enforcement abroad of such enactments. For example that eminent Judge, Dr. Lushington, may be quoted:

"The power of this country is to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but no further:"[4]

but in a later case he used this unequivocal language:

"If the Act governs the question, and its meaning is clear, I must obey it, whether it is in conformity with international law or not, for Acts of Parliament are clearly binding on the Court:"[5]

and still later:[6]

"I have always recognized the full force of this objection that the British Parliament has no proper authority to

[3] See the judgment of Riddell, J., in *Smith* v. *London*, 20 Ont. L. R. 133. That learned Judge, in the opinion of the Court of Appeal, went too far in holding that a legislature of limited jurisdiction can make *ultra vires* legislation really operative by enacting that no Court shall entertain an action to question the validity of transactions had under the *ultra vires* legislation; but apart from this, the judgment contains valuable matter on the question of the omnipotence of Parliament.

[4] *The Zollvercin*, 2 Jur. N. S. 429.

[5] *The Wild Ranger* (1862), 32 L. J. Adm., at p. 55.

[6] *The Amalia* (1863), 32 L. J. Adm. 193.

legislate for foreigners out of its jurisdiction; and I especially did so in the case of *The Zollverein*.[7] No statute ought, therefore, to be held to apply to foreigners with respect to transactions out of British jurisdiction unless the words of the statute are perfectly clear; but I never said that if it pleased the British Parliament to make such laws as to foreigners out of the jurisdiction Courts of Justice must not execute them; indeed, I said the direct contrary speaking of the Court of Admiralty, reserving any particular considerations that might attach to the Prize Court."

In 1879, Brett, L.J. (afterwards Lord Esher) speaks of "the limited power of the legislature of England to legislate" as to acts done abroad;[7a] but later in the same year he says:

"General words in a statute have never, so far as I am aware, been interpreted so as to extend the action of the statute beyond the territorial authority of the legislature. All criminal statutes are in their terms general; but they apply only to offences committed within the territory or by British subjects. When the legislature intends the statute to apply beyond the ordinary territorial authority of the country, it so states expressly in the statute, as in the Merchant Shipping Acts and in some of the Admiralty Acts. If the legislature of England in express terms applies its legislation to matters beyond its territorial capacity an English Court must obey the English legislature, however contrary to international comity such legislation may be."[8]

In 1900, Lindley, M.R., delivering the judgment of the Court of Appeal,[9] said:

"What authority have we to say that the parties here are subject to our jurisdiction and that they have committed

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[7] *Supra.*

[7a] *Ex p. Blain* (1879), 12 Chy. D. 522.

[8] *Niboyet* v. *Niboyet* (1879), L. R. 4 P. D. 20; 48 L. J. P. 1. See also his judgments in *Colquhoun* v. *Brooks* (1888), 21 Q. B. D. 65; 57 L. J. Q. B. 439; and *Colquhoun* v. *Heddon* (1890), 59 L. J. Q. B. 465 (C.A.). And see *ante*, p. 77.

[9] *In re A. B. & Co.* (1900), 69 L. J. Q. B. 375 (Lindley, M. R., Rigby & Vaughan Williams, L.JJ.): affirmed in H. L. *sub nom.* *Cooke* v. *Chas A. Vogeler Co.* (1901), A. C. 102; 70 L. J. K. B. 181. See *ante*, p. 84.

an act of bankruptcy? If the Act of Parliament told us in so many words that we were bound to do so, then we should be obliged to exercise the jurisdiction."

And in the House of Lords Lord Halsbury said:[10]

"If the law has intended, and has expressed its intentions, that a foreigner may be made a bankrupt under the circumstances of this case, no Court has jurisdiction to disregard what the legislature has enacted."[1]

In conclusion upon this phase of the subject it may safely be said that there is no constitutional limitation upon the power of the British Parliament which any British Court can recognize. So far as other nations are concerned, its enactments are of

[10] 70 L. J. K. B., at p. 184. Lord Davey concurred *simpliciter*, and none of the other Lords expressed any dissent from the proposition as laid down by Lord Halsbury.

[1] For similar expressions of opinion, see (*e.g.*):

Per Bramwell, B., in *Santos* v. *Illidge* (1860), 8 C. B. N. S. 869; 29 L. J. C. P. 348.

Per Willes, J., in *Lee* v. *Bude, &c., Ry. Co.* (1871), 40 L. J. C. P. 285. It was contended that the Acts upon which the plaintiff founded his action had been obtained from Parliament by fraud. "As to this, I will observe that the Acts are the law of the land, and that we do not sit as a Court of Appeal from Parliament. We have no authority to act as regents over Parliament, or to refuse to obey a statute because of its rigour."

Per Cockburn, C.J., in *R.* v. *Keyn* (1876), L. R. 2 Ex. D. 63; 46 L. J. M. C., at p. 86. This celebrated judgment was concurred in *simpliciter* by Lush, J., Pollock, B., and Field, J. The question was as to the jurisdiction of the Central Criminal Court (without Act of Parliament) over foreigners in respect of offences committed on a foreign ship within the three-mile zone off the British coast. That zone was held by the majority not to be British territory by English law, either common or statutory. The decision led to the passage of the Territorial Waters Jurisdiction Act, 1878: see *post*, p. 243. There is scarcely a hint of doubt through all the judgments of the power of Parliament to extend its legislation to the three-mile zone, and the Act of 1878 was passed in direct affirmance of the power. There is no case throwing doubt upon the validity of the Act.

course inoperative beyond the borders of the Empire,[2] including within those borders the "floating islands" of the British navy and mercantile marine.[3] But if no construction otherwise be possible, effect must be given by all Courts throughout the Empire to Imperial legislation in respect of persons, property, and acts, not in an international sense within the legislative ken of the British Parliament. Such legislation is, of course, exceptional and, comparatively speaking, does not bulk large on the statute book. Nevertheless there is a respectable body of legislation of that character, some of which has already appeared in previous pages of this book and many instances will appear later. Here the question is as to the principle involved, as introductory to an enquiry as to the position of Canadian legislatures in reference to the doctrine of exterritoriality.

Colonial Legislation.

Does the doctrine of exterritoriality represent a constitutional limitation upon the power of a colonial legislature?

The weight of English authority at the present time is, it is conceived, in favour of the view that a colonial legislature cannot affix penal consequences to acts committed without the colony, though such consequences to the doers of the acts are to be visited upon them only within the colony, and necessarily, of course, only if they are caught within

[2] Subject to what was said *ante*, p. 65, as to the Foreign Jurisdiction Act, 1890.

[3] See *per* Cockburn, C.J., in *R.* v. *Keyn* (1876), 46 L. J. M. C., at p. 64; *R.* v. *Anderson*, L. R. 1 C. C. R. 161; *R.* v. *Carr*, L. R. 10 Q. B. D. 76. And as to the "three miles from shore" zone, see note (1) *ante*, p. 90; *Direct U. S. Cable Co.* v. *Anglo-Amer. Tel. Co.*, L. R. 2 App. Cas. 394; 46 L. J. P. C. 71; and *post*, chap. XII. on "Merchant Shipping."

the colony;[5] and that the limitation applies to the acts abroad of all persons, British subjects as well as foreigners, and whether ordinarily resident within the colony or not. But because there is weighty authority, both English and colonial, against the existence of any such limitation and because, it is thought, the law is not so definitely settled by the judgments of the Privy Council as to preclude its further consideration by that Court of last resort for the colonies, it is proposed to examine the authorities with some care. First, however, some preliminary observations.

The doctrine of exterritoriality is to be found only in case-law. It rests upon the common law, not upon statutory enactment. And, as to the colonies, it may safely be affirmed that neither in the old colonial charters (whether governor's commission, letters patent, or other form of grant of legislative power) nor in modern constitutional Acts for the various colonies, nor in the Colonial Laws Validity Act, 1865, is there any direct reference to such doctrine or any expressed limitation along such a line upon the legislative power conferred. In Canada's case there is no hint of such a doctrine in the British North America Act, 1867, so far at all events as the Parliament of Canada is concerned.[6] "To make laws for the peace, order, and good government of the colony" is the usual form of grant of legislative power to a colonial assembly; and the very wide range covered by these words is emphasized in several well-known cases.[7] It is, however, more to

[5] Extradition Treaties would obviously be inapplicable.

[6] In sec. 92, some of the enumerated classes contain the phrase "within the province," or "in the province," or "provincial," and much will appear later as to the effect of these phrases.

[7] *Powell* v. *Apollo Candle Co.* (1885), 10 App. Cas. 282; 54 L. J. P. C. 7; *Riel* v. *Reg.* (1885), 10 App. Cas. 675; 55 L. J. P. C. 28; *R.* v. *Crewe* (1910), 79 L. J. K. B. 874, *per* Kennedy, L. J., at p. 896; *Ashbury* v. *Ellis* (1893), A. C. 339; 62 L. J. P. C. 107.

the purpose here to refer to certain cases in which the nature and extent of colonial legislative power is examined not merely generally but in comparison with that of the British Parliament.

Colonial Legislative Power: Its Nature.

In the last analysis colonial rights, legally speaking, are held under Imperial grant, and one must always refer to the colonial "Charter"—proclamation, commission, or Imperial Act—containing the grant of legislative power, to ascertain its extent. Beyond the limits therein laid down the power cannot extend; within those limits it is supreme, "with authority subordinate indeed to Parliament but supreme within the limits of the colony for the government of its inhabitants."[8] Speaking of the Jamaica assembly in 1870, seven Judges of the Exchequer Chamber concurred in this statement:

"We are satisfied that a confirmed Act of the local legislature lawfully constituted, whether in a settled or a 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."[9]

This principle is fully recognized in the judgment of the Privy Council in a later case involving consideration of the position of the legislature in India.[10] Lord Selborne, delivering the opinion of the committee, referred to the judgment of the Court below as in effect treating the Indian legisla-

[8] *Kielley* v. *Carson* (1842), 4 Moo. P. C. 63 (Newfoundland Assembly).

[9] *Phillips* v. *Eyre*, L. R. 6 Q. B. 20; 40 L. J. Q. B. 28.

[10] *Queen* v. *Burah*, L. R. 3 App. Cas. 889; 3 Cart. 409; followed in *Powell* v. *Apollo Candle Co.*, 10 App. Cas. 282; 54 L. J. P. C. 7; 3 Cart. 432; *Ashbury* v. *Ellis* (1893), A. C. 339; 62 L. J. P. C. 107; 5 Cart. 636; *Riel* v. *Reg.*, 10 App. Cas. 675; 55 L. J. P. C. 24; 4 Cart. 1; *Hodge* v. *Reg.* (1883), 9 App. Cas. 117; 53 L. J. P. C. 1; *Liquidators' Case* (1892), A. C. 437; 61 L. J. P. C. 75.

ture as an agent or delegate acting under a mandate from the Imperial Parliament.

"But their Lordships are of opinion that the doctrine is erroneous, and that it rests upon a mistaken view of the powers of the Indian legislature,[1] and indeed of the nature and principles of legislation. The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, *plenary powers of legislation, as large, and of the same nature, as those of Parliament itself*. The established Courts of Justice when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would of course be included any Act of the Imperial Parliament at variance with it) it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions and restrictions."[2]

[1] "A question came before the law officers of the Crown and myself, in 1867, as to whether the Indian legislature, by virtue of the power inherent in Sovereignty, irrespective of Acts of Parliament, could pass laws binding on native subjects out of British India; and we were of opinion that, having regard to the manner in which Imperial legislation had been, from time to time, applied to the government of India, the extent of the powers of the legislature of India depend upon the authority conferred upon it by Acts of Parliament, and we thought it unsafe to hold that the Indian legislature had an inherent power to pass such laws. It is, however, right to mention that the then Queen's Advocate (Sir R. Phillimore), was of a different opinion": *Forsyth*, 17.

[2] Compare with this the language of Marshall, C.J., in *McCullough* v. *Maryland*, 4 Wheat. 421 (U. S. Supreme Ct.)

Again, in 1906, Lord Halsbury said:

"Every Act of the Victorian Council and Assembly requires the assent of the Crown; but when it is assented to it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different. If indeed it were repugnant to the provisions of an Act of Parliament extending to the colony it might be inoperative to the extent of its repugnancy—see the Colonial Laws Validity Act, 1865 (28 & 29 Vict., c. 63)—but with this exception no authority exists by which its validity can be questioned or impeached."[3]

To apply the doctrine of exterritoriality as a constitutional limitation upon the legislative power of a colonial assembly would seem *primâ facie* to enlarge constructively their prescribed limitations. In the absence of express condition or restriction, the limitation, if it exist, must exist because "the general scope of the affirmative words" is not sufficiently wide to cover legislation affecting acts done without the colony, although, just as in the case of Imperial legislation, no ex-territorial enforcement of such legislation is provided for or contemplated.

If such legislation, to be enforced within the colony, is beyond the general scope of such affirmative words as "laws for the peace, order, and good government" of the colony, it must be because it is contrary to some fundamental principle in the constitution of the Empire that a colonial legislature should have such a power. Is it because such a power improperly exercised might lead to trouble with foreign powers? The Crown in Council

[3] *Webb* v. *Outrim* (1907), A. C. 76, L. J. P. C. 25. In the last analysis all questions as to colonial legislative power do, perhaps, resolve themselves into a question of repugnancy either to the Imperial Act which is the colonial charter (*e.g.*, the British North America Act), or to some other Imperial Act extending to the colony; of which something will appear later. See *post*, p. 113.

(Imperial) has power within limits to disallow, and the Crown in Parliament (Imperial) has power without limit to override, colonial legislation which in the opinion of the home authorities might create friction with other nations; and these powers would seem sufficient for the purpose without any constructive curtailment by the Courts of the power of a colonial legislature to pass laws "having the operation and force of sovereign legislation."

It is remarkable that the English opinions and cases which affirm a constitutional limitation along this line, while of great weight by reason of the standing of those whose views are expressed, nevertheless almost entirely fail to set forth any statements of principle or line of reasoning to support the conclusion reached. In one aspect this may be considered as an element of additional weight; as indicative of an opinion that self-evident propositions were being laid down.

Opinions of Law Officers.

The law officers of the Crown in England have, almost without exception,[4] taken the view that colonial legislatures are under a constitutional limitation along this line. In 1855, this opinion was given[5] in reference to the assembly of British Guiana:

"We conceive that the colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits—three miles from shore[6]—or, at the utmost, can only do this over persons domiciled in the colony who may offend against its

[4] See note, *ante*, p. 94.

[5] By Sir J. D. Harding (Queen's Advocate), Sir A. E. Cockburn, A.-G. (afterwards Lord Chief Justice of England), and Sir R. Bethell, S.-G. (afterwards Lord Chancellor Westbury). *Forsyth*, 24.

[6] See note, *ante*, p. 90.

ordinances even beyond those limits but not over other persons." [7]

In 1861, the Parliament of (Old) Canada passed an Act to give jurisdiction to Canadian magistrates in reference to certain offences committed in New Brunswick. This Act was disallowed by order of the Queen in Council upon the report of the law officers of the Crown, who advised that "such a change cannot be legally effected by an Act of the colonial legislature, the jurisdiction of which is confined within the limits of the colony." [8]

The Dominion Parliament in 1869 passed an Act respecting perjury, the third section of which purported to affix penal consequences to the making abroad of affidavits for use in Canada. In a despatch [9] to the Governor-General, the Colonial Secretary adverted to this section as assuming "to affix criminal character to acts committed beyond the limits of the Dominion of Canada," and "as such a provision is beyond the legislative power of the Canadian Parliament," he suggested amendment. The Act was amended in the very next session, so as to limit the operation of the third section to affi-

[7] Strong, C.J., criticizes this opinion as uncertain and indeterminate, and contrasts it with the opinion referred to in note, *ante*, p. 94. He objects particularly to the introduction of the element of domicile. "Domicile, so far as I have been able to discover, apart from local residence on the one hand and national allegiance on the other, has nothing to do with criminal law": *In re Bigamy Sections* (1897), 27 S. C. R., at p. 476-7. But, surely, the close identification with the life of a colony indicated by habitual residence there—the word "domicile" seems to be used in that somewhat popular and untechnical sense in the opinion quoted in the text—affords strong moral support, to say the least, to legislation as to the conduct abroad of such habitual resident. As to allegiance: see *post*, p. 166.

[8] Jour. Leg. Ass. Can., 1862, p. 101.

[9] Can. Sess. Papers, 1870, No. 39.

davits made in one province of the Dominion for use in another province.[10]

English Cases Prior to Macleod's Case.

Of judicial opinion in England bearing upon the question, prior to 1891,[1] the following instances may be cited:

In 1851, the Court of Queen's Bench in England had to consider the validity and effect of an Act of the New South Wales assembly. An unincorporated banking association carried on its operations in the colony and the colonial assembly passed an Act "for the benefit of the bank" enabling the chairman of the company to sue or be sued on behalf of the company. Under this statute a judgment had been recovered in the colony against the chairman representing the company; and an action was brought upon this judgment in England against a shareholder resident in England who had not been served with process in the colonial action. He was held liable.[2]

"The colonial legislature, we think, clearly had authority to pass an Act regulating the procedure by which the contracts of the bank should be enforced in the Courts of the colony. Nor is there anything at all repugnant to the law of England or to the principles of natural justice[3] in enacting that actions on such contracts, instead of being brought individually against all the shareholders in the company, should be brought against the chairman whom they have

[10] 33 Vict. c. 26 (Dom.), amending 32-33 Vict. c. 23, s. 3.

[1] The date of the decision in *Macleod* v. *A.-G. New South Wales* (1891), A. C. 455; 60 L. J. P. C. 55. This is the case upon which, as will appear, the discussion mainly turns.

[2] *Bank of Australasia* v. *Nias* (1851), 20 L. J. Q. B. 284; *coram* Campbell, C. J., Wightman & Coleridge, JJ. The Chief Justice delivered the judgment of the Court. See also *Ashbury* v. *Ellis*, *post*, p. 105.

[3] See *ante*, p. 57.

appointed to represent them. A judgment recovered in such an action, we think, has the same effect beyond the territory of the colony which it would have had if the defendant had been personally served with process and, being a party to the record, the recovery had been personally against him. The Act imposes no new liability upon him but only regulates the mode in which that liability shall be judicially constituted. Any specific remedy upon the judgment which might have existed in the colony[4] cannot be obtained out of the colony and unless the judgment may be made the foundation of an action it could not in any manner be rendered available in this country."

Again, in 1870, in the well-known case against Governor Eyre already referred to[5] an Act of Indemnity passed by the legislature of Jamaica relieving the governor and others from all liability for acts done in the Island in connection with certain troubles there was held operative in England to protect the defendant from any action in the English Courts. The ordinary principle was applied that a release by the *lex loci* operates as a release everywhere; and colonial legislation along that line was held to be sovereign legislation as truly as the legislation of the Imperial Parliament or the parliament of a foreign state.

Running somewhat counter apparently to these decisions is the judgment of Mr. Justice Chitty in a case[6] which came before him in 1885. The Oriental Bank was in liquidation under a winding-up order made in England. The colony of Victoria proved a claim arising out of the deposit of government monies with the bank in the colony and claimed priority

[4] This refers to a provision in the Act for the issue of execution against the individual shareholders; and bears out what has already been said (*ante*, p. 95), that executive enforcement abroad is really out of the question.

[5] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 20; 40 L. J. Q. B. 28. See *ante*, p. 93.

[6] *In re Oriental Bank* (1885), 54 L. J. Ch. 327, at p. 330.

as for a Crown debt over the claims of ordinary creditors. A colonial statute was in force in the colony which enacted that Her Majesty should not enforce a demand against a public debtor or accountant or against any of his property in any other manner than any one subject can enforce a claim against another subject and his property and shall have such and the same lien, claim, and rights as any subject has and can enforce, and no others. Notwithstanding this wide language, it was held that the Crown in right of the colony, was not deprived of its prerogative right to priority in the English liquidation:

"The point is a short one. The Victorian statute is a mere procedure statute regulating the procedure by the Crown in Victoria in respect of Crown debts. The statute is also a colonial statute and has no force outside the colony. Section 17 deals with claims of the Crown sought to be enforced in the colony and contains nothing which can be said to operate outside the colony as a waiver by the Crown of its prerogative. The Crown's right to sue in this country and enforce its prerogative can only be taken away by express words or words of necessary implication and there is nothing of the kind to be found in the statute. It has been said that sec. 17 ought to be deemed to be incorporated in every contract made in the colony; but when so incorporated there is no reason why the statute should be interpreted as having effect outside the colony."[7]

Dealing more specifically with statutes which purport to affix penal consequences to acts done abroad, two *obiter dicta* of their Lordships of the judicial committee of the Privy Council should be

[7] Nothing appears as to any claim by other Victorian creditors. As to such creditors at least, it would seem difficult to support the judgment; and the decision, it is submitted with deference, is not in line with the earlier cases noted in the text. But no criticism of it appears in any later case.

cited. In 1873, in an extradition case [8] from the colony of Hong Kong, this passage occurs:

"Their Lordships cannot assume without evidence that China has laws by which a Chinese subject can be punished for murdering beyond the borders of the Chinese territory a person not a subject of China. Up to a comparatively late period England had no such laws. Moreover, although any nation may make laws to punish its own subjects for offences committed outside its own territory, still, in their Lordships' opinion, the general principle of criminal jurisprudence [9] is that the quality of the act done depends on the law of the place where it is done."

It was held, therefore, that there was no evidence that the murder by a Chinese subject of a Frenchman upon a French ship on the high seas was a crime against the laws of China and, as such, within the Extradition Treaty and the colonial ordinance passed to effectuate the treaty. But earlier in the judgment it was stated broadly that "it was impossible that the colonial government could punish Chinese subjects for acts committed within the territory of China."

Again, in 1875,[10] their Lordships speak of the Imperial Act of 1849 which conferred upon colonial Courts jurisdiction to try persons charged with offences upon the high seas within the jurisdiction of the admiralty [1] as conferring "a jurisdiction which their own legislatures could not confer."

Macleod's Case.

In 1891, the case of *Macleod* v. *Attorney-General of New South Wales* [2] came before the Privy Council

[8] *Atty.-Gen. of Hong-Kong* v. *Kwok-a-Sing* (1873), 42 L. J. P. C. 64, at p. 70.

[9] See, however, the note (5), *ante*, p. 67.

[10] *R.* v. *Mount*, L. R. 6 P. C. 283; 44 L. J. P. C. 58.

[1] See *post*, p. 234.

[2] (1891), A. C. 454; 60 L. J. P. C. 55.

and their Lordships' decision calls for careful study. Macleod had been convicted in the colony upon an indictment which charged him with having married in the colony in 1872 and with having, "while he was so married," married again in the United States of America in 1889, his first wife being then still alive. The indictment contained no allegation as to the national character of the accused nor as to his connection through domicile, habitual residence, or otherwise with the colony; and this is referred to in their Lordships' judgment. At the date of the second marriage a colonial statute was in force in New South Wales which provided: "Whosoever being married marries another person during the life of the former husband or wife—wheresoever such second marriage takes place—shall be liable to penal servitude for seven years." As already mentioned,[3] the Board applied to this statute the canon of construction against undue exterritorial operation and read the word "wheresoever" as meaning "wheresoever in the colony;" but the reason given for limiting the *primâ facie* wide natural meaning of the word [3a] was that with such wide meaning the statute would be *ultra vires*. The decision, therefore, cannot be considered a mere *obiter* on the question of legislative power.

"If their Lordships construe the statute as it stands, and upon the bare words, any person, married to another person, who marries a second time anywhere in the habitable globe is amenable to the criminal jurisdiction of New South Wales if he can be caught in that colony. That seems to their Lordships to be an impossible construction of the statute: *the colony can have no such jurisdiction*, and their Lordships do not desire to attribute to the colonial legislature an

[3] *Ante*, p. 85.

[3a] Compare *R.* v. *Russell* (1901), 70 L. J. K. B. 998, referred to *post*, p. 110.

effort to enlarge their jurisdiction to such an extent as would be *inconsistent with the powers committed to a colony*, and, indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general."

Later on, their Lordships reiterate the view that the statute, read in its wide natural meaning, would be *ultra vires*:—

"Their Lordships think it right to add that they are of opinion that, if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, '*Extra territorium jus dicenti impune non paretur*,' would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys* v. *Boosey*,[25b] expresses the same proposition in very terse language. He says (page 926): 'The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons must, *primâ facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect.' All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than her Majesty's subjects; more than any persons who may be within the jurisdiction of the colony by any means whatsoever; and that, therefore,

[25b] See *ante*, p. 72.

if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the colony did mean to give themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used subject to the well-known and well-considered limitation that they were only legislating for those who were actually within their jurisdiction and within the limits of the colony."

This decision must be taken as holding that a colonial legislature cannot affix criminal character to acts committed out of the colony by persons other than British subjects; and as a strong expression of opinion *obiter* against the validity of colonial legislation as to the acts abroad of any person. There is no suggestion of any such thing as colonial citizenship short of national British allegiance.[3c] As will appear, the Canadian Courts have treated this judgment as binding only to the extent of the actual decision, *i.e.*, as limited to criminal law and to the case of foreigners without the colony, and as leaving open the question as to British subjects whether such by birth or naturalization and whether (in the latter case) naturalized under British or colonial Acts.

But the most striking feature of this judgment is that the denial of the jurisdiction of colonial legislatures to legislate as to acts done by foreigners without the limits of the colony is based upon a denial of the jurisdiction of the British Parliament to legislate as to the acts of foreigners without the Empire; and such latter denial is opposed to the strong line of authorities reviewed in previous pages of this chapter.[3d]

[3c] See note (1), *post* p. 165.
[3d] *Ante*, p. 87, *et seq.*

Later English Cases.

Subsequent cases before the Privy Council have, it is conceived, put colonial legislative power upon a basis wider than a logical application of the *Macleod Case* would warrant.

Service Ex Juris.

In 1893, on an appeal from New Zealand, the Privy Council had under consideration [1] the validity of a colonial Act which purported to give jurisdiction to the Supreme Court of the colony to proceed against absent defendants without notice to such defendants "in actions founded on any contract made or entered into, or wholly or in part to be performed within the colony." There were other provisions for service out of the jurisdiction in specified cases but the contention of the appellant was, as their Lordships pointed out, "equally hostile to the validity of both groups of rules."

> "His broad contention is that the Act of Parliament (15 & 16 Vict., c. 72) which gives to the legislature of New Zealand power 'to make laws for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the laws of England,' does not give it power to subject to its judicial tribunals, persons who neither by themselves nor by agents are present in the colony. It is not contended that the rules in question are repugnant to the laws of England. In fact, they are framed on principles adopted in England. But it is said that the moment an attempt is made by New Zealand law to affect persons out of New Zealand that moment the local limitations of the jurisdiction are exceeded and the attempt is nugatory. This was put at the bar in so broad and abstract a way that it might be sufficient for their Lordships to answer it by equally abstract propositions."

[1] *Ashbury* v. *Ellis* (1893), A. C. 339; 62 L. J. P. C. 107.

What those propositions would have been is not stated, the Board preferring to deal with the specific rules under discussion. But the broad proposition contended for by the appellant is obviously denied and it may be taken as affirmed generally by this judgment that colonial legislation may affect and may be designed to affect persons out of the colony, and it was held specifically that the rules in question were within the limits of permissible legislation.

"Their Lordships are clear that it is for the peace, order, and good government of New Zealand that the Courts of New Zealand should, in any case of contracts made or to be performed in New Zealand, have the power of judging whether they will or will not proceed in the absence of the defendant. The power is a highly reasonable one. So far as regards service of process on persons not within their local jurisdiction, or substituted service, or notice in lieu thereof in proper cases, the English Courts have it conferred on them by the Imperial Parliament. The New Zealand legislature, it is true, has only a limited authority; but in passing the rules under discussion it has been careful to keep within its limits."

There seems to be a suggestion here of some difference between the extent of the authority of the British Parliament and that of a colonial legislature in regard to proceedings against absentees, but what that difference is does not appear.

Deportation:—

Again, in 1906, the Board had under consideration[5] "The Alien Labour Act" of Canada by which provision is made for the deportation of aliens in certain cases. It had been held by Mr.

[5] *Atty.-Gen. of Canada* v. *Cain* (1906), A. C. 542; 75 L. J. P. C. 80.

Justice Anglin [6] that as deportation under the Act would necessarily involve some exterritorial restraint of the deported alien the provision was *ultra vires*. This decision was reversed by their Lordships; and it was held that under the power to make laws for the peace, order, and good government of a colony a colonial legislature may pass a law for preventing an alien from entering the colony;[7] that expulsion is but the necessary complement of exclusion; and that therefore a colonial legislature may legislate as freely as may the Imperial Parliament [8] for the expulsion of immigrants who have entered the colony in contravention of its law, notwithstanding the fact that exterritorial constraint might necessarily, but incidentally, be involved.

Other Cases:—

In 1908, it was held by the Privy Council as a proposition too plain for serious discussion that a colonial Act incorporating a company may validly empower it to carry on its business " in or out of " the colony.[9]

And, lastly, reference may be made to the language of the Lord Chancellor, Earl Loreburn, in delivering the judgment of the Board in 1912:[10]

" In the interpretation of a completely self-governing constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the

[6] 10 Ont. L. R. 469.

[7] Citing *Musgrove* v. *Chun Teeong Toy* (1891), A. C. 272; 60 L. J. P. C. 28.

[8] " A colonial legislature has, within the limits prescribed by the statute which created it, 'authority as plenary and as ample as the Imperial Parliament possessed or could bestow' ": citing *Hodge* v. *R.* (1883), 9 App. Cas. 117; 53 L. J. P. C. 1.

[9] *Campbell* v. *Australian Mutual* (1908), 77 L. J. P. C. 117.

[10] *Re References of Constitutional Questions to the Courts* (1912), A. C. 571; 81 L. J. P. C. 210.

text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous—as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either—recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself—as, for example, a power to make laws for some part of his Majesty's dominions outside of Canada—or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act."

Canadian Cases.

The question has naturally been much discussed in Canadian cases. For example, it has been held by the Supreme Court of Canada that under the power conferred upon the Parliament of Canada to make laws in relation to "sea coast and inland fisheries" the Dominion Parliament has as full power in every respect in relation to the fisheries of Canada as was possessed by the Imperial Parliament itself;[2] that the "Act respecting Fishing by Foreign Vessels" (R. S. C., c. 94) was not merely valid legislation as to fishing rights within the three-mile limit off the Canadian coast but that it must also be read in the light of international law as authorizing a seizure on the high seas outside that limit, upon "fresh pursuit," for an offence committed within the limit. The decision is of far-reaching importance for, in effect, it affirms the

[2] *The Ship "North" v. R.* (1906), 37 S. C. R. 385; affg. 11 Exch. Ct. R. 141; 11 B. C. 473. The *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90, does not touch the exterritorial phase of this question.

power of the Parliament of Canada to exercise control upon its coast waters in respect of all those matters over which international law recognizes the right of a state bordering upon the sea to exercise jurisdiction. It has been held in a celebrated judgment that the sea coast below low water mark is not part of the realm and that consequently British Courts have not, without statutory authority, jurisdiction over crimes committed on the high seas, even within the three-mile zone;[3] but this jurisdiction has now been conferred by the Territorial Waters Jurisdiction Act, 1878,[4] in respect not only of the British coast but also of the coasts of all His Majesty's dominions. But in addition to this jurisdiction assumed by statute, international law recognizes the right of a state bordering upon the sea to exercise jurisdiction in (1) the prohibition of hostilities; (2) the enforcement of quarantine; (3) the prevention of smuggling; and (4) the policing of fisheries; this last involving the assertion and protection of the exclusive right of its own subjects to fish within the three-mile limit.[5] All these matters with the exception of the first named have been the subject of Canadian legislation, the validity of which is affirmed by the judgment of the Supreme Court of Canada above referred to.

The soil under the Great Lakes of Canada—Ontario, Erie, St. Clair, Huron and Superior—is Canadian territory in the full sense of the term under treaty with the United States, as far out as the international boundary line.[6] Their waters,

[3] *R.* v. *Keyn* (1876), L. R. 2 Ex. D. 152; 46 L. J. M. c. 17. See note (1), *ante*, p. 90.

[4] 41 & 42 Vict. c. 73 (Imp.), printed in Appendix.

[5] *R.* v. *Keyn*, *ubi supra*: see judgment of Martin, L.J., Adm: 11 Exch. Ct. R., at p. 147.

[6] *The Grace* (1854), 4 Exch. Ct. R. 283; and township boundary lines extend that far: R. S. O. (1887), c. 5, s. 7.

however, have been held to be "the high seas" and as such within admiralty jurisdiction.[7] The jurisdiction of the Ontario legislature in regard to the sale of liquor upon a United States ship plying upon Lake Huron on the Canadian side of the boundary line was discussed in a Divisional Court in Ontario[8] in 1905. The right of that legislature to ignore in its enactments the ordinary rule of international law as to the foreign territorial character of a foreign ship upon the high seas within the three-mile zone was affirmed;[9] but this was really *obiter* as the judgment was based on this, that the ship was "practically in the harbour of Goderich and contravening the local laws which prevailed there."

Canadian legislation on the subject of bigamy has brought the question up for very careful consideration. The British statute on the subject[10] provides: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony;" but the enactment was not to extend "to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty." The word "elsewhere" in this British statute was held not to be limited to British dominions but to have a

[7] *R.* v. *Sharpe* (1869), 5 Ont. P. R. 135; *per* Wilson, J. In *R.* v. *Meiklejohn* (1905), 11 Ont. L. R. 366, a Divisional Court (Meredith, C.J., Teetzel, J., and Mabee, J.), did not question this view, holding, however, that the ordinary territorial Courts had concurrent jurisdiction.

[8] *R.* v. *Meiklejohn*, *supra*.

[9] "When it is plain that the legislature has intended to disregard or interfere with that rule, the Courts are bound to give effect to its enactments": *per* Meredith, C.J., delivering the judgment of the Court. In a sense, no question as to the exterritorial operation of a provincial statute was involved; but the jurisdiction claimed was somewhat akin.

[10] 24 & 25 Vict. c. 100, s. 57 (Br.).

world-wide application;[1] while language *primâ facie* wider in a colonial statute was in *Macleod's Case* held to be limited to a second marriage within the colony (as already pointed out)[2] in order, as it was expressly put, to keep it within the limits of colonial legislative jurisdiction. The Canadian statute making bigamy a crime[3] defines it as "the act of a person who, being married, goes through a form of marriage with any other person in any part of the world," but there is the further provision that "no person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage." The enactment in this form has since the decision in the *Macleod Case* been upheld as valid by the Court of Appeal of Ontario in a concrete case[4] and by the Supreme Court of Canada upon a reference under the Supreme Court Act.[5] *Macleod's Case* has been treated as limited to the particular case of a man in no way identified with the colony at the date of the second marriage, either by domicile, habitual residence, or even British citizenship; and the leaving Canada with intent as a necessary ingredient in the crime—an ingredient involving wrong-doing in Canada—has been seized upon as further differentiating the two statutes. The only dissentient opinion in the Supreme Court of Canada was that of Strong, C.J. He thought that the offence struck at was the second marriage and that the *Macleod Case*, in principle, settled that a colonial legislature cannot affix criminal character to an act

[1] *R. v. Russell* (1901), 70 L. J. K. B. 998 (H.L.).
[2] *Ante*, p. 103.
[3] R. S. C. (1906), c. 146, s. 307 (*a*).
[4] *R. v. Brinkley* (1907), 14 Ont. L. R. 435.
[5] *Re Bigamy Sections* (1897), 27 S. C. R. 461.

any essential ingredient in which is to be done abroad.[6] The Imperial Parliament, in his opinion, might in express terms empower a colonial legislature so to do, but had not gone that far by a mere general grant of power to legislate as to "criminal law." Such a grant should be construed in accordance with the ordinary restrictive rule as not authorizing ex-territorial legislation;[7] but this, it is conceived, is altogether too restricted a view to take of a grant in a constitutional Act of plenary powers of legislation.[8] The judgment of Meredith, J.A., in the Court of Appeal for Ontario is noteworthy. He points out that it is altogether too narrow a proposition to say that the legislative power of a Canadian legislature is strictly limited to matters wholly within the territorial limits, and he instances the Extradition Act,[9] Deportation Act,[10] the enactment against bringing stolen property into Canada, and the legislation respecting officers in England and other countries maintained by Canada for political and commercial purposes.[1] Of the legislation in question he says:

"The enactment relates to an act done out of Canada, but that is only one circumstance in the constitution of crime; and it is immaterial whether that act is or is not lawful or is or is not a crime where it is done. It cannot

[6] This was the view previously taken by a Divisional Court (Armour, C.J., and Falconbridge, J.), in *R.* v. *Plowman* (1894), 25 Ont. R. 656.

[7] "If, therefore, the creation of a penal offence is by settled rules of interpretation to be restricted as regards locality, it would seem that on the same principles a grant of power to legislate on the subject of criminal law, to be exercised by a dependent legislature, should also be so construed": 27 S. C. R., at p. 475.

[8] See *post*, Chap. XVIII.

[9] See *post*, p. 194.

[10] See *ante*, p. 106.

[1] Provincial legislation as to the execution abroad of instruments concerning land may be added. See *ante*, p. 67.

be said that the gravamen of the offence is in the act so done; it is quite harmless so far as the enactment goes without the other ingredients (1) a British subject; (2) residence in Canada; and (3) leaving Canada with the intent to do the act. The wrong struck at was an evasion of the law of Canada in favour of peace and morality by the simple expedient of stepping over an international boundary line to go through a form of marriage."

Prior to the *Macleod Case* the question came before a Divisional Court in Ontario.[2] Untrammelled by any pronouncement of a higher Court, Boyd, C., examined the matter as one of principle and could find no limitation upon colonial legislative power along this line. "The objection is, that the Dominion Parliament had no authority to pass an Act making the contracting of a second marriage in a foreign country a crime. But where is to be found any limitation of its authority in this direction? It was argued as if the law were in some sense extra-territorial; but that is not so, for it is only intended to affect the man on his return to the Dominion after having committed the offence."[3] In his opinion the lines of judicial enquiry open to a Court in examining as to the validity of colonial legislation are only two: a consideration of the constitutional charter on the one hand and of the Colonial Laws Validity Act, 1865, on the other. In effect, this would in the case of Canada, whose constitution rests upon an Imperial statute, reduce the matter to the one question of repugnancy; repugnancy to the provisions, express or implied, of the British North America Act, or of other Imperial Acts

[2] *R.* v. *Brierly* (1887), 14 Ont. R. 525: Boyd, C., Ferguson, J., and Robertson, J.

[3] This rather unduly limits the meaning of the word "extra-territorial." It is constantly used in the books to describe the attempt by the legislature of one state to determine the legal relations to arise in that state from acts done and contracts entered into in another. See *ante*, p. 66.

extending to the colony either expressly or by necessary intendment. Among those so extending by necessary intendment should be included general Imperial Acts "of such universality and public importance as obviously to run paramount wherever the Queen's sovereignty obtains."[4] The Chancellor also examined the Canadian enactment, limited as it is to British subjects resident in Canada, as to its propriety in the light of recognized principles of international law, and found no fault with it along that line. This, however, does not really touch the principle involved.[5]

In conclusion it is submitted that there is no constitutional limitation upon the power of a Canadian legislature to make laws as to the results which are to follow in Canada (on proceedings either civil or criminal in the Canadian Courts) from acts done abroad, or as to the effect to be given in Canadian Courts to Canadian legislation in regard

[4] For example, the Act of Settlement, the Bill of Rights, etc. In the last analysis this view as to the limits of necessary enquiry is probably right, although it may be difficult to refer the limitation of colonial legislative power in the matter of national or international affairs to such a principle. See *post*, p. 134.

[5] Other Canadian cases bearing upon the question are *Peak* v. *Shields* (1882), 8 S. C. R. 579; *In re Massey Mfg. Co.* (1886), 13 Ont. App. R. 446; *Deacon* v. *Chadwick* (1901), 1 Ont. L. R. 346; *Couture* v. *Dom. Fish Co.* (1909), 19 Man. L. R. 65 (see *ante*, p. 81); *McMulkin* v. *Traders Bank* (1912), 26 Ont. L. R. 1: and also the cases as to provincial powers concerning taxation touching property without the province. See chap. XXX., *post*. In *Swift* v. *Atty.-Gen. (Ireland)* (1912), A. C. 276; 81 L. J. P. C. 158, question was raised in the House of Lords, but not decided, as to the power of the former Irish Parliament to declare void a foreign marriage, valid according to the law of the place where it was celebrated. On the construction of the statute it was held to have no extra-territorial application. *Deacon* v. *Chadwick*, *ubi supra*, appears to throw doubt, by reason of the very wide language used in the judgment of Armour, C.J., upon the validity of provincial legislation authorizing service *ex juris* on non-residents; but *Ashbury* v. *Ellis* (*ante*, p. 105), is opposed to such a view. This subject will come up again for discussion in treating of the jurisdiction of Canadian Courts.

to persons and property without the Dominion or province, as the case may be, or to rights of action accrued abroad. The *Macleod Case*, it is true, is directly opposed to such a wide statement of existing law; but that case, as already pointed out, is based upon a wrong principle. It denies validity to colonial legislation because of a constitutional limitation upon the power of the British Parliament to legislate as to the acts abroad of persons not British subjects; a limitation which it is submitted is negatived by a long line of undoubted authority.[6]

That a colonial legislature may go to extremes along this line is beside the question; in the last resort the power of disallowance or the exercise by the Imperial Parliament of its supreme legislative authority should suffice to prevent international complications.[7] But that a colonial legislature exercising its right to make laws "having the operation and force of sovereign legislation" for the peace, order, and good government of the colony should have no right to have regard to men's acts and conduct abroad with a view to holding them responsible for such acts or conduct when they seek to renew or acquire Canadian citizenship or residence is a proposition, it is submitted, radically unsound. Our immigration laws, the constitutional validity of which, even to the extent of authorizing the extra-territorial application of force, has been affirmed by the Privy Council, ignore all such limitations. In what way the undesirable immigrant, British subject or foreigner alike, may have to answer for his previous acts and conduct abroad is immaterial; penal consequences are affixed and it matters not in principle that the penalty may be exclusion or expulsion rather than imprisonment within the colony.

[6] See *ante*, p. 87 *et seq.*
[7] See *ante*, p. 95.

CHAPTER VIII.

The Crown in Council (Imperial).

Imperial Prerogatives.

The British Ministry, like the British Parliament, has a dual character. It is at once the Crown in Council (British) administering the government of the United Kingdom and the Crown in Council (Imperial)[1] governing the Empire in its international relations and in those matters which concern the relations of the colonies to the motherland or to each other. It administers the law as laid down in Imperial Acts in so far as such administration is not confided by such Acts to the Crown in Council (colonial); for it must be remembered that in so far as the executive powers of the Crown are regulated by Imperial statute the statute governs, whether the question be as to the government of Great Britain or of a colony; as, for example, of Canada under the British North America Act. The British Ministry as the Crown in Council (Imperial) also administers that small part of the common law which concerns the Crown's Imperial authority over the colonies; and it is this relatively small part of the common law, not controlled by statute, which alone creates any real difficulty.

There has been no more fruitful cause of dispute and debate in reference to the government of

[1] It is difficult to express in any short phrase the idea of the Crown acting in Council with, on the one hand, the British Ministry, and, on the other, a Colonial Ministry. The Crown in Council (Imperial), the Crown in Council (British), and the Crown in Council (colonial), may answer the purpose.

the British colonies than the lack of a proper understanding of that branch of English law which relates to the prerogatives of the Crown; and in our Canadian federal system the same want of appreciation of the essential principles which underlie that law has given rise to notable disputes between federal and provincial authorities as to which executive head, the Governor-General or a Lieutenant-Governor, should exercise the prerogative in certain cases.[2]

It was, perhaps, not much to be wondered at. The older authorities on this branch of law[3] so mix statements of law with hymns of praise and ascriptions of attributes almost divine to the wearer for the time being of the Crown of England that it is a difficult task to disentangle the thread of legal principle which runs through them.[4] *Ubi jus est vagum ibi misera servitus* has no more forcible illustration than in the history of the struggles of the English people to free themselves from the despotism of government by prerogatives, unearthed by the industry of Court lawyers and tortured into legal justification for executive oppression.

So careful indeed, the old writers put it, is the common law in its provision for the due execution of the laws of the land, so careful to provide a check against any legislative hindrance to their smooth and expeditious working, that the King is by the

[2] *The Pardoning Power Case* (1894), 23 S. C. R. 458; the *Q. C. Case* (1898), A. C. 247; 67 L. J. P. C. 17; 23 Ont. App. R. 792.

[3] "A topic that in some former ages was ranked among the *arcana imperii*; and, like the mysteries of the *bona dea*, was not suffered to be pried into by any but such as were initiated in its service; because, perhaps, the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober enquiry."—*Blackstone.*

[4] "The boundless crop of venerable learning as to pardon and prerogative"—*per* Hagarty, C.J., in the *Pardoning Power Case*, 19 O. A. R., at p. 36.

common law and for the very purpose of protecting the royal executive authority[5] a constituent branch of Parliament; and the consent of the Crown is absolutely essential to the validity of all Acts. This right to give or withhold consent has been treated as itself one of the prerogatives of the Crown, the cover and protection to all the other prerogatives; and upon its exercise the law recognizes no limitation. While from time to time Parliament has withdrawn certain prerogatives from the Crown and has in regard to others fettered their exercise by conditions as to time, place, and manner of exercise, such action has always had the consent of the Crown, no matter how unwillingly or under what stress of circumstances given; and this supreme prerogative of giving or withholding consent no power short of revolution can take away. This is the aspect of the question which is pre-eminently apparent in the older law books, and it is the inadequacy of this mode of treatment which makes this branch of the law so difficult to the student.

But when it is remembered that this supreme prerogative has fallen into complete desuetude;[6] that it and all other prerogatives of the crown are simply common law powers in aid of efficient executive government; and that Parliament, the Crown in Parliament, as the sovereign law-making body may legislate and has legislated freely as to the powers of the Crown in Council, much of the difficulty vanishes.

Dr. Dicey defines the prerogatives of the Crown as "nothing else than the residue of discretionary or arbitrary authority which at any given time is

[5] *Chitty*, Prerog. of the Crown, 3. See *post*, p. 324, for an extract from Gov. Cornwallis' Commission, disclosing this reason in frank terms.

[6] It was last exercised by Queen Anne in 1707. See *Anson*, Law and Custom of the Const., 2nd ed., Pt. I., 287.

legally left in the hands of the Crown;'[7] and Anson speaks of them as "ancient customary powers,"[8] not, as Blackstone says, out of the ordinary course of the common law, but "part of the common law and as capable of ascertainment and definition by the Courts as any other part of the unwritten law of the land."[9]

In so far as the Imperial Parliament has legislated as to the Crown's powers the statute determines their residence, extent, and efficacy; and this proposition holds good as to those prerogatives which, as having more particular reference to the relations between the Crown and colonial government, may be termed Imperial. And, in like manner, where the Crown's prerogatives in relation to the internal government of a colony have rightly been taken possession of by the statute law of the colony, the statutory law must govern.

Where the whole legislative power of a colony is entrusted to one legislature, the sole task is to determine what prerogatives are truly Imperial, that is to say, have essentially reference to the Crown's Imperial headship. But where, as in Canada, the legislative power of a colony is distributed among different legislatures, the very difficulty which arises as to the line of division for legislative purposes arises also as to the residence of the Crown's prerogatives.

The attributes, privileges, and powers of the Crown must, therefore, be considered, as a matter of principle rather than of detail, in reference to these questions:

(1) *What powers, attributes, etc., statutory or prerogative, are truly Imperial?*

[7] *Dicey*, Law of the Const., 5th ed., p. 355.
[8] *Anson*, Pt. II., 2.
[9] *Ib.*, 3.

It will appear that these attach exclusively to the Crown in Council (Imperial); that they have no colonial counterpart; and that without an express grant of power in that direction colonial legislation cannot usurp or affect them.

(2) *What are the powers, etc., statutory or prerogative, of the Crown in Council (British) in reference to what may be called the local government of the United Kingdom?*

These have in very many cases their colonial counterparts, powers, etc., both statutory and prerogative, exerciseable by the Crown in Council (colonial), and colonial legislation may as freely deal with these as the British Parliament may deal with their British counterparts.

This division of the prerogatives of the Crown into Imperial and Non-Imperial has not been adopted by English writers, but it is the vital distinction from a colonial standpoint. As to the Dominion of Canada on the one hand and the provinces of Canada on the other, there is the further and difficult question as to the line of demarcation between their respective spheres of authority; but apart from that, the question is quite as important from a Canadian standpoint as from that of any other colony. What is that Imperial sphere of executive authority which colonial legislatures cannot invade?

A short reference, however, to the classification adopted by English writers will serve to bring the various prerogatives into view.

One large principle of division appears in the classification of prerogatives into attributes, and prerogatives proper. The attributes of sovereignty (or pre-eminence), perfection, and perpetuity, find expression in the sayings:—"The King is properly the sole executive magistrate," "The King can do

no wrong," and " The King never dies." The prerogatives proper represent, according to the common law, powers of action in connection with every department of executive government, administrative and judicial. Chitty divides them—the line of division is not very exact—into:

1. Prerogatives in reference to *foreign states and affairs*, such as the sending of ambassadors, the making of treaties, making war and peace, and the various acts of executive government necessary in connection with these various matters.[10]

2. Prerogatives arising from the recognized position of the Crown as *Head of the Church*.[1]

3. Prerogatives in connection with the assembling, proroguing, and dissolving of Parliament.[2]

4. Prerogatives annexed to the position of the Crown as the *fountain of justice*,[3] such as the creation of Courts, the appointment of Judges and officers in connection therewith; the pardoning of offenders, and the issuing of proclamations.

5. Those prerogatives attributed to the Crown as the *fountain of honor*, such as the bestowing of titles,[4] franchises, etc.

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[10] *Chitty*, 39.—These are all matters which for obvious reasons are still treated as matters of Imperial concern, and over which, therefore, colonial legislatures have no legislative power. See, however, sec. 132 of the B. N. A. Act.

[1] *Chitty*, 50.—See *post*, p. 275.

[2] *Chitty*, 67.—See ss. 38 and 50, B. N. A. Act.

[3] *Chitty*, 75.

[4] *Chitty*, 107.—These would seem to be, so to speak, prerogatives at large, not connected with any particular department of executive government. In *Reg.* v. *Amer*, 42 U. C. Q. B. 391, the power to issue commissions of Oyer and Terminer seems to have been treated as a prerogative at large; but it is submitted there are none such in relation to our self-government; certainly none are conferred on the Governor-General by his commission. See as to franchises, *Perry* v. *Clergue*, 5 O. L. R. 357; *Re Ferries* (1905), 36 S. C. R. 206; *Atty.-Gen.* v. *British Museum* (1903), 72 L. J. Chy. 742.

6. The superintendency of commerce.[5]

7. The prerogatives in connection with the collection of the revenue.[6]

Sergeant Stephen, in his new Commentaries on the Laws of England (founded on Blackstone), adopts a somewhat different division. According to his arrangement, prerogatives are either *direct*, or by way of *exception*. Of the latter he says:[7]

"Those by way of exception are such as exempt the Crown from some general rules established for the rest of the community—as in the case of the maxims that no costs shall be recovered against the Crown; that the Sovereign can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects."[8]

Direct prerogatives he divides into three classes, according as they regard, (1) the royal character; (2) the royal authority; and (3) the royal income. Of these classes the prerogatives by way of exception, and those regarding the royal authority and the royal income, correspond with Chitty's class "prerogatives proper."

Sir W. R. Anson[9] groups the Crown's prerogatives under three heads: (1) in connection with the executive and legislative departments of government; (2) feudal rights as overlord; (3) attributes ascribed to the Crown by mediæval lawyers.

It needs but a cursory glance at the last edition of *Stephen's* Commentaries to make clear that Parliament has so taken control of these prerogatives, has so fettered their exercise by conditions as to the

[5] *Chitty*, 162.

[6] *Ib.*, 199.

[7] *Steph.* Comm., 5th ed., Vol. II., 494.

[8] See *Liquidators of Mar. Bank* v. *Rec.-Gen.* (*N.B.*), (1892) A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1; *Exchange Bank* v. *Reg.*, 11 App. Cas. 157; 55 L. J. P. C. 5; *Reg.* v. *Bank of N. S.*, 11 S. C. R. 1.

[9] "Law and Custom of the Const.," Pt. II., 3 *et seq.*

manner, time, and circumstance of putting them into execution, has indeed in so many cases indicated the particular official by whom they are to be exercised, that although exercised in the Sovereign's name all arbitrary power in connection with them has vanished. They have very largely ceased to be common law prerogatives and are now statutory powers. This is particularly true of those prerogatives which have been spoken of above as non-imperial or local to the United Kingdom; but even the Imperial prerogatives have to some extent been the subject of Imperial legislation as will appear from a study of the various Acts conferring constitutions upon the colonies. To what extent in Canada's case will be discussed hereafter.

Upon the acquisition of a colony, what is the position of its inhabitants in reference to the prerogatives of the Crown? This broad question finds scant consideration in the older text writers on this branch of law. The two following quotations exhaust all that Chitty has to say on the subject:[10]

"Though allegiance be due from everyone within the territories subject to the British Crown, it is far from being a necessary inference that all the prerogatives which are vested in His Majesty by the English laws are, therefore, exercisable over individuals within those parts of His Majesty's dominions in which the English laws do not, as such, prevail. Doubtless those fundamental rights and principles on which the King's authority rests, and which are necessary to maintain it, extend even to such of His Majesty's dominions as are governed by their own local and separate laws. The King would be nominally, and not substantially, a sovereign over such of his Dominions if this were not the case. But the various prerogatives and rights of the Sovereign which are merely local to England, and do not fundamentally sustain the existence of the Crown or form the pillars on which it is supported, are not, it seems, *primâ*

[10] *Chitty*, 25, 32.

facie extensible to the colonies, or other British Dominions which possess a local jurisprudence distinct from that prevalent in, and peculiar to England. To illustrate this distinction: the attributes of the King, sovereignty, perfection, and perpetuity, which are inherent in, and constitute His Majesty's political capacity, prevail in every part of the territories subject to the English Crown, by whatever peculiar or internal laws they may be governed. The King is the head of the Church;[1] is possessed of a share of legislation; and is *generalissimo* throughout all his Dominions; in every part of them His Majesty is alone entitled to make war and peace; but in countries which, though dependent on the British Crown, have different and local laws for their internal governance, *as, for instance, the plantations or colonies*, the minor prerogatives and interests of the Crown must be regulated and governed by the peculiar and established law of the place.[2] Though, if such law be silent on the subject, it would appear that the prerogative, as established by the English law, prevails in every respect; subject, perhaps, to exceptions which the differences between the constitution of this country and that of the dependent Dominion may necessarily create in it. . . . In every question, therefore, which arises between the King and his colonies respecting the prerogative, the first consideration is the charter granted to the inhabitants. If that be silent on the subject, it cannot be doubted that the King's prerogatives in the colonies are precisely those prerogatives which he may exercise in the mother country."

Chitty, it will be noticed, emphasizes the distinction between fundamental rights and principles and those merely local to England. He does not bring out clearly that the "peculiar and established law" of a colony may largely rest upon colonial enactment; nor does he deny in terms though he does inferentially the power of a colonial legislature to interfere with the fundamentals, just as he inferentially

[1] But see *post*, p. 275.

[2] See *Exchange Bank* v. *Reg.*, 11 App. Cas. 157; 55 L. J. P. C. 5; *Liquidators' Case* (1892), A. C. 437; 61 L. J. P. C. 75; 5 Cart. 1.

asserts the power to legislate locally as to what he calls the minor prerogatives and interests of the Crown. In a conquered or ceded colony, therefore, which continues to be governed by a foreign law,[3] unless and until the new sovereign see fit to change the law, the *lex prerogativa* of English jurisprudence is no more to be deemed in force than is any other branch of English law; in a settled colony that *lex prerogativa* is carried with them by emigrating colonists to the same extent and with the same conditions as to applicability as is the case with other branches of the law of England;[4] but subject as to all colonies, however acquired, to the operation therein, as Chitty puts it, of those fundamental principles on which the King's authority rests and which are necessary to maintain it, and, it should be added, to those principles which underlie the relations between the Crown and the colonies.[5]

The question then is: *What powers, statutory or prerogative, come within the class of fundamentals; or, as already indicated, what powers, etc., are truly Imperial?*

As to all others, the power of colonial legislatures being, within the sphere of their authority, plenary,

[3] This aspect of the question is of peculiar interest to the Province of Quebec. See *Re Marriage Laws* (1912), 46 S. C. R. 132.

[4] Chapter XIV., *post*, p. 271.

[5] "Authorities which it would be useless to quote, so familiar are they, establish that in a British colony governed by English law the Crown possesses the same prerogative rights as it has in England, in so far as they are not abridged or impaired by local legislation, and that even in colonies not governed by English law and which, having been acquired by cession or conquest, have been allowed to remain under the government of their original foreign laws, all prerogative rights of the Crown are in force except such minor prerogatives as may conflict with the local law." *Per* Strong, J., in *R. v. Bank of N. S.*, 11 S. C. R. 1.

"The prerogative of the Queen when it has not been expressly limited by local law or statute is as extensive in Her Majesty's colonial possessions as in Great Britain." *Liquidator's Case*, *supra*.

such a legislature may, the Crown as a constituent branch assenting, legislate in reference to the Crown's prerogatives in the colony as fully as the British Parliament may so legislate for the United Kingdom. The Crown is bound by colonial legislation, and, for example, is entitled in Quebec to no priority over other creditors because "the subject of priorities is exhaustively dealt with by them" (i.e., by the codes passed by the local parliament) "so that the Crown can claim no priority except what is allowed by them."[6] A glance through Canadian statutes will disclose that Canadian legislatures have freely legislated in reference to the Crown's prerogatives, and that the arbitrary power of the executive is reduced to a minimum, as in the United Kingdom. Now, however, that executive responsibility to parliament, and through parliament to the electorate, is so thoroughly recognized and the "conventions" of the constitution which ensure such responsibility so universally observed, the tendency of legislation is to increase the amount of discretion allowed to the executive officers in the various departments of the public service; but this is not a matter of prerogative (a common law right) but a statutory discretion.

The question as between the federal and provincial governments of Canada will be discussed later; the question here is as between the home government and the colonies. For the purposes of this enquiry, the Imperial prerogatives of the Crown may be considered under these heads:

1. Attributes and privileges.
2. Powers.

[6] *Exchange Bank* v. *Reg.*, 11 App. Cas. 157; 55 L. J. P. C. 5. See also *Chitty*, 7; *Gould* v. *Stewart* (1896), A. C. 575; 42 L. J. Chy. 553; *Re Oriental Bank*, 28 Chy. D. 643, 649; 54 L. J. Chy. 327; *Commrs. of Taxation* (*N.S.W.*) v. *Palmer* (1906), 76 L. J. P. C. 41; *Atty.-Gen.* (*N.S.W.*) v. *Curator* (1907), 77 C. J. P. C. 14.

Attributes.

The Crown's Headship.

(1) In legislation:

The attributes of pre-eminence and perpetuity as described by Chitty and the older writers are comprehended in the one word Monarchy, the constitutional headship of one person; and that is fundamental in the constitution of the Empire.

Canada is a Dominion "under the Crown of the United Kingdom,"[7] and there must be in any Canadian legislation a saving of the sovereignty of the British Parliament, the Crown-in-Parliament (Imperial). In the Quebec Resolutions, upon which the British North America Act is founded, this restriction is express;[8] but it was no doubt deemed unnecessary to insert any words of express restriction upon this point in the Act itself as it is an implied but no less fundamental restriction upon all colonial legislation. In a very early case[9] Chief Justice Vaughan, under the heading "What the Parliament of Ireland cannot do," says:

1. It cannot alien itself, or any part of itself, from being under the dominion of England; nor change its subjection.

2. It cannot make itself not subject to the laws of and subordinate to the Parliament of England.[10]

3. It cannot change the law of having judgments there given, reversed for error in England,[1] and others might be named.

[7] B. N. A. Act, 1867, preamble.
[8] See Appendix.
[9] *Craw* v. *Ramsay*, Vaughan, 292.
[10] *I.e.*, to the Crown in Parliament (Imperial).
[1] As to appeals to the Privy Council, see *post*, p. 157.

4. It cannot dispose the Crown of Ireland to the King of England's second son, or any other but to the King of England.

It may seem idle to pursue this subject further. There is no doubt that any colonial legislation inconsistent with the colonial relationship would be unconstitutional and void.[2] The monarchical principle has been already shewn to obtain throughout the Empire; and those sections of the British North America Act which embody that principle have already been quoted.[3]

The title to the Crown is, it is true, parliamentary; but the very statute of Anne which is a practical denial of the theory of divine right impliedly asserts the Crown's headship in legislation. It adjudges traitors all who affirm "that *the Kings or Queens of this realm* with and by the authority of Parliament are unable to make laws and statutes of sufficient force and validity to limit and bind the Crown and the descent, limitation, inheritance, and government thereof."[4]

The Crown's Headship.

(2) In executive government:

Here, again, there is no Imperial legislation to weaken the operation of the monarchical principle, much less to destroy it. Such legislation is conceivable perhaps; but it would spell such a revolution, peaceful or otherwise, that it is quite unprofitable to contemplate its possible course. At all events, Canada's constitutional charter, the British North

[2] *International Bridge Co.* v. *Can. Southern Ry.*, 28 Grant, at p. 134; and see *Tully* v. *Principal Officers of H. M. Ordnance*, 5 U. C. Q. B. 6.

[3] *Ante*, chap. III.

[4] 6 Anne c. 7 (Imp.).

America Act, expressly declares the Crown's headship in the executive government of Canada and any Canadian legislation in a contrary sense is of course impossible.

Personal Irresponsibility:—

"The King can do no wrong." This is not merely a truism in politics but a legal proposition. It is said by the older writers to flow from the kingly attribute of perfection; but it is really an immunity by way of compensation for the absence of despotic power. The sovereign in the eye of the law never acts alone. The constitution does not contemplate the possibility of private wrong doing;[5] and for the work of government the law prescribes not merely that some minister or official must be legally responsible for every act of the King, but also that such responsibility be fixed by the observance of forms prescribed by law, written or customary.[6]

[5] *Dicey*, Law of the Const., 5th ed., 24.

[6] "It is now well established law that the Crown can act only through ministers, and according to certain prescribed forms, which absolutely require the co-operation of some Minister, such as a Secretary of State or Lord Chancellor who, therefore, becomes, not only morally, but legally, responsible for the legality of the Act in which he takes part. Hence, indirectly but surely, the action of every servant of the Crown and, therefore, in effect of the Crown itself is brought within the supremacy of the law of the land." *Ib.*, p. 307. See also *Anson*, Pt. II., 42, *et seq.*; *Tobin* v. *R.* (1864), 33 L. J. C. P. 199; *coram*, Erle, C.J., Williams, J., Willes, J., and Keating, J.

"The maxim that the King can do no wrong is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong; that which the Sovereign does personally the law presumes will not be wrong; that which the Sovereign does by command to his servants cannot be a wrong in the Sovereign, because if the command be unlawful it is in law no command; and the servant is responsible for the unlawful act in the same way as if there had been no command." *Ib.*, p. 205. Erle, C.J., delivered the judgment of the Court.

To no one else in the Empire does this immunity extend. The officer who performs any act must answer in the Courts for its legality and can plead no superior's command for an illegal act.

"Let it not, however, be supposed," said Cockburn, C.J.,[7] "that a subject sustaining a legal wrong at the hands of the Crown is without remedy. As the sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown. The learned counsel for the suppliant rested part of his argument on the ground that there could be no remedy by action against an officer of state for an injury done by the authority of the Crown, but he altogether failed to make good that position. The case of *Buron* v. *Denman*,[8] which he cited in support of it, only shews that where an act injurious to a foreigner, and which otherwise might afford a ground of action, is done by a British subject and the act is adopted by the government of this country, it becomes the act of the state and the private right of action becomes merged in the international question which arises between our own government and that of the foreigner.[9] The decision leaves the question as to the right of action between subject and subject wholly untouched. On the other hand, the case[10] of the general warrants, *Money* v. *Leach*, and the cases of *Sutton* v. *Johnstone*[1] and *Sutherland* v. *Murray*[2] there cited are direct authorities that an action will lie for a tortious act, notwithstanding it may have had the sanction of the highest authority in the state. But in our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown; a position which seems

[7] *Feather* v. *R.* (1866), 35 L. J. Q. B. 200, at p. 209; *coram.* Cockburn, C.J., Crompton, J., Blackburn, J., and Mellor, J. The Chief Justice delivered the judgment of the Court.

[8] 2 Exch. R. 167.

[9] As to "acts of state" in relation to colonial government, see *post*, p. 145.

[10] 1 Term. Rep. 493.

[1] 3 Burr. 1742.

[2] 1 Term R. 538.

to us to rest on principles which are too well settled to admit of question and which are alike essential to uphold the dignity of the Crown on the one hand and the rights and liberties of the subject on the other."

It is beyond the scope of this work to deal with that large branch of public law which concerns the position of public officials and their relations to private individuals.[3] But there is one class of officers on whose behalf a claim to personal irresponsibility has been strongly urged, namely, colonial governors; and this would appear to be the proper place to deal with their position in this respect as recognized in the Courts.

Colonial Governors:—

In the early days of colonial history there seems to have been a disposition on the part of governors appointed to distant portions of the Empire to set themselves above the law,[4] and to insist upon the applicability to their case of the maxim, "The King can do no wrong." As in England the Sovereign cannot be arrested by virtue of any legal process, or be impleaded in any Court of Justice in reference to any act, public or private,[5] so these early colonial governors, claiming a delegated sovereignty, attributed to themselves a corresponding sacredness of person, and an equal immunity from the jurisdiction of Courts of Justice. But by a series of decisions [6] the attributes with which they had in fancy

[3] It will be briefly touched upon again in reference to "acts of state." See *post*, p. 144 *et seq.*

[4] See preamble to 11 & 12 Wm. III. c. 12 (Imp.), quoted in the note on p. 133, *post*.

[5] *Steph.* Comm., Vol. II., 498; *Chitty*, "Prerog. of the Crown." 374; *ante*, p. 129.

[6] *Fabrigas* v. *Mostyn*, Cowp. 161; 1 Sm. Ldg. Cas. (8th ed.), 652; *Cameron* v. *Kyte*, 3 Knapp P. C. 332; *Hill* v. *Bigge*, 3 Moo. P. C. 465; *Musgrave* v. *Pulido*, L. R. 5 App. Cas. 102; 49 L. J. P. C.

clothed themselves were one by one stripped from them until now their position, as legally recognized, may be shortly summarized thus:

1. The powers, authorities and functions of a colonial governor are such, and such only, as are conveyed expressly or impliedly by his commission.[7]

2. For any act done *quâ* governor and within his authority as such, he incurs no liability, either *ex contractu*[8] or in tort.[9]

3. For any act done in his private capacity, or done *quâ* governor but beyond his powers as such, a colonial governor is amenable to the civil jurisdiction of His Majesty's Courts to the same extent as any other individual; and no distinction can be drawn between the Courts of England and the colonial Courts in respect to their jurisdiction to entertain an action against a governor.[10]

4. To any action brought against him he cannot plead in abatement a plea of personal privilege—of immunity from being impleaded. He must plead in bar the larger plea that the acts complained of were

20. And see *Broom*, "Const. Law," 622, *et seq.*; *Forsyth*, 84, *et seq.*; *Todd* "Parl. Gov't in Brit. Col.," *passim*; *Harvey* v. *Lord Aylmer*, 1 Stuart, 542.

[7] *Cameron* v. *Kyte*, *Hill* v. *Bigge*, *Musgrave* v. *Pulido*, *ubi supra*.

[8] *Macbeth* v. *Haldimand*, 1 T. R. 172; and see *Palmer* v. *Hutchinson*, 6 App. Cas. 619; 50 L. J. P. C. 62.

[9] *Reg.* v. *Eyre*, L. R. 3 Q. B. 487; 37 L. J. M. C. 159.

[10] *Hill* v. *Bigge*, *Musgrave* v. *Pulido*, *ubi supra*. See also *Wall* v. *MacNamara*, 1 T. R. 536; *Wilkins* v. *Despard*, 5 T. R. 112; *Glynn* v. *Houston*, 2 M. & G. 337; *Oliver* v. *Bentick*, 3 Taunt. 456; *Wyatt* v. *Gore*, Holt N. P. 299 (defendant was Lieut.-Gov. of Upper Canada, and had to pay £300 for libelling plaintiff in the colony). It is to be observed that the commissions of some of these governors conferred military authority, and their cases were in respect of military excesses, but the principle is throughout the same. See too *Phillips* v. *Eyre*, L. R. 4 Q. B. 225; 6 Q. B. 1; 40 L. J. Q. B. 28.

done *quâ* governor and within the limits of his authority as such.[1]

5. A governor must plead specially his justification: in other words, when a governor justifies any act as being within the powers vested in him by his commission, he must plead the commission, his powers thereunder, and show by proper averments that the acts complained of were done in the proper exercise of those powers.[2]

6. A governor is amenable criminally to the Courts of the colony for crimes committed in the colony, whether such crimes are connected with his official position or entirely aside from it.[3]

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[1] *Musgrave* v. *Pulido*, *ubi supra*. As to "acts of state," see *post*, p. 145.

[2] Cases *supra* and *Oliver* v. *Bentick*, 3 Taunt. 460.

[3] This would seem to result from the reasoning upon which *Hill* v. *Bigge*, and *Musgrave* v. *Pulido*, *supra*, are based. The preamble to the statute 11 & 12 Wm. III. c. 12—"An Act to punish governors of plantations, in this Kingdom, for crimes by them committed in the plantations"—characterizes the governors of those days as "not deeming themselves punishable for the same here nor accountable for such their crimes and offences to any person within their respective governments"; for remedy whereof provision was made by the statute for the trial of any offending governors in England. This statute was extended so as to apply to other persons holding colonial appointments, by 42 Geo. III. c. 85, and both statutes are to-day in force. They have, however, been held to apply only to misconduct in office. Ellenborough, C.J., thus characterizes the later statute (*Reg.* v. *Shaw*, 5 M. & S. 403): "The object of this Act was in the same spirit with the Act of 11 & 12 William III., to protect His Majesty's subjects against criminal and fraudulent acts committed by persons in public employment abroad, *in the exercise of their employments*; to reach a class of public servants which that statute did not reach and to place them *in pari delicto* with governors. It has no reference in spirit or letter to the commission of felonies. . . . The reason of the thing, *a priori*, would lead us to conclude that the jurisdiction as to trial of felonies *should be restrained to the local Courts*."

Powers.

(1) *Foreign Relations.*

Internationally, state recognizes only state. A colony, no matter how complete for purposes of local self-government its political organization may be, is nevertheless a subordinate community and has no place in the councils of the nations. It cannot therefore be, internationally, a party to an act of state. In all intercourse with foreign powers the British nation is represented by the Crown, acting only upon the advice and with the consent of the British ministry. The appointment of those who are to act as the accredited agents of the nation rests necessarily with the Crown in Council (Imperial). Treaties and diplomatic arrangements of all sorts are made between His Britannic Majesty as the Empire's representative and embodiment and the executive head of each foreign state. Over none of these matters have the colonial governments or legislatures any control or jurisdiction, *primâ facie.*

Treaties: their colonial operation.

The British North America Act indeed provides:—

> 132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

Inferentially there is a statement here that Imperial treaties may impose obligations upon Canada and its provinces; but the section itself imposes none. Nor is anything said as to the nature and extent of these obligations in the event of the Cana-

dian Parliament and Government taking no step to recognize or meet them. And, manifestly, no treaty-making power is conferred by the section.

This is, perhaps, the most important of the many questions which arise touching Canadian relations to foreign states and foreigners. It presents itself in two aspects: (1) To what extent, if any, can the treaty-making power of the Crown operate to alter or affect private rights as to person or property? (2) Is an Imperial treaty a law of the Empire so as to limit the power of a colonial legislature to make laws which, but for the treaty, would ordinarily be within its competence? The question, of course, in either aspect is as to an Imperial treaty apart from Imperial legislation sanctioning it, or making provision for its operation. Such legislation may be expressly or by necessary intendment extended to the colonies, one or more; in which case it is both a law and a limitation upon legislative power in any colony to which it so extends.

But is a treaty in itself the equivalent of an Imperial Act? The answer must, it is submitted, be in the negative. The Crown, without Parliament, cannot by bargain with a foreign power, any more than in any other way, make any alteration in the law of the land either of the United Kingdom or of any colony above the rank of a Crown colony; and no treaty can of itself be a limitation upon the legislative power conferred upon Canada by Imperial Act. The authorities which either support these views or render them doubtful merit careful attention.

In a despatch from the colonial office in 1872 this statement appears: "Her Majesty's Government apprehend that the constitutional right of the Queen to conclude treaties binding on all parts of the Empire cannot be questioned, subject to the discretion

of the Parliament of the United Kingdom or of the colonial parliaments, as the case may be, to pass any laws which may be required to bring such treaties into operation."[4]

This may be taken to express the view of the law officers of the Crown in England at that date, and it recognizes that a treaty may fail of operation in the absence of Imperial or colonial legislation, as the case may be. Failing such legislation, in what sense does the treaty bind?

The question as to the effect of a treaty in regard to private rights, both as to person and property, is discussed in but few cases. And, it should be observed, the United States authorities afford but little direct assistance because by an express provision in their constitution treaties duly made are "the supreme law of the land" equally with Acts of Congress duly passed.[5] Nevertheless, even there, if the treaty calls for payment of money, legislation would be necessary to carry out its provisions.[6]

That a treaty made in time of peace does not of itself without statutory authority extend so far as to alter the law either as regards individual rights in property, rights of action, or as to personal liberty is clearly established. For example:

A foreign ship is ordinarily liable to be arrested in an action *in rem* if within British waters. Warships of a foreign power are excepted from this general rule. But it was held by Sir R. Phillimore in *The Parlement Belge*[7] that a convention between Her Britannic Majesty and the King of the Belgians could not arbitrarily and contrary to the fact give to the government-owned Belgian mail-packet plying

[4] *Todd*, Parl. Gov. in Brit. Col., Ed. 1880, 196.
[5] Art. VI.: see *U. S.* v. *Schooner "Peggy,"* 1 Cranch 103.
[6] *Kent*, Comm.
[7] (1879), 48 L. J. P. 18.

between Ostend and Dover the character of a public ship of war so as to render her immune from arrest in an action for damages suffered in a collision in Dover Harbour between her and another ship.[8]

"If the Crown had power without the authority of Parliament by this treaty to order that the *Parlement Belge* should be entitled to all the privileges of a ship of war . . . the right of the subject—but for the order, unquestionable—to recover damages for the injuries done to him by her is extinguished. This is a use of the treaty-making prerogative by the Crown which I believe to be without precedent and in principle contrary to the law of the constitution."[9]

Sir R. Phillimore instances the Declaration of Paris of 1856, by which certain of the Great Powers came to an agreement as to certain of the rights of belligerents (to that time notoriously matter of dispute) as a treaty not requiring parliamentary sanction. It dealt with national, not private, rights.

The treaty in question before him was itself a sequel to the Treaty of Berne of 1874 respecting international postal arrangements and that treaty had been carried into effect by an Imperial Act which recited that the treaty and its regulations "cannot be carried into effect except by the authority of Parliament"; and in the judgment of Sir R. Phillimore other instances are cited of parliamentary ratification of treaties[10] involving the public revenue and taxation.

[8] The Court of Appeal, it is true (see 5 P. D. 197), reversed this decision, but upon the ground that Sir R. Phillimore had unduly limited the exempted class; that it covered not only ships of war but also any public ship of a foreign power engaged in carrying out a national purpose, such as the transmission of mails. No view was expressed as to the effect of the convention, as the packet did not stand in need of its protective clauses.

[9] *Ib.*, at p. 24.

[10] An earlier case before Lord Stowell, *The Elsebe Maas*, 5 C. Rob. 123, involving a question as to the restoration of prizes

In two cases [1] it was held that the International Convention for the Protection of Industrial Property (patents, trade marks, etc.) signed at Paris in 1883, to which Great Britain and the United States afterwards acceded, could not have effect given to it in regard to certain United States trade marks by reason of the provisions of the English Act then in force; in other words, that the Convention could not override existing law. In the earlier case, Sterling, J., after referring to the article of the Convention upon which the applicants relied, said:

"By that article Her Majesty is now bound. Certainly, according to my construction of the Act, the Act does not afford the means of carrying out that article and it will no doubt be for Her Majesty's Government to consider . . . what legislative steps ought to be taken to give effect to that article if necessary. But with that I have nothing to do: I have simply to consider this question, dealing as I am with and being bound by a statute of the realm."

Registration was refused in this case because the application was not made within the time limited by the Imperial statute, the Convention containing no such limitation. In the later case, registration was refused because the trade mark did not satisfy in regard to the signs composing it the legislation of Great Britain, while the Convention expressly declared that registration should not be refused upon

taken during war, was treated by Sir R. Phillimore as not decisive of the question before him, as that case had turned upon the Crown's right (recognized indeed in the Prize Act then in force) to restore prize at any time before actual condemnation, thus, of course, depriving the captors of the fruits of the capture. And the case before the Supreme Court of the United States, *U. S.* v. *The Peggy*, 1 Cranch 103, was treated as turning upon the same point; but it seems clear upon perusal of the report that it really turned upon the express clause in the constitution to which reference has already been made.

[1] *In re The California Fig Syrup Co.'s Trade Mark* (1888), 58 L. J. Ch. 341: Stirling, J., *In re the Carter Medicine Co.'s Trade Mark* (1892), 61 L. J. Ch. 716: North, J.

such a ground so long as the requirements of the law of the state where the trade mark had been originally registered were satisfied.

In 1892 the Privy Council had to consider the effect of a treaty between Great Britain and France by which a *modus vivendi* had been arrived at in regard to the Newfoundland fisheries.[2] One of the terms agreed to by Great Britain was that no lobster factories would be permitted to operate on those parts of the coasts of the island colony where the French enjoyed rights of fishery under earlier treaties. A British ship of war was sent to enforce observance of the terms of the *modus vivendi* and her captain took possession and stopped the working of a factory within the area of prohibition. There had been no statutory confirmation of the arrangement, either Imperial or colonial, and the captain was held liable in damages for what was held to be an unauthorized trespass upon private property.

"The learned Attorney-General, who argued the case before their Lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty. The proposition, he contended for, was a more limited one. The power of making treaties of peace is, as he truly said, vested by our constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that, if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace: that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law. Whether the power contended for does exist in the case of treaties of peace,

[2] *Walker* v. *Baird* (1892), A. C. 491; 61 L. J. P. C. 92.

and whether, if so, it exists equally in the case of treaties akin to a treaty of peace, or whether in both or either of these cases interference with private rights can be authorised otherwise than by the Legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion. Their Lordships agree with the Court below in thinking that the allegations contained in the statement of defence do not bring the case within the limits of the proposition for which alone the appellant's counsel contended."

Anson terms this judgment an evasion;[3] but it must be taken to affirm that the treaty in question was not a treaty of peace nor akin thereto as intended to avert imminent war, in which cases alone the question would be arguable.

Question has also arisen as to the power of the Crown to surrender by treaty any part of the national territory, without parliamentary authority. It was exhaustively discussed before the Privy Council in 1876[4] but, as their Lordships held that no cession had taken place, it became unnecessary to decide the point. The High Court of Bombay had indeed denied the power of the Crown to cede territory in time of peace and their Lordships went so far as to say that they had such grave doubts of the correctness of the "general abstract doctrine" laid down by the High Court that they put their affirmance of the judgment upon the other ground. When, in 1890, Heligoland was ceded to Germany the cession was made subject to the approval of Parliament. This was obtained but it was very strongly argued that no such approval was required.[5] Distinctions were drawn between the cession of territory after a war and during a time of peace, and between territory in Crown colonies, in colonies as to which

[3] Law and Custom of the Const., 2nd ed., Pt. II., 298.
[4] *Damodhar Gordhan* v. *Deoram Kangi* (1876), 1 A. C. 352.
[5] *Anson*, *ib.*, 299.

Parliament had legislated, and in colonies with representative assemblies; but it is deemed unnecessary to do more here than refer to the argument before the Privy Council in 1876 in the Indian appeal above mentioned.

As to personal liberty, it has not been seriously questioned that extradition treaties cannot of themselves and without legislation confer upon executive officials any right to arrest or detain a person accused of crime committed abroad. Legislation is necessary to legalize the arrest and to constitute the necessary tribunals to pass upon the *prima facie* case for surrender to be made out by the applying country. It has, it is true, been held that the Imperial Extradition Act, 1870 [6] is to be read with and is limited by the treaties to which it applies; so that, for example, where the Swiss treaty of 1874 stipulated that under it neither power should be asked to surrender its own subjects, a British subject, whose extradition was sought by Switzerland and who had been committed for surrender under the unlimited wording of the Extradition Act, was discharged upon *habeas corpus*.[7] But it has also been held that the provisions of the treaty as to the form of the requisition may be waived by the British authorities;[8] a holding which clearly denies to a treaty the character of Imperial legislation and treats it as an international contract merely. That the right to hold for extradition depends upon and is entirely governed by the Act has never been seriously questioned since the decision in *Re Jacques Besset*.[9] The warrant of commitment having been held fatally defective, it was nevertheless urged that the prisoner should be remanded to custody, but the Court held

[6] 33 & 34 Vict. c. 52: see *post*, p. 195.
[7] *R.* v. *Wilson* (1877), 3 Q. B. D. 42; 48 L. J. M. C. 37.
[8] *Re Counhaye* (1873), L. R. 8 Q. B. 40; 42 L. J. Q. B. 217.
[9] (1844), 6 Q. B. 481; 14 L. J. M. C. 17.

that the gaoler could not detain him except under the Act. "Our gaolers are not gaolers for foreign states," said Denman, C.J., thus judicially affirming what he had stated in the House of Lords that there is no common law right to surrender and "indeed no means of securing persons accused of crimes committed in a foreign country." Under a writ of *habeas corpus* at common law any person arrested or detained upon such a charge otherwise than under the Act would be certainly discharged. This subject is one discussed elsewhere in this book.[10] Here the point to be emphasized is that no treaty with a foreign power can, of itself, without legislation, affect the right of the individual to that freedom of person which is the legal right of every man within British territory.

(2) *Does an Imperial treaty of itself act as a limitation upon colonial legislative power?* Is a colonial Act, otherwise *intra vires*, inoperative because of its repugnancy to an existing treaty with some foreign power? Let it be granted that treaties are binding international contracts so far as there can be binding contracts where there is no international Court to enforce them, and that it is the clear duty of the British ministry, as the sole Imperial council, not only to urge Imperial or colonial legislation or both wherever necessary to the honourable fulfilment of treaty obligations, but also to disallow any colonial legislation which puts obstacles in the path of national good faith; it is the legal operation of treaties as a limitation upon legislative power in the colonies in the absence of legislative affirmance and aid that now concerns us.

After the grant of representative institutions to a colony by the Crown the Crown may no longer legislate for the colony;[1] *a fortiori* it may not do so where

[10] See *post*, p. 194 *et seq.*
[1] See *ante*, p. 16.

the legislative power of the colony is conferred and defined by Imperial Act. That, within the limits so defined, colonial legislative powers are " plenary powers of legislation as large and of the same nature as those of Parliament itself " is a proposition often affirmed by the Privy Council.[2] That is itself the law of the land which it is not in the power of the Crown, without Parliament, to alter or curtail by any agreement with a foreign power.

Subject therefore to the possible exceptions of a treaty made to conclude a war,[3] it seems clear that the Crown in Council (Imperial) cannot by treaty place any restraint on the legislative power of a colony as conferred upon such colony by Imperial Act.

Of Canadian legislation adopting an Imperial treaty the Act of 1907, known as the Japanese Treaty Act[3a] is an instance. It was held to make the provisions of that treaty part of the law of Canada, subject only to the provisions of the Canadian Immigration Act; and a provincial statute of British Columbia designed to place further restrictions upon the immigration of Japanese into that province was held *pro tanto* void.[4] That Canadian legislation was necessary in order to effectuate the treaty was not doubted by any of the Judges.

In conclusion, it may be suggested that the Colonial Laws Validity Act, 1865,[5] is not conclusive

[2] See *ante*, p. 93 *et seq.*

[3] *Forsyth*, Cases and Opinions, 182, *et seq.* "When it was resolved, in 1782, to recognize the independence of the North American colonies, an Act of Parliament (22 Geo. III. c. 46), was passed authorizing the Crown to make peace with the colonies and to repeal and make void Acts of Parliament relating to them." See also *ante*, p. 140.

[3a] 6 & 7 Ed. VII., c. 50.

[4] *In re Nakane* (1908), 13 B. C. Rep. 370. Earlier cases in British Columbia on the subject of Asiatic immigration are referred to *post*, p. 672.

[5] See *ante*, p. 57.

upon the question. It recognizes that there may be "orders and regulations," not under Acts of Parliament, which may nevertheless have in a colony the force or effect of Imperial Acts. But it seems reasonably clear that the reference is to Crown colonies as to which the Crown in Council (Imperial) had still, in 1865, a right to legislate.[6] "Orders and regulations," moreover, is not an apt phrase to cover a treaty. Subject to these observations, the Colonial Laws Validity Act does enact, in effect, that the only limitation upon colonial legislative power is existing Imperial legislation or (confining the matter to the Crown in Council) orders and regulations made under such Imperial legislation. A treaty made under the authority of or ratified by an Act of the Imperial Parliament is in effect Imperial legislation and, as such, a limitation upon colonial legislative power if extending to the colonies; but a treaty made without Parliament is not legislation at all.

Acts of State:—

So far as concerns the internal government of the Empire, there is no such thing as an "act of state" into the legality of which the Courts will not enquire. As between this Empire and foreign nations or foreigners abroad, the Crown in Council (Imperial) may take the responsibility of approving acts, either before or after their commission,[7] which as against the private persons affected by them would be illegal and in such case British Courts will leave the complainant to his diplomatic remedy.[8] To constitute an act of state these two facts must appear: *First*, the act must be done to one who is not at the time a British subject either by birth or

[6] See *ante*, p. 16.

[7] *Buron* v. *Denman*, 2 Exch. 167.

[8] See judgment of Cockburn, C.J., in *Feather* v. *R.*, *ante*, p. 130.

by presence within the Empire;[9] and this in effect means that an act of state, the legality of which the Courts will not undertake to question, can take place only without the state territory, except in the case of diplomatic representatives and the case of the alien refused admission at the threshold;[10] *Second*, the act must be sanctioned or adopted by the state, as an act done by a duly authorized agent of the state.

It follows that a colonial government cannot be a party to an act of state as above indicated; and a colonial governor or any other person connected with a colony can perform an act of state—*i.e.*, an act into the legality of which a British Court, colonial or other, should not enquire—only as an Imperial officer under instructions from the British Ministry, the Crown in Council (Imperial); and any such act must, as intimated before, be done without the Empire.[1] No such "act of state" can be done by a colonial governor acting under the advice of the colonial ministry.

In the latest case on the subject[2] an action was brought in Jamaica against the governor of that colony for the seizure and detention in a port of the Island of a British ship of which the plaintiff was the charterer. The governor pleaded to the jurisdiction that his act was an "act of state" done by him as governor and in the reasonable exercise of his discretion as such. The Supreme Court of

[9] See *post*, p. 166.

[10] *Musgrove* v. *Chung Teeong Toy* (1891), A. C. 272; 60 L. J. P. C. 28.

[1] For a very able discussion of this question, see the judgments of the Victorian Judges in *Musgrove* v. *Chung Teeong Toy*, 14 Vict. L. R. 349; 5 Cart. 570. The judgment of the Privy Council (*ubi supra*), does not touch this point. It held that the Victorian Act as to Chinese exclusion did convey the necessary power to the officer who had acted; but the decision was put on the broad ground that an alien has no right *enforceable by action* to enter British territory. See *ante*, p. 107.

[2] *Musgrove* v. *Pulido*, L. R. 5 App. Cas. 102; 49 L. J. P. C. 20.

Jamaica gave judgment of *respondeat ouster* against the governor. The Privy Council affirmed this judgment, treating the plea as a dilatory plea of privilege; but they also examined it as a plea on the merits and held it insufficient as not alleging any facts upon which the Court could judge whether in truth the act complained of was or was not an act of state. What is such an act is discussed in the light of earlier cases. The result may be thus summarized: A colonial governor may be authorized by his commission to perform that act of Sovereign power described as an act of state; but the Courts will in any case enquire so far into the facts as may be necessary to determine whether or not it is an act of state.[3] If the act is one covered by the governor's commission and is, moreover, an act which the sovereign could himself lawfully do under the law of the land that of course is a defence upon the merits.[4] But if the act be one within the commission but one which does not pretend to be justified by the municipal law, it must be an act of Sovereign power in relation to international or extra-municipal affairs in which case the Courts will not enquire further.[5] Indeed it may be said that the power of the Crown in international affairs is of so widely discretionary a character, so little touched by statute law, that municipal Courts must deem its exercise as always lawful; and in this view it is correct to say that every official act must be justified by law.

As between Crown and subject—this includes any person within British territory—the legality of any act done within the Empire may be questioned before the ordinary Courts, and the orders of the Crown in Council or indeed of any superior officer cannot

[3] *Rajah of Tanjore's* Case, 13 Moo. P. C. 22.

[4] *Cameron* v. *Kyte*, 3 Knapp P. C. 332.

[5] *Rajah of Tanjore's Case, ubi supra.* See *ante*, p. 131, as to the position generally, of a colonial governor before the Courts.

avail to render legal any act unauthorized by law. And the same rule applies to any act done anywhere to the British subject by birth.[6] "State necessity" was put forward as justifying the seizure of papers under a warrant of a secretary of state during the exciting times following Wilkes' publication of the notorious No. 45 of the North Briton.[7] Lord Camden thus dealt with the argument:[8]

"It is then said that it is necessary for the ends of government to lodge such a power with a state officer and that it is better to prevent the publication before than to punish the offender afterwards. I answer, if the legislature be of that opinion they will revive the Licensing Acts. But if they have not done that I conceive they are not of that opinion. And with respect to the argument of state necessity or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning nor do our books take notice of any such distinctions.[9] Sergeant Ashley was committed to the Tower in the 3rd of Charles I. by the House of Lords only for asserting in argument that there was a "law of state" different from the common law and the ship-money Judges were impeached for holding, first, that state necessity would justify the raising money without consent of Parliament; and, secondly, that the King was judge of that necessity.

If the King himself has no power to declare when the law ought to be violated for reasons of state, I am sure we, his Judges, have no such prerogative."

Even the duty of the Crown to carry out treaty obligations cannot justify the invasion of private rights.[10]

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[6] *Tobin* v. *R.*, *Feather* v. *R.* See *ante*, pp. 129-130.

[7] See *Leach* v. *Money* (1765), 3 Burr. 1692; *Wilkes* v. *Wood* (1763), Lofft. 1.

[8] *Entick* v. *Carrington* (1765), 2 Wils. 275; *Broom*, at p. 605 (2nd ed.).

[9] *Anson* says that these words "will meet every case of this character": Pt. II., 477 (2nd ed.).

[10] *Walker* v. *Baird* (1892), A. C. 491; 61 L. J. P. C. 92. See *ante*, p. 139.

Powers (*continued*).

(2) *In connection with the colonies.*

1. *To legislate*:

The power of the Crown without Parliament to legislate for conquered or ceded territory or for the plantations has already been discussed in these pages.[1] No such power now exists so far as the self-governing colonies are concerned; subject to this apparent but not real exception, that an Imperial Act extending to the colonies (one or more) may and not infrequently does confer a subordinate and delegated power upon the Crown in Council to settle details and make regulations for the better carrying out of the purposes of the Act. And such orders in council (Imperial), though valid only if within the power conferred,[2] are in effect Imperial legislation; and colonial legislation repugnant thereto is "to the extent of such repugnancy but not otherwise" void and inoperative.[3]

2. *To appoint governors*:

As has been already pointed out, the British North America Act makes no provision as to the appointment of the Governor-General of Canada.[4] There is, in fact, no Imperial Act dealing with the subject of the appointment of the Crown's representatives in the colonies generally or in particular, unless (as in the case of the Canadian provinces) the appointment was intended to be placed in other hands than those of the British Ministry, i.e., of the

[1] *Ante*, pp. 11, 15 *et seq.*
[2] *Atty.-Gen.* v. *Bishop of Manchester*, L. R. 3 Eq. 436.
[3] Colonial Laws Validity Act (1865). See *ante*, p. 57.
[4] *Ante*, p. 27.

Crown acting by and with the advice of the Imperial council. The lieutenant-governors of the Canadian provinces are appointed by the Governor-General in Council,[5] that is to say, by the Dominion Ministry. Their appointment is an appointment by the Crown, represented to that end by "a governing body who have no power and no functions except as representatives of the Crown." But under the British North America Act that is the only legal method of appointment; the Crown's prerogative in that regard has been taken from the Crown in Council (Imperial) and lodged in the Crown in Council (Dominion). In Australia, on the other hand, the appointment, not only of the Governor-General of the Commonwealth, but also of the various State Governors is with the British Ministry, the Crown in Council (Imperial).[6]

The Imperial Parliament has, indeed, legislated in regard to the conduct of colonial Governors;[7] but the Crown's prerogative to appoint whom it will to represent it in a colony has never been the subject of any general restrictive legislation. And, it is hardly necessary to say, any colonial attempt at legislation along this line would be a declaration of independence; and would be clearly void as repugnant to the constitutional charter, whether Governor's Commission or Imperial Act.[8]

(3) *To disallow Colonial Legislation.*

In settling the form of government for the various colonies,[9] the Crown has from the beginning reserved to itself the right to disallow colonial legis-

[5] B. N. A. Act, s. 58.
[6] See *ante*, p. 27.
[7] See *ante*, p. 133.
[8] See *ante*, p. 128.
[9] See *ante*, p. 15.

lation;[10] and in the first Imperial Act which framed a colonial government (The Quebec Act, 1774), and in all Acts since passed to that end, the right is reserved. As to Canada the right is statutory, and its mode of exercise is provided for in the British North America Act:

> 56. Where the Governor-General assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State; and if the Queen in Council within two years after the receipt thereof by the Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by speech or message to each of the Houses of the Parliament, or by proclamation, shall annul the Act from and after the day of such signification.

At common law no such time limit existed, and this is one instance of the conversion of an unlimited common law prerogative into a limited statutory power.[1] The two years being allowed to pass without such disallowance, the executive department of the Imperial government can no longer interfere with the operation of the Act; nothing short of repugnant Imperial legislation can weaken its validity.

The power of disallowance bears no necessary relation to the question of legislative competence. As expressed by the Chancellor of Ontario,[2] it "may operate in the plane of political expediency and in that of jural capacity;" but the jurisdiction of the

[10] See, for example, the Commission to Gov. Cornwallis of Nova Scotia: *Houston*, Const. Doc., at p. 12. There is an interesting discussion as to the nature of this right, and whether it is a legislative or judicial power in the Crown in Council, in *Brinton Coxe*, "Judicial Power and Unconstitutional Legislation," p. 203, *et seq.* See *ante*, p. 51.

[1] See *ante*, p. 122.

[2] *Pardoning Power Case*, 20 O. R., at p. 245; 5 Cart., at p. 546.

Courts to pass upon the question of the legislative competence of the Federal Parliament to enact a particular law operates in the plane of jural capacity alone, and is not affected in any way by the non-exercise of the power of disallowance under this section 56.

The power to disallow provincial legislation has been taken from the Crown in Council (Imperial) by the British North America Act, and is now lodged with the Crown in Council (Dominion).[3]

90. The following provisions of this Act respecting the Parliament of Canada, namely, the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, *the disallowance of Acts*, and the signification of pleasure on bills reserved, shall extend and apply to the legislatures of the several provinces as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the legislatures thereof, with the substitution of the Lieutenant-Governor of the province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State of one year for two years, and of the province for Canada.

This is, perhaps, the proper place to advert to a strange error into which Dr. Dicey has fallen in the work to which frequent reference has already been made—a work which, in its elucidation of the principle of the *supremacy of law* as the fundamental principle of Anglo-Saxon government the world over, stands to-day *facile princeps;* but which, in its reference to the colonies generally, and to Canada in particular, displays an apparent lack of apprecia-

[3] It may be noted that prior to Confederation the power of disallowance rested solely upon prerogative so far as the Maritime Provinces were concerned. In (old) Canada the power was limited by the Union Act, 1840 (3 & 4 Vict. c. 35: Imp.), sec. 38, to two years, as in the B. N. A. Act.

tion of the true position of affairs.[4] To confine attention, however, to this particular error: Dr. Dicey is completely astray in laying it down that the lodging of this veto power in the hands of the Governor-General in Council—*i.e.*, with the Dominion government—was intended to obviate the necessity for resort to the Courts for the decision of constitutional cases involving the determination of the line of division between the sphere of authority of the Dominion Parliament and that of a provincial Assembly.

"The futility of a hope grounded on a misconception of the nature of federalism," is a strong expression,[5] and contains a very direct charge that

[4] "The Law of the Constitution," The first chapter of Dr. Dicey's book—"On the Nature of Parliamentary Sovereignty"—contains nothing which might not be, with equal truth, said of the legislative bodies throughout Canada. What he writes in disproof of "the alleged legal limitations on the legislative sovereignty of Parliament,"—namely, limitations arising out of the precepts of the moral law, the prerogatives of the Crown, and the binding effect upon Parliament of preceding Acts of Parliament—is all equally applicable to the position of Canadian legislatures. And with reference to them, too, it may be said, that there is no competing legislative power either in the Crown, in either branch of the legislature (where the legislature happens to be bi-cameral), in the constituencies, or in the law Courts. The second chapter "is to illustrate the characteristics of such sovereignty, by comparing the essential features of a sovereign Parliament like that of England, with the traits that mark non-sovereign law-making bodies,"—among which he classes colonial legislatures. Yet, on a later page he lays it down: "When English statesmen gave parliamentary government to the colonies, they almost, as a matter of course, bestowed upon colonial legislatures authority to deal with every law, whether constitutional or not, which affected the colony, subject, of course, to the proviso, rather implied than expressed, that this power should not be used in a way inconsistent with the supremacy of the British Parliament. The colonial legislatures in short are, within their own sphere, copies of the Imperial Parliament. They are, within their own sphere, sovereign bodies, but their freedom of action is controlled by their subordination to the Parliament of the United Kingdom."

[5] To charge the men who had in hand the framing of the scheme of Confederation with "misconception of the nature of

the Fathers of Confederation did not know what they were about in this matter. One who, like Dr. Dicey, speaks with authority, should not have penned such a grave charge without first consulting the debates which took place in the various legislatures upon the "Confederation Resolutions." Had he done so, he would have found that a very sharp line of distinction was drawn between the exercise by the Dominion government, *as a matter of political expediency*, of the power of disallowance of provincial Acts, and the exercise by the Courts of *the judicial function* of declaring an Act *ultra vires*. As expressed by the Chancellor of Ontario,[6] the supervision touching provincial legislation entrusted to the Dominion government works in the plane of political expediency as well as that of jural capacity, while the question for the Courts is as to the latter merely. The framing of the Quebec Resolutions, upon which the British North America Act is

federalism" comes with rather bad grace from Dr. Dicey. He speaks (p. 133), of a federal state as "a political contrivance intended to reconcile national unity and power with the maintenance of state rights. "The end aimed at," he says, "fixes the essential character of federalism." A very clear statement this; and yet, Dr. Dicey apparently fails to note that "state rights" may be paraphrased and generalized as "local self-government," and that his definition of federalism is clearly applicable to those "conventions" of the British Constitution which regulate the relations between Great Britain and her colonies. There is, too, another passage in which he is historically inaccurate. He treats the division of power between the legislative and executive departments of government under the American system, and the restrictions which appear in their "Constitution" upon interference with *individual* rights, as being part and parcel of—"connected with"—the same federal idea of division. In fact, several of the constitutions which existed in the individual states prior to the adoption of "the Constitution of the United States," exhibit both these characteristics—the first, because that was thought to be the English principle, and the second, because of the prevalence then of the doctrines of Rousseau and Montesquieu.

[6] *The Pardoning Power Case*, 20 O. R., at p. 245; 5 Cart., at p. 546.

founded, was the work of the most eminent legal minds of that day in Canada; and a glance at the debates upon these Resolutions will show that they thoroughly appreciated the distinction pointed out in later days by the Chancellor. Throughout the debates it was clearly recognized that the exercise by the Dominion government of the power of disallowance was to be exercised in support of federal unity—*e.g.*, to preserve the minorities in different parts of the confederated provinces from oppression at the hands of the majorities. That it was not intended to obviate the necessity for resort to the Courts is apparent from one extract. Complaint was made that, while the Dominion government was invested with this *veto* power, no authority was provided to supervise its exercise; and the question was further asked:—What check will there be upon Dominion legislation? The speaker[1] presumed, for the purpose of his argument, that in each of these cases the only check would be through the Imperial government:

"HON. ATTORNEY-GENERAL CARTIER.—The delegates understood the matter better than that. Neither the Imperial government nor the general government will interfere, but *the Courts of justice will decide* all questions in relation to which there may be differences between the two powers.

"A VOICE.—The Commissioner's Courts!

"HON. MR. DORION.—Undoubtedly. One magistrate will decide that the law passed by the federal legislature is not law, whilst another will decide that it is law, and thus the difference, instead of being between the legislatures, will be between the several Courts of justice.

[1] Hon. A. A. Dorion; afterwards Sir A. A. Dorion, Chief Justice of Quebec. See Confed. Deb., p. 690.

"HON. ATTORNEY-GENERAL CARTIER.—Should the general legislature pass a law beyond the limits of its functions, it will be null and void, *pleno jure*.[8]

"HON. MR. DORION.—Yes, I understand that; and it is doubtless to decide questions of this kind that it is proposed to establish federal Courts."

The fact is that the power of disallowance vested in the Governor-General in Council is precisely analogous to the power of disallowance vested in the King in Council over Dominion legislation. An Act of the Dominion Parliament may run the gauntlet of the home government, and yet be afterwards declared by the Courts to be invalid. As is well known, the supervision exercised by the law officers of the Crown in England is directed to seeing that any colonial Act submitted for their consideration is not repugnant to any Imperial legislation; and they do not pretend to examine Dominion Acts in order to determine the question of their validity as being within the range of subject matters confided to the Parliament of Canada by sec. 91 of the British North America Act. And so, as between Canada and its individual provinces, the existence of the *veto* power in the hands of the Dominion Ministry has no logical relation whatever to the question of legislative competence.[9] The position is thus tersely summed up by the Privy Council:

"Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the confederated provinces *a carefully balanced constitution under which*

[8] See *Théberge* v. *Landry*, 2 App. Cas. 102; 46 L. J. P. C. 1; 2 Cart. 1; *Brophy's Case* (1895), A. C. 202; 64 L. J. P. C. 70; 5 Cart. 156.

[9] *Leprohon* v. *Ottawa*, 2 O. A. R. 522; 1 Cart. 592; *Reg.* v. *Chandler*, 1 Hannay (N.B.), 558; 2 Cart. 437; and *Brophy's Case*, *ubi supra*.

no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General."[10]

Nevertheless the Dominion Government does examine provincial legislation more or less closely in order to determine its validity as being within provincial competence, and acts freely upon the opinion, right or wrong, formed upon such examination. If the opinion be right, no harm is done; if wrong, much harm may result without appeal. And, while the functions of the Courts—the constitutional expounders of the law—are thus dangerously usurped, the responsibility of exercising upon proper occasion that "control of the whole" over every part, referred to in the passage just quoted, is evaded. This, however, is a digression, perhaps unwarranted, into the realm of practical politics.

Upon the expiration of the two years allowed by sec. 56 for the disallowance by the King in Council of Dominion legislation: (1) no Act of Imperial executive authority can thereafter weaken its effect; (2) repugnant Imperial legislation can alone override it.[1] The first proposition is equally applicable to the position of the Dominion executive in reference to provincial legislation after the expiration of the one year allowed by this sec. 90 for its disallowance. To the extent to which *intra vires* Dominion legislation conflicts with *intra vires* provincial legislation, the former is of paramount authority.[2] With this limitation, the second proposition has no application; the federal Parliament cannot interfere with the operation of a provincial Act; only repugnant Imperial legislation can override it.

[10] *Lambe's Case*, 12 Ap. Cas. 575; 56 L. J. P. C. 87; 4 Cart., 7.
[1] See *ante*, p. 150.
[2] See *post*, p. 468.

4. *To hear Appeals from Colonial Courts.*

"It is the settled prerogative of the Crown to receive appeals in all colonial cases."[3] And the question here is as to the power of a colonial legislature to deal with this prerogative. The Imperial Parliament may, of course, do so; "the Crown may abandon a prerogative, however, high and essential to public justice and valuable to the subject, if it is authorized by statute to abandon it."[4] The question is: Can a colonial Act do away with the right or authorize its abandonment? In the absence of express decision by the Judicial Committee itself, the question is one not of easy solution.

Bearing in mind what Lord Selborne said,[5] that in determining the question as to the validity of any colonial Act the only way is "by looking to the terms of the instrument by which, affirmatively, the legislative powers were created and by which, negatively, they are restricted," and that it is not for any Court of justice "to enlarge constructively those conditions and restrictions," it may be argued in Canada's case that the affirmative words, "peace, order, and good government,"[6] coupled with the express provision as to the constitution, maintenance, and organization of a Court of Appeal for Canada, and the establishment of additional Courts for the better administration of the laws of Canada,[7] are sufficiently wide to authorize legislation barring further appeal from federal Courts; and that in the case of the Canadian provinces the words "the

[3] *In re Lord Bishop of Natal* (1864-5), 11 Jur. N. S. 353; 3 Moo. P. C. (N.S.), 115, at p. 156.

[4] *R.* v. *Eduljee Byramjee* (1846), 5 Moo. P. C. 276.

[5] *R.* v. *Burah*, L. R. 3 App. Cas. 889. See *ante*, p. 94.

[6] B. N. A. Act, sec. 91.

[7] *Ib.*, sec. 101.

administration of justice in the province,"[8] are equally comprehensive. Against this it may be contended that as Canada is "under the Crown of the United Kingdom,"[9] and as this is a truly Imperial prerogative[10] held by that Crown, and as no express power is given by the British North America Act to legislate in derogation of this prerogative, the usual rule of interpretation should apply, namely, that in the absence of such express words the power to touch it is wanting.[1] The question is one to be settled by the Privy Council; but as it touches the larger and very vital question as to the extent of the right of self-government enjoyed in Canada under the British North America Act it will be well to consider the authorities.[2]

In a very early case, Chief Justice Vaughan, under the heading, "What the Parliament of Ireland cannot do," said:

"3. It cannot change the law of having judgments there given reversed for error in England."[3]

The question as to Irish appeals came up incidentally. It was apparently settled practice even then to entertain such appeals and it was argued that there must be some English statute, then no

[8] *Ib.* sec. 92, No. 14. Provincial legislation cannot bar an appeal to the Supreme Court of Canada: see *post*, p. 538: so that the question here would be as to an appeal *per saltum* only.

[9] *Ib.*, preamble. See *ante*, p. 127.

[10] See *post*, p. 159.

[1] *Hardcastle*, Statute Law, 3rd ed., 385. At p. 394, he says: "The prerogative of the Crown to admit appeals from the colonies is not, and cannot be, limited or abolished by any colonial legislation": citing *Cushing* v. *Dupuy*, referred to *infra*, p. 160.

[2] To say, in this connection, that "whatever belongs to self-government in Canada belongs to the Dominion or the provinces within the limits of the British North America Act" (*Reference Case*, 1912, A. C. 571; 81 L. J. P. C. 210), really begs the question, which is: Is this a matter of local self-government or a matter concerning the government of the Empire?

[3] *Craw* v. *Ramsay*, Vaugh. 292. See *ante*, p. 127.

longer extant, to authorize them. But Vaughan, C.J., held that no Act was necessary. "A writ of error lies not, therefore, to reverse a judgment in Ireland by special Act of Parliament, for it lies at common law to reverse judgments in any inferior Dominions; and if it did not, inferior and provincial governments, as Ireland is, might make what law they pleased, for judgments are laws when not to be reversed."

Chief Justice Vaughan was evidently of opinion that a colonial legislature could not derogate from the prerogative right of the Crown to entertain appeals from colonial Courts; and in 1867 the Privy Council used this language:—

"Upon principle and reference to the decisions of this committee it seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where either by the terms of a charter or statute the authority has not been parted with, it is the inherent prerogative right and on all proper occasions the duty of the Queen in Council to exercise an appellate jurisdiction with a view not only to ensure, as far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally."[4]

The reference to "the terms of a charter or statute," would lead one to infer that as the charter referred to would necessarily be an Imperial instrument conferring a constitution upon a colony, the statute meant to be indicated would be of the same character. But at all events the intimation that the appellate jurisdiction has a view to something beyond the administration of justice in the individual case points to its Imperial character. Earlier cases advert to this: that more is involved than the individual suitor's right: there is the Crown's right

[4] *Atty.-Gen. N. S. W.* v. *Bertrand*, L. R. 1 P. C. 520; 36 L. J. P. C. 51.

in the interest of the Empire to see to it that fundamental principles are not ignored in any of the Empire's Courts. And as late as 1908 the Privy Council said: "The exclusion of the right to appeal to his Majesty would therefore be a forfeiture of existing rights on the part of sovereign and subject."[5]

Nevertheless in recent years the Privy Council has evaded any direct pronouncement upon the question as to the power of a colonial legislature to extinguish the Crown's prerogative, or, in other words, to enact that no appeal shall lie, even by special leave, from the judgment of a colonial Court. When the Supreme Court of Canada was established it was the express intention of the Canadian Ministry to so enact as to that Court,[6] but the home authorities, we are told, intimated that the Queen's assent would be withheld if such a clause were inserted, and in fact the Act as passed expressly preserves to the Crown the prerogative right in question.

Where a colonial Act provides for an appeal as of right to the Privy Council such right of appeal may be taken away by subsequent colonial legislation.[7] But, in the case in which it was so held, an appeal was entertained by Her Majesty in Her Privy Council as an act of grace, the colonial statute not professing to interfere specifically with the Crown's prerogative in this respect; though it did provide that the decision of the Canadian Court should be "final."

"The question of the power of the Queen to admit the appeal as an act of grace gives rise to different considerations. It is, in their Lordships' view, unnecessary to consider what

[5] *In re Wi Matua's Will*, 78 L. J. P. C., at p. 18.

[6] *Todd*, Parl. Gov. in Brit. Col., 150 (1st ed.)

[7] *Cushing* v. *Dupuy*, 5 App. Cas. 409; 49 L. J. P. C. 63. The earlier cases are reviewed in this judgment.

power may be possessed by the Parliament of Canada to interfere with the royal prerogative, since the 28th section of the Insolvency Act does not profess to touch it; and they think, upon the general principle, that the rights of the Crown can only be taken away by express words, that the power of the Queen to allow the appeal is not affected by this enactment."[8]

Reference is also made in the judgment to a section in the Dominion "Interpretation Act,"[9] which provides that an Act is not to be construed as intended to interfere with the Crown's prerogative unless the language is express to that effect; a statutory statement of a well settled principle, as their Lordships point out. A provision in a colonial Act, that the judgment of the colonial Court is to be "final and conclusive," does not affect the Crown's right to entertain an appeal by special leave as an act of grace,[10] though, as already mentioned, it may take away any appeal as of right, existing under colonial Act.

In a case in which a Canadian statute provided for an appeal "to the Privy Council in England in case their Lordships are pleased to entertain the appeal," it was intimated that the provision ignored "the constitutional rule that an appeal lies to Her Majesty and not to this Board, and that no such jurisdiction can be conferred upon their Lordships, who are merely advisers of the Queen, by any legislation either of the Dominion or of the provinces of Canada."[11] This is a strong denial of the right of a colonial legislature to legislate in derogation of the

[8] *Ib.*, 49 L. J. P. C., at p. 66.

[9] 31 Vict. c. 1, s. 7, s.-s. 33. Now to be found in R. S. C. (1906), c. 1.

[10] *Re Wi Matua's Will* (1908), A. C. 448; 78 L. J. P. C. 17; *Can. Pac. Ry.* v. *Toronto* (1911), A. C. 461; 81 L. J. P. C. 5.

[11] *Indian Claims Case* (1897), A. C. 199; 66 L. J. P. C. 11.

Crown's constitutional prerogative in connection with colonial appeals.

In none of the other cases since *Cushing* v. *Dupuy*,[2]—except, perhaps, in some recent Australian appeals—has the Privy Council suggested a doubt as to the validity of such colonial legislation. In every case their Lordships have proceeded upon this, that the colonial Act in question in the case before the Board fell short of taking away the Crown's prerogative by reason of the absence of express words to that effect. As the larger question lies *in limine*, the fact that it has of late been invariably passed over is suggestive.

In certain Australian appeals since 1900, the question is complicated somewhat by the provisions of "The Commonwealth of Australia Constitution Act, 1900."[3] This Act provides (sec. 74), that no appeal shall be permitted to the Queen in Council from any decision of the High Court (which is a Federal Court) upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth, and those of the States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall itself certify that the question is one that ought to be determined by Her Majesty in Council. One appeal[4] was dismissed upon the holding that the question at issue fell within the prohibition of this Imperial Act, the constitutional validity of which is, of course, beyond doubt.[5] The Act further provides that except as mentioned in this section (74) the Act was not to impair any right which the Queen might be pleased to exercise by

[2] See *ante*, p. 160.

[3] 63 & 64 Vict. c. 12 (Imp.).

[4] *Atty.-Genl. N. S. W.* v. *Collector of Customs* (1909), A. C. 345; 78 L. J. P. C. 114.

[5] See *ante*, p. 157.

virtue of Her royal prerogative to grant special leave to appeal from the High Court; but the Commonwealth Parliament is expressly empowered to make laws "limiting the matters in which such leave may be asked," with this condition, however, that any such proposed laws should be reserved by the Governor-General for Her Majesty's pleasure. The grant of this power, thus limited, affords ground for argument that in the absence of such permissive Imperial legislation, the power would not exist. It was held not to authorize federal legislation curtailing the right of appeal from State Courts to the Privy Council.[6] In an earlier case,[7] a federal Act conferring federal jurisdiction upon certain State Courts, and containing provisions purporting to limit the right of appeal to the Crown in Council was held not to be retrospective, "assuming them to be within the powers of the Commonwealth legislature," that phase of the question not being further discussed.

But this settled prerogative of the Crown to receive appeals in all colonial cases is to be understood as limited to cases in which the colonial Courts have exercised the ordinary jurisdiction of Courts of justice. Upon the transfer to the Canadian Courts from the Canadian Parliament of the jurisdiction to try election petitions, it was held by the Privy Council[7a] that the Crown's prerogative did not attach, the subject matter of adjudication touching the privileges of Parliament, and being entirely alien to the region of prerogative. And again,[8] where a colonial Court was entrusted with jurisdiction to decide as between conflicting claims to Crown grants

[6] *Webb* v. *Outrim* (1907), A. C. 81; 76 L. J. P. C. 25.

[7] *Col. Sugar Refining Co.* v. *Irving* (1905), A. C. 369; 74 L. J. P. C. 77.

[7a] *Théberge* v. *Landry*, 2 App. Cas. 102; 46 L. J. P. C. 1.

[8] *Moses* v. *Parker* (1896), A. C. 245; 65 L. J. P. C. 18.

of land in the colony (a jurisdiction previously exercised by Commissioners) the Court being "guided by equity and good conscience only . . . nor bound by strict rules of law or equity," it was held that the functions of the Court were not strictly judicial, and that the Crown's prerogative to entertain an appeal did not, therefore, attach. In both these cases,[9] "the subject matter of the protected jurisdiction connoted functions conferred on the Court by statute which would not otherwise have belonged to it as the general distributer of justice." On the other hand litigation in insolvency,[10] and in the region of probate,[1] have been held to be within the ordinary functions of a Court of justice to which the Crown's prerogative would attach. And it is now definitely settled[2] that the Crown may hear appeals in criminal cases, though the right is very sparingly exercised. Their Lordships do not exercise functions as a general Court of Criminal Appeal. They do not interfere unless "by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done." [2a]

[9] By an evident slip, in *In re Wi Matua's Will* (1908), A. C. 448; 78 L. J. P. C. 17; *Cushing* v. *Dupuy* (*supra*), is classed with *Théberge* v. *Landry* (*supra*). Clearly *Moses* v. *Parker* (*supra*), was intended. The four cases are discussed and correctly classified in *C. P. Ry.* v. *Toronto* (1912), 81 L. J. P. C. 5.

[10] *Cushing* v. *Dupuy* (1880), 5 A. C. 409; 49 L. J. P. C. 63.

[1] *In re Wi Matua's Will* (1908), A. C. 448; 78 L. J. P. C. 17.

[2] *R.* v. *Joykissen Mookerjee* (1863), 1 Moo. P. C. (N.S.), 273; *Falkland Island Co.* v. *R.*, ib., 299; *A.-G.* (*N.S.W.*) v. *Bertrand* (1867), *infra*. Cf. *R.* v. *Eduljee Byramjee* (1846), 5 Moo. P. C. 276; *R.* v. *Aloo Paroo*, *ib.*, 296; *Lanier* v. *R.* (1914), 83 L. J. P. C. 116; *Clifford* v. *R.*, *ib.*, 152; *Ibrahim* v. *R.*, *ib.*, 185.

[2a] *In re Dillet* (1887), 12 App. Cas. 459.

CHAPTER IX.

ALLEGIANCE: NATIONALITY: NATURALIZATION: ALIENS.

[Since this chapter was written a great advance has been made toward securing uniform action throughout the Empire in the matter of imperial nationality and the naturalization of aliens; and some, perhaps all, of the anomalies disclosed in the text will disappear. The Imperial Parliament lately passed the *British Nationality and Status of Aliens Act, 1914*,[a] and the Parliament of Canada has passed *The Naturalization Act, 1914*,[b] to come into force on January 1st, 1915. Both of these Acts are printed in the appendix; but it has been deemed advisable to print this chapter as originally written.]

The modern conception of a State or Nation is of an organized society occupying and governing absolutely a definite portion of the earth's surface. Not all persons within the national territory are members of the body-politic, and, of course, members may be at times abroad. It is for each nation to prescribe by its own municipal law the conditions of political membership or citizenship. This is NATIONALITY, a term which as between nations can only apply to an independent community as an organic whole, regardless of territorial subdivisions and of the method adopted for their government, and no matter how, as between themselves, those subdivisions may approach complete self-government.[1]

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[a] 4 & 5 Geo. V., c. 17 (Imp.)

[b] 4 & 5 Geo. V., c. 44; amended in the recent war session, 5 Geo. V., c. 7.

[1] "We are not disposed to give any countenance to the novel doctrine that there is an Australian nationality as distinguished from a British nationality": *per* Griffith, C.J., in delivering the judgment of the High Court of Australia in *Atty.-Gen. of Commonwealth* v. *Ah Sheung* (1906), 4 Comm. L. R. 949.

All, national subjects or citizens and foreigners alike, within the territory of a modern State are subject to the State's laws; and this subjection, viewed with reference to the Sovereign under the British monarchical system, is termed ALLEGIANCE. And there exists a notion that there is some difference between the local allegiance due from one who, from the standpoint of nationality, is the subject or citizen[2] of a foreign State, while he is present within British territory, and the national allegiance due from the British subject, natural-born or naturalized.

ALLEGIANCE.

What was said on a previous page as to the ancient and ill-defined customary powers of the King at common law, known as the prerogatives of the Crown,[3] might be repeated here. The older authorities[4] mystify rather than enlighten the ordinary reader. The *ligamen* or tie between the Crown and the subject is affirmed as reciprocally binding; but what of positive right or duty is given or enjoined by it, if it appear at all, appears most vaguely. And as between local and national allegiance within the realm one looks in vain in these days for any tangible distinction between the commorant alien and the national subject. Except in the domain of feudal law which governed land-holding, there never was any marked distinction between them so far as concerned the civil as distinguished from the political rights of the individual within the realm,[5] and, as

[2] "Subject" is the term usually employed in monarchies; "citizen" in republics. But there is no rigid rule. One reads at times of a British citizen or of a subject of the United States.

[3] See *ante*, p. 117.

[4] *E.g.*, *Calvin's Case* as set out in *Broom*, Const. Law, 4 *et seq.* (2nd ed.).

[5] See *ante*, pp. 73-4.

will be seen later, the special disabilities of the alien as to land have in these days almost entirely disappeared.[6] On the other hand, with the growing supremacy of commercial interests, a new statutory disability has made its appearance: an alien, even though resident, cannot own a British ship or any share therein.[7] And there are a few individual statutes relating to civil rights which are limited in their operation to British subjects.[8]

But for the British subject and foreigner alike, when within British territory, allegiance, both national and local, is comprised in, and does not extend beyond, the duty to obey the law of the land. The correlative duty resting upon the Sovereign to protect his subjects both local and national within the Empire in return for their allegiance is comprised in, and does not extend beyond, the duty to govern the people according to law. All within the realm are subject only to the law of the land; and all have and need no protection other than that the law affords. "The law is the only rule and measure of the power of the Crown and of the obedience of the subject."[9]

Except in so far as by the statute law—and that is now mainly in the realm of political rights—a distinction is drawn between the British subject and the alien, the matter is of very little practical importance. There is substantially nothing the Crown in Council can command a British subject within the realm to do or to abstain from doing, except by statutory authority.[10] And the same may be laid down

[6] In some of the colonies aliens are precluded from acquiring Crown land by pre-emption or direct purchase from the Crown.

[7] Merchant Shipping Act, 1894, sec. 1; see *post*, pp. 212-3.

[8] See *Bloxam* v. *Favre*, *post*, p. 188.

[9] Sir R. Walpole, in 15 St. Tr. 115.

[10] The writ *ne exeat regno*, except as a Court writ in civil cases, is practically obsolete. See *Forsyth*, Cases and Opinions,

of the alien within our borders; though here, as will appear, it may be argued that the Crown, without Parliament, may command an alien to leave the country.[1]

As to the alien without the realm and so long as he is without the realm, the law of the United Kingdom cannot, of course, touch him; but the same is true, substantially, of the British subject abroad.[2] The power of the British Parliament to legislate in reference to the conduct of British subjects abroad and to enforce such legislation in British Courts within the realm is not here in question.[3] The enquiry is as to the existence of any duty resting upon the British subject abroad to which his allegiance binds him, or of any right upon his part to that protection which it is the correlative duty of the Crown to afford. Has allegiance, in the narrower sense of a tie between the Crown and the national subject, any bearing upon this enquiry? Modern nations do recognize that the bond between a state and its members is not to be taken as absolutely broken when, as Mr. Hall puts it, "the latter issue from the national territory."[4] A certain moral right to bind its own subjects wherever they may be by its legislation is accorded by international law to every state; and

164, 180. A colonial governor, it is conceived, could not issue such a writ on the advice of colonial ministers without statutory authority.

[1] See *post*, chap. X., p. 191.

[2] "No country can there"—*i.e.*, in another country—"exercise jurisdiction over the persons of its subjects without the express or implied consent of the territorial sovereign": *Hall*, Foreign Jurisdiction of the British Crown, 3. See *ante*, p. 65.

[3] See *ante*, pp. 70-1.

[4] "Foreign Jurisdiction of the British Crown," 2. Mr. Hall is spoken of by Kennedy, L.J., as "that learned and careful jurist": *R.* v. *Crewe* (1910), 79 L. J. K. B., at p. 895. Very free use has been made of this masterly work in the preparation of this chapter.

the enforcement of these laws when its subjects return from abroad by punishment for their breach is not cavilled at by foreign nations even if the act were lawful in the place where it was done.[5] The British Parliament may indeed make laws which no Court within the Empire can refuse to enforce as to acts done abroad even by foreigners;[6] but international law would not recognize them, and their enforcement might well afford good ground for diplomatic remonstrance, where none would be thought of if the legislation were limited to the subjects of the enacting state. Similarly, the duty of a state to protect its subjects when abroad is recognized between states as having a reasonable moral basis; so much so that where the principle of territorial sovereignty can be conveniently yielded, a modified jurisdiction is allowed to one state over its own subjects within the territory of another.[7]

But, as has been said,[8] a British subject abroad is governed by British law only to the extent that British law, common or statutory, professes to govern his conduct abroad; and that is to a very small extent. Of the unwritten law there is scarcely a trace extant touching the right of the King over his subjects abroad. It is almost entirely, if not entirely, statute law.[9]

"To the King in his politic and not in his personal capacity is the allegiance of his subjects

[5] As, *e.g.*, in *R.* v. *Russell* (1901), 70 L. J. K. B. 998.

[6] See *ante*, p. 87 et seq.

[7] See *ante*, p. 66, *post*, p. 184.

[8] *Piggott*, Exterritoriality, 9.

[9] The Crown at common law might command the return of a subject from abroad on pain of forfeiture of his property during further absence: *Forsyth*, 181. This was to aid in defending the Kingdom; and the Army and Navy Acts now cover the ground: *post*, p. 201. Court writs addressed to British subjects abroad are all issued and served under statutory authority.

due."[10] And that allegiance is nothing more nor less than the obligation to obey the law, whether that law have reference to matters within or without the realm. With regard to matters within the realm—property and civil rights and the criminal law—little distinction now survives between the British subject and the alien. It is as to the position of the British subject abroad that British citizenship in its true national sense—the *Civis Romanus sum* of Lord Palmerston[1]—is of chief practical importance, legal as well as diplomatic.

It is of prime importance therefore to determine who is a British subject abroad; and it is in this aspect that the nature and effect of naturalization laws, both British and colonial, require careful study. The first step is to enquire as to nationality or national citizenship.

Nationality.

Nationality involves the idea of identification in some way with the nation's territory. The "rule of Europe" which had its origin in feudalism and which dominated European nations until the days of the Code Napoleon fixed birth within the national territory as the one sure badge of national character, identifying a person for life with the nation within whose territory he had been born. Rather inconsistently some of these same nations claimed as their own citizens the children born abroad of their natural-born citizens, thus giving rise to question as to a possible double nationality. The changes wrought by the adoption by many European

[10] *Re Stepney Election* (1886), 55 L. J. Q. B. 331, at p. 339; *per curiam*, Coleridge, C.J., Hawkins, J., and Mathew, J.

[1] "The Roman citizen was in this instance a Mediterranean Jew, who chanced to be a British subject": *Morley*, Life of Gladstone, Vol. I., 368.

powers of the principles of the Code Napoleon is shortly summarized by a "learned and careful jurist" thus:[2]

"Probably until the establishment of the Code Napoleon by France no nation regarded the children born of foreigners upon its territory as aliens. In that Code, however, a principle was applied in favour of strangers by which states had long been induced to guide themselves in dealing with their own subjects, owing to the inconvenience of looking upon the children born abroad of natives as foreigners. It was provided that a child should follow the nationality of its parents; and most civilized states, either in remodelling their system of law upon the lines of the Code Napoleon or by special laws, have since adopted the principle simply or with modifications giving a power of choice to the child, or else, while keeping to the ancient rule in principle, have offered the means of avoiding its effects."

The Natural-born British Subject.[2a]

England long adhered to the old principle in all its rigour. The common law rule was simple. Nationality was a matter not of race but of birth-place. Every one born within the King's dominions[3] was a natural-born British subject; everyone born without was an alien. The result was often startling. The child born in France of English parents during the mother's sojourn there, of however temporary a character that sojourn might be, was an alien, though his life was afterwards spent on British soil and his material possessions and interests were all centred there.[4] The child born in England of French

[2] *Hall*, International Law, 2nd ed., 201-2. See note *ante*, p. 168.

[2a] See note at the beginning of this chapter. Both the Imperial and the Canadian Acts there referred to contain a definition of "natural-born British subject." See Appendix.

[3] Including, as within those dominions, British ships.

[4] "The English female owner of an estate or settlement, if she comes to Dover and there lies in, produces issue inheritable, being English issue; if she had been taken in labour at Calais

parents, though taken at once to France and never again identified with British life or affairs, was through life a British subject. To him the British nation owed the duty of protection; to the other, none. The absurdity in the case of the Englishman accidentally, as it were, born abroad was recognized and statutes were from time to time passed to remove it;[5] and now the children and grandchildren, born abroad, of a natural-born British subject are themselves to be taken as natural-born subjects; but not, however, so as to be in themselves the root for further extension, for the great-grandchild born abroad is an alien.[6] The absurdity in the other case of the Frenchman born in England was modified in diplomacy so far as France's claim to his allegiance was concerned; but in law he was and could not be other than a British subject prior to 1870. The Naturalization Act of that year, both in its provisions for throwing off an arbitrary and unnatural British nationality and for acquiring a natural British nationality, was an attempt to bring a person's right to political membership into some degree of consonance with his real identification with the nation's life and affairs.

But at common law the national character was indelible,[7] as expressed in the loose saying: "once a British subject always a British subject." The *status* could not be got rid of except in the one case of the cession of British territory followed by adherence to the new government on the part of the

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the issue would have been alien and could not have taken the estate": *per* Lord Brougham in *Jeffery* v. *Boosey* (1855), 24 L. J. Ex., at p. 105.

[5] 25 Ed. III., st. 2 (as construed: see *Doe dem. Duroure* v. *Jones*, 4 T. R. 308); 7 Anne c. 5; 10 Anne c. 5; 4 Geo. II. c. 21; 13 Geo. III. c. 21.

[6] *DeGeer* v. *Stone*, 22 Chy. D. 243; 52 L. J. Ch. 57.

[7] *Re Æneas Macdonald*, 18 St. Tr. 858; *Fitch* v. *Weber*, 6 Hare 63; 17 L. J. Ch. 73.

former British subject.[8] The right of expatriation is now, however, fully recognized by the Imperial Naturalization Act, 1870.

The Naturalized British Subject.

Prior to 1844, an alien might acquire wholly or in part the privileges of a natural-born British subject in two ways: (1) by Denization, which was the prerogative act of the Crown in Council, evidenced by Letters Patent, and (2) by Act of Parliament.[9]

(1) Denization "may be described as a sort of inferior naturalization by which the person received into the community of British subjects, enters it as 'a new man' whose capacities date only from the moment of denization and are not as in naturalization cast back for certain purposes to an earlier period."[10] After 1844 it sank into an inferior position, for by the Act of that year[1] certain restrictions imposed by the Act of Settlement and an Act of the first year of Geo. I.'s reign, not only upon the grant of Letters Patent of Denization, but also upon the passage of unlimited Acts of Naturalization[2] were

[8] *Jephson* v. *Riera*, 3 Kn. P. C. 130; *Doe d. Thomas* v. *Acklam*, 2 B. & C. 771; 2 L. J. K. B. 129; with which compare *Doe d. Auchmuty* v. *Mulcaster*, 5 B. & C. 771; 4 L. J. K. B. 311. The last two cases were as to the effect of the separation of the United States from England.

[9] By operation of law, the inhabitants of territory acquired from a foreign power by conquest or cession, become British subjects if they choose to remain in the conquered or ceded territory: *Campbell* v. *Hall*, Cowp. 204; *Forsyth*, 267, *et seq.*; *Re Marriage Laws*, 46 S. C. R. 132.

[10] *Hall*, Foreign Jurisdiction of the British Crown, p. 31, *et seq.*

[1] 7 & 8 Vict. c. 66 (Br.). See *post*, p. 175.

[2] These provisions, which could not, of course, bind future Parliaments (see *ante*, p. 2), were prompted by fear of the Dutch and Hanoverian counsellors of Wm. III. and Geo. I. respectively. Under them naturalized persons and denizens (unless born of English parents) were debarred from the Privy Council, from both Houses of Parliament, from all offices of trust, civil or military, and from receiving grants of land from the Crown. They enjoyed the franchise at all elections, parliamentary or municipal. See *Hall*, Foreign Jurisdiction, 32.

removed as to the latter but not as to the former. As a rule, naturalized persons enjoy now all political privileges;[3] denizened persons are still under the old disabilities. They need not, therefore, be considered further although the Naturalization Act, 1870, expressly reserves the Crown's right in this regard.

(2) An Act of Parliament might make of an alien a natural-born British subject in the eye of the law; in other words, it might give him that *status;* or, it might merely confer on him all or some of the privileges of a natural-born subject without the *status*. That would be a question of construction upon the Act itself.[4] Naturalization "hath the like effect as a man's birth hath," and if *all* the privileges of a natural-born British subject were conferred that would, no doubt, be held to confer nationality in the absence of qualifying words. Lord Halsbury speaks of "the nationality conferred by naturalization,"[4a] meaning necessarily, it is conceived, complete naturalization. The view was expressed in an early case[5] that a British Naturalization Act was operative throughout the Empire; but this was *obiter*. The decision[6] was that an Act of the Irish Parliament could not make a man a naturalized subject in England so as to entitle him to inherit land there. "Naturalization," said Vaughan, C.J.,

"is but a fiction of law and can have effect but upon those consenting to that fiction; therefore it hath the like effect as

[3] But see *Tomey Homma's Case*, referred to *post*, p. 672 *et seq.*

[4] *Mette* v. *Mette* (1859), 28 L. J. P. 117.

[4a] *Tomey Homma's Case* (1903), A. C. 151; 72 L. J. P. C. 23. See *post*, p. 184.

[5] *Craw* v. *Ramsay*, Vaugh. 274, at p. 280.

[6] *Quære.* The Court was equally divided, "viz., the C. J. and Tyrell, for the plaintiff; Wylde and Archer, for the defendant." The plaintiff in whose favour the judgment of Vaughan, C.J., was pronounced would, therefore, fail.

a man's birth hath, where the lawmakers have power but not in other places where they have not.[7] Naturalization in Ireland gives the same effect in Ireland as being born there, so in Scotland as being born there, but not in England, which consents not to the fiction of Ireland or Scotland, nor to any but her own. . . . The law of England is that no alien can be naturalized but by Act of Parliament with the assent of the whole nation."

It was argued that there must have been some English Act, then no longer extant, authorizing the Irish Parliament to naturalize generally. Vaughan, C.J., held that no such English Act could be presumed but he did not suggest that in such case naturalization under the Irish Act would not be effective in England, conferring in fact Imperial nationality. As will be apparent later, this is not without bearing upon the question of Canada's position under the British North America Act.

The converse case is thus quaintly put:

"The people of England now do and always did consist of native persons, naturalized persons, and denizened persons; and no people, of what consistence so ever they be, can be aliens to that they have conquered by arms or otherwise subjected to themselves (for it is a contradiction to be a stranger to that which is a man's own and against common reason and publique practice)."

The operation of a private Act of Naturalization passed by the British Parliament since 1844 must depend upon its language, read perhaps, if general words are used, in the light of the above judgment.[8]

In 1844, for the first time, provision was made for the issue of certificates of naturalization;[9] and

[7] *I.e.*, it can have no ex-territorial operation.

[8] See *Mette* v. *Mette* (1859), 28 L. J. P. 117.

[9] 7 & 8 Vict. c. 66 (Br.). It is declared (by 10 & 11 Vict. c. 83, sec. 3, reciting that doubts had arisen on the question) not to extend to the colonies.

in 1870 was passed the Imperial Naturalization Act, 1870, to which as the existing Imperial Act on the subject particular attention must be given.[10]

After wiping out, in effect, all the remaining disabilities as to property (except British ships), under which aliens had laboured since 1844 (sec. 2) and after taking away (sec. 5) the right they had theretofore enjoyed of trial by a mixed jury (*de medietate linguae*), the Act still left them under political disabilities. His larger enjoyment of property was not to "qualify an alien for any office or for any municipal, parliamentary, or other franchise;" but in effect this political disability was all that was left to distinguish him from the natural born or naturalized British subject, save in the one matter of ownership of a British ship; and subject also to what is said on a later page as to statutory privileges conferred on British subjects *eo nomine*.[1]

The Act then proceeds to alter the law as to expatriation so as to bring it into conformity with modern ideas.[2] The details of this branch of the subject are beyond the scope of this work. Suffice it to say that as to this feature as well as many others the Act is a really Imperial statute, extending either by express words or necessary intendment to the whole Empire. British nationality in its wide Imperial sense is the subject matter of the enactment and Canadian legislation cannot alter it or do other than implement it by consistent provisions.[3] Other provisions of the Act are as clearly of local

[10] 33 Vict. c. 14 (Br. and Imp.): printed in Appendix. Amended in matters immaterial here by 33 Vict. c. 102; 35-36 Vict. c. 39; 58-59 Vict. c. 43. But see note at the beginning of this chapter, *ante*, p. 165.

[1] *Post*, p. 188.

[2] Report of Commrs.: *Cockburn* on Nationality.

[3] See *ante*, p. 59.

application to the United Kingdom. Such a one apparently in sec. 7, which sets out the conditions upon which an alien resident in the United Kingdom may procure a certificate of naturalization, the effect of which is thus described:

"7. An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers and privileges and be subject to all obligations to which a natural-born British subject is entitled or subject in the United Kingdom; with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect."

Of this provision Mr. Hall says:[4]

"The intention of the Act, no doubt, is to invest him with like rights and obligations when within the jurisdiction of foreign powers, subject to the important qualification" (as to his position when in the state of which he had previously been a subject). "The actual words of the section, however, do not go to this length. The United Kingdom and the state of which the naturalized alien was previously a subject are the only states mentioned. His position in all other countries is left open. At the same time, as these other countries are not expressly excluded, the presumption is that he remains clothed with all the rights of a subject that he has been given in the country of his adoption. It is at least tolerably clear that the executive government may assert for him this position as between itself and foreign governments. A state as a general rule must take its information upon the law of a foreign country from the organ which is duly charged with the conduct of external relations;[4a] and even if there be

[4] *Hall*, Foreign Jurisdiction, 25.

[4a] Courts—at least British Courts—do not act on any such rule. Foreign law is to be proved as a fact on the evidence of experts: see *Phipson* on Evidence, 4th ed., 359.

a difficulty in the terms of the Act, it is certainly permissible for a British Government in dealing with foreign powers to take up its ground upon the unquestionable intention. Hitherto the practice has been in accordance with this view and naturalized persons[4b] have been invariably regarded as occupying a position identical with that of natural-born subjects of the Crown in all states other than their state of origin."

But before a foreign Court the question might well be a question of law and not one of diplomacy. In a colony where, for example, the holder of a certificate under the British Act might wish to hold office or to vote, the question would clearly be one not of diplomacy but of law; and the wording of the statute seems clear: "shall *in the United Kingdom* be entitled . . . and be subject, etc." It may be proper to speak of this as conferring nationality; but only *quoad* the United Kingdom. From a truly national, that is to say, imperial standpoint, the *status* of full citizenship is not conferred and in a colony the *status* of alienage would, it is conceived, still subsist. In 1836 a private Naturalization Act was passed by the British Parliament for one Bernard Mette which provided that "he shall be and he is hereby from henceforth naturalized and shall be adjudged and taken, to all intents and purposes, to be naturalized and as a free-born subject of the said United Kingdom;" and there were no words one way or the other as to the territorial operation of the Act. This was held to make him so completely a British subject that, so long as he retained an English domicile, he was governed by British law as fully as a natural-born British subject and could not therefore validly contract marriage abroad with his deceased wife's sister, though

[4b] *I.e.*, persons holding certificates under the British Act. Mr. Hall is very guarded as to the position of colonially naturalized persons: see *post*, p. 181.

such a marriage was valid by the law of the place where it was celebrated.[5] But, as already noted, the Imperial Naturalization Act, 1870, contains in the clause above quoted, express words of territorial limitation; so that it may be doubted if the decision in *Mette* v. *Mette* would hold good as to one holding merely a certificate under the British Act.

Colonial Naturalization Acts.[5a]

The Imperial Naturalization Act, 1870, provides:

"16. All laws, statutes and ordinances which may be duly made by the legislature of any British possession[6] for imparting to any person the privileges or any of the privileges of naturalization, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law;"

subject to disallowance as in ordinary cases.

Doubts had been expressed as to the power of a colonial legislature to pass Naturalization Acts;[7] and it seems clear that British nationality could not be conferred by any such Acts. It had been held by the Privy Council that the *status* of an alien must be determined by the law of England, while the consequences of that *status* would depend upon the local law.[8] It does not seem possible to view these cases

[5] *Mette* v. *Mette* (1859), 28 L. J. P. 117. It had previously been held in *Brook* v. *Brook*, 9 H. L. Cas. 193, that Lord Lyndhurst's Marriage Act (as it is commonly called) did not apply to colonial or foreign marriages of persons not domiciled in England.

[5a] See note at the beginning of this chapter, *ante* p. 166.

[6] "All territories and places under one legislature are deemed to be one British possession for the purposes of this Act": sec. 17. But the British North America Act, 1867, also places "Naturalization and Aliens" within federal jurisdiction: sec. 91, No. 25.

[7] See preamble to 10 & 11 Vict. c. 83 (Imp.), referred to *post*, p. 180.

[8] *Donegani* v. *Donegani* (1835), 3 Knapp P. C. 63: from Lower Canada: and *Re Adams* (1837), 1 Moo. P. C. 460. See also *Mayor of Lyons* v. *East India Co.* (1837), 1 Moo. P. C. 175, in which it was held that an alien could hold land in India. See also *Forsyth*, 330.

as holding anything less than this, that only a truly national law can determine nationality.[9] That is in itself an Imperial matter, a question of birth within the Empire. What the consequences are to be of a want of national character may be determined by each colony for itself,[10] subject of course to overriding provisions in the constitutional charter or in Imperial legislation. All civil and even political disabilities may be removed so far as some particularly liberal-minded colony may be concerned; but the *status* of alienage still remains. This agrees with what was said by Strong, C.J., in 1897:[1]

"The acquisition of British nationality is a matter upon which the Imperial Parliament has the exclusive right of legislation, although the effect of alienage upon the local tenure of land may well be dealt with by a colonial legislature."

In 1847 an Imperial Act was passed which recited that doubt had arisen[2] as to the validity of colonial Acts "for imparting to divers aliens there resident the privileges or some of the privileges of naturalization to be exercised and enjoyed within the respective limits of such colonies," and then proceeded to validate all such colonial Acts.[3] Sec. 16 of the Naturalization Act, 1870, is to the same

[9] See *Craw* v. *Ramsay*, referred to, *ante*, p. 174.

[10] See *Forsyth*, 330, quoting opinion of the law officers of the Crown in 1850, that a colonial legislature could confer an office of trust upon an alien.

[1] *In re Bigamy Sections*, 27 S. C. R., at p. 475. This was a dissenting opinion on the larger question involved, as to which, see *ante*, p. 111. But the law laid down in the passage quoted is not commented on by any of the other Judges.

[2] These doubts were not merely as to nationality. Imperial enactments—the Act of Settlement and an Act passed in 1 Geo. III., as to which, see *ante*, p. 173,—were considered to stand in the way of Colonial Acts. See *Forsyth*, 330.

[3] This was the Act in force when the British North America Act, 1867, was passed.

effect, without the recital. The colonial Acts mentioned are not nationalizing Acts. They do not purport to make of an alien an Imperial subject but merely to impart to him within the colony the privileges or some of the privileges of naturalization, leaving his national character untouched. As to the nation he is still an alien, though admitted more or less completely to colonial citizenship in the particular colony. In the absence of permissive Imperial legislation a colonial legislature could not confer national *status*, and it seems clear that the Imperial Naturalization Act, 1870, does not purport to convey to a colonial legislature any such complete nationalizing power. It may be proper to speak of an alien who has taken the benefit of a colonial Act as a British subject *quoad* the colony, but he has clearly not acquired national *status*; and, as already intimated,[4] a certificate under the British Act apparently confers British citizenship only and not Imperial.

Mr. Hall thus deals with section 16 of the Imperial Act in reference to the effect of colonial legislation under it:[5]

"By the Act of 1870 it is provided that 'all laws, statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges, or any of the privileges of naturalization, to be enjoyed by such person within the limits of such possession shall within such limits have the authority of law.' No language follows such as that which in the 7th section leads to the inference that a naturalized British subject[5a] must be intended to keep his British character in countries other than that of which he was a subject previously to his naturalization, and in it also if he has ceased to owe it allegiance. A colonial Act would seem therefore on the terms of the Act

[4] *Ante*, p. 178.

[5] *Hall*, Foreign Jurisdiction, 28, *et seq.*; and see also at p. 127.

[5a] *I.e.*, a person holding a certificate under the British Act.

of 1870 to be operative only within the particular colony in which it has been enacted and to be incapable of investing a naturalized person with the quality of a British subject in foreign states. The Naturalization Act does not however appear to have been read quite in this sense;[sb] and it has been the practice to issue passports to the holders of colonial certificates of naturalization and to protect them in all foreign countries other than their country of origin, on the ground, it must be supposed, that when a person is treated as a subject for all purposes in any part of the British dominions, it is impossible for the state entirely to wash its hands of him and his affairs the moment that he oversteps the boundary of the empire.

The feeling is natural; it is even inevitable. At the same time it may well be that foreign tribunals, if called upon to weigh the effect of colonial naturalization, may refuse to regard it as possessing any international value."

To this a foot note is appended: "In a case arising in France it has already been held by the *Cour de Cassation* (Feb. 14, 1890) that naturalization in a British colony 'does not amount to true naturalization within the meaning of the French *Code Civil* (Art. 17, sec. 1) and cannot cause the holder of a colonial certificate to lose thereafter his character of Frenchman.' The case was one in which the appellant wished to secure advantages from the possession of a French national character; there is no reason to suppose that the decision would have been different if it had been sought to burden him with obligations."

* * * * * * * *

"The difficulties, which have been already noticed as presenting themselves in connection with colonially naturalized persons in European states, re-appear with additions in Oriental countries. In accordance with the practice elsewhere,

[sb] In *Howell*, on Naturalization, reference is made (p. 13), to an opinion of the law officers that "a foreigner duly naturalized in a British colony is entitled as a subject of the Queen in that colony to the protection of the British Government in every other state but that in which he was born and to which he owes a natural allegiance." Cockburn, C.J., in his treatise on Nationality (p. 38), agrees that this "would be the sounder view."

they would no doubt be diplomatically protected, except in their country of origin, and it is not likely that the right to afford them diplomatic protection would be gainsaid. But would they be given the protection of the Consular Courts? Would their civil disputes or would criminal charges in which they were involved be withdrawn from the local jurisdiction? Would, for example, a Dutchman, naturalized in Australia, in circumstances which deprived him of his nationality of origin, be obliged to submit himself and his causes to the territorial laws of Persia or Morocco? It is impossible to suppose the deliberate intention of the Legislature in 1870 to have been to bring about such a result as that a European without any other than a British nationality should find himself ruled in life, and his property disposed of, on death, by Mohammedan law.[5c] Upon the terms of the Act, however, it seems hard to avoid the conclusion that this is the situation in which he is placed."

In another colony or in England the question would clearly be one of law and not of diplomacy; and it may well happen that a person who has acquired all or some of the privileges of naturalization in one colony might properly be excluded or expelled from another as an alien.[6]

The British North America Act, 1867, is of earlier date than the Imperial Naturalization Act of 1870; and the power conferred upon the Parliament of Canada, as distinguished from the provincial legislatures, to make laws in relation to "Naturalization and Aliens" was, it is conceived, subject to the limitation set out in the Imperial Act of 1847, and is now subject to the limitation expressed in the Act of 1870. At all events, Canadian legislation has followed the wording of sec. 16:[7]

24. An alien to whom a certificate of naturalization is granted shall, *within Canada*, be entitled to all political and

[5c] See *Abd-el-Messir* v. *Chukri Farra*, 57 L. J. P. C. 88.

[6] See *post*, p. 192.

[7] See the Canadian Naturalization Act, R. S. C. (1906), c. 77, sec. 24.

other rights, powers, and privileges, and be subject to all obligations, to which a natural born British subject is entitled or subject within Canada, with this qualification [7a] that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect.

It is, however, a curious and somewhat disconcerting fact that in the two judgments [8] of the Privy Council in which the line was drawn between federal and provincial spheres of authority in regard to this subject no reference at all is made to any limitation of the federal power by reason of Canada's colonial position generally or under the Imperial Naturalization Act of 1870. Lord Halsbury, it is true, in the later case, refers to "the nationality conferred by naturalization," but he speaks very generally and without express reference to the effect of Canadian legislation; and it is submitted that true nationality —imperial citizenship—is not conferred by naturalization under the Canadian Act. These two cases, however, will call for more extended reference later when the respective spheres of authority of the federal and provincial legislatures are discussed.[9]

The British Subject Abroad.

It is, of course, beyond the scope of this work to discuss the nature and extent of the protection and assistance which the British nation, through its

[7a] Sec. 16 of the Imperial Act contains no warrant for this qualification, but it is a valid provision, it is conceived, so far as Canadian Courts are concerned, though it may be hard to imagine how the question could arise in Canada. See *ante*, p. 114, as to ex-territorial operation.

[8] *Union Colliery Co.* v. *Bryden* (1899), A. C. 580; 68 L. J. P. C. 118; *Tomey Homma's Case* (1903), A. C. 151; 72 L. J. P. C. 23.

[9] See Part II., *post*; *Quong Wing* v. *R.* (1914), 49 S. C. R. 440.

agents, affords to its members beyond its frontiers or the quasi-jurisdiction which with the consent of a foreign power it exercises within the territorial limits of such foreign power.[9a]

The functions of British agents abroad—ambassadors, consuls, naval and military officers, etc.[10]—may be grouped as protective, ministerial, and jurisdictional.

Protective: Apart from wrongs inflicted upon British subjects abroad which call for diplomatic action, and may end in coercive measures, a general protective supervision is exercised by British consular agents in respect of both the persons and property of British subjects. The issue and countersigning of passports may be mentioned; in which connection Mr. Hall tells us[1] that to a colonially naturalized British subject a consul can issue only a provisional passport "good for a limited time so that the holder may return to his colony or to the United Kingdom." The transmission of evidence as to the nationality of a British subject and the granting of certificates of British nationality may be also mentioned among protective functions exerciseable by British consular agents abroad.

Ministerial: These are the most important in a practical sense. They embrace the celebration of marriage under the Foreign Marriage Act, 1892,[2] the performance of notarial acts, the registration of births and deaths, and the administration of the estates of British subjects dying abroad; besides many others.

[9a] Incidental references have already been made to this subject. For full and masterly treatment of it, see *Hall*, Foreign Jurisdiction of the British Crown.

[10] See *Hall*, 15, for a classification.

[1] P. 74.

[2] 55 & 56 Vict., c. 23 (Imp.).

Jurisdictional: In States of the European type, the supremacy of the territorial law is paramount and if effect is given in British Courts to acts done abroad by British agents in the exercise of a coercive jurisdiction (with the express or tacit consent of the territorial sovereign), it must be by virtue of statute law; and it would appear[3] that such jurisdiction is limited to matters connected with British ships and their crews, and is all to be found within the four corners of the Merchant Shipping Act, 1894, and its amendments. The position of the colonies generally, and of Canada in particular, in reference to this legislation must be discussed later.[4]

With regard to Oriental States and barbarous lands the exercise of jurisdiction is regulated by the Foreign Jurisdiction Act, 1890.[5]

The question of importance in all these matters is to determine who is the British subject abroad, who alone is entitled to claim the benefit of these various Acts or who alone, in some cases, is subject to a coercive jurisdiction civil or criminal.[6] Although, as already indicated, the British government may and does undertake to protect the colonially naturalized British subject without the realm, this does not touch the legal questions which may arise as to the validity of transactions abroad in which such colonially naturalized persons may have participated. The better opinion would seem to be that as to all these matters they are not British

[3] See *Hall*, 77, *et seq.*

[4] See chap. XII., *post*.

[5] 53 & 54 Vict. c. 37 (Imp.). See *ante*, p. 65: *Japanese Gov't* v. *P. & O.*, 64 L. J. P. C. 107.

[6] There is a preliminary question in reference to some of the British Acts, namely: Do they extend to the colonies at all? For example, the Foreign Marriage Act, 1892, says nothing as to the effect to be given in colonial Courts to marriages solemnized under it. It simply enacts that such marriages are to be as valid as if duly solemnized in England; and this, *primâ facie*, would mean that English Courts only should so view them. But see *post*, p. 263.

subjects when without the limits of the colony under the law of which they hold certificates of naturalization.

The Unnaturalized Alien.

Very seldom now in any Canadian Court do the rights of a litigant depend upon his nationality. Except to an alien enemy[6a] the King's Courts are open to all. A non-resident plaintiff may be ordered to give security for costs, but a non-resident British subject is in this respect in no better or worse position than a non-resident alien. By the common law of England an alien friend was under no disability as to personal property of any description other than chattels real. He was accorded full protection by the law for his person and reputation. And it was immaterial that he had never been within the realm.[7] The disabilities he was under as to the ownership of real property had their origin in the feudal system and these were from time to time relaxed[8] until finally by sec. 2 of the Naturalization Act, 1870,[9] it was enacted that " Real and personal

[6a] The recent outbreak of war has brought into unexpected prominence the alien enemy. The non-resident alien enemy cannot begin or prosecute any action in Canada; but the resident alien who is a subject of a country at war with us, but who remains here in the peaceful pursuit of his avocation, is entitled to the assistance of the Courts to protect him in his rights: see judgment of Gregory, J., in *Topay* v. *Crow's Nest Coal Co.* (1914), 29 West. Law Rep. 555, where the Orders-in-Council which operate as the Crown's license are noted.

[7] *Pisani* v. *Lawson* (1839), 9 L. J. C. P. 12; *Jefferys* v. *Boosey* (1855), 5 H. L. Cas. 315; 24 L. J. Ex. 81; *per* Maule, J., *Routledge* v. *Low* (1868), L. R. 3 E. & I. App. 113; 37 L. J. Ch. 454; *per* Lord Westbury. See extracts quoted *ante*, pp. 73-4.

[8] See 7 & 8 Vict. c. 66 (Br.).

[9] 33 Vict. c. 14 (Br. and Imp.). In regard to relief from civil disabilities, as well as in some other respects, the Act is local to the United Kingdom; while some of its provisions (for example, those as to Expatriation) are truly Imperial. See *ante*, p. 176.

property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject."

This, however, was not to qualify an alien for any office or for any municipal, parliamentary, or other franchise;[10] or to own a British ship;[1] and it has been held not to give to an alien the benefit of any statutory right or exemption bestowed upon British subjects *eo nomine*.[2] Subject to these exceptions an alien in the United Kingdom lies under no disabilities. In all the Canadian provinces his position is the same;[3] in fact in some of the provinces his freedom from restrictions of any sort in regard to property dates back to an earlier time than in the United Kingdom.

But even when his residence is of a permanent character he is not a citizen in the true sense. He is not a member of the politically organized society which governs the land. And although in all British Courts he is as fully protected in all his rights as to person, property, and reputation as the citizen proper, the British subject, yet the British Government makes no claim as of right as against a foreign power to control his conduct or question his treatment when abroad.[4] In this respect, as has already been pointed out,[5] the British subject, natural-born or naturalized, is in a different position

[10] Sec. 2, s.-s. 1. Appendix.

[1] Sec. 14. And see the Merchants' Shipping Act, 1894.

[2] *Bloxam* v. *Favre* (1884), 52 L. J. P. 42; 53 L. J. P. 26 (C.A.)

[3] Though, as already noted (see *ante*, p. 167), there are in some colonies restrictions in regard to acquiring Crown land.

[4] The British Parliament in its omnipotence may enact laws for his punishment, upon his return, for acts done abroad, and these acts again may in certain cases have legal efficacy in England only if done as English law prescribes. As to the position of a colonial legislature in this regard, see *ante*, p. 91 *et seq.*

[5] See *ante*, p. 168.

when abroad. Whether the difference in any given case is one of law or a matter for diplomatic action is one important consideration. Another and still more important question is as to the position of a person holding a certificate of naturalization under the British or Canadian Act or under the similar legislation of any other colony when in other parts of the Empire; and this, it is conceived, is a question of law and not of diplomacy; while the position of such a person without the Empire is a question of both law and diplomacy.[6]

[6] In some respects the next chapter is but a continuation of this.

CHAPTER X.

Exclusion: Expulsion: Extradition: Fugitive Offenders Act.

Full treatment of these topics is not here attempted. The enquiry is as to possible limitations upon colonial powers along these lines.

The prerogative powers of the Crown at common law in this connection, that is to say, the right of the executive without parliamentary authority to take action to prevent a person's entry into the realm or to expel or deport therefrom one already there, have been often the subject of discussion; and distinctions have been drawn as between national subjects and aliens, as between simple expulsion and extradition at the request of a foreign power, and as between removal from British territory and removal from one part of such territory to another. There is no authority, for example, to support a claim on behalf of the Crown to a prerogative right to expel a national subject from British soil;[1] but *dicta* are to be found in support of the view that the national subject—*a fortiori* the alien—may be handed over by the executive to a foreign power to take his trial for offences alleged to have been committed within the territory of such foreign power,[2] and the Habeas Corpus Act of Charles II.'s

[1] "No power upon earth, except the authority of Parliament, can send a subject out of the Kingdom against his will": 1 Steph. Comm. (15th ed.), 92, on authority of Co. Litt. 133a.

[2] *East Ind. Co.* v. *Campbell* (1749), 1 Vesey, Sen. 246; *Mure* v. *Kaye* (1811), 4 Taunt. 34; opinion of Sergeant Hill (1792), quoted in *Clarke* on Extradition, 25. See also *Forsyth*, Cases and Opinions, 370. In 1842, in a debate in the House of Lords (Hansard, Vol. 60, 317-327), all the Law Lords concurred in the view expressed by Lord Denman that, apart from legislation,

reign is said to recognize the right of the executive to send persons accused of crime from one part of the realm to another.[3] Again, the right of the supreme authority of a state to exclude or expel aliens from the state is laid down by the Privy Council as a fundamental principle;[4] and that supreme authority it may be argued, would at common law in the absence of parliamentary intervention rest with the Crown in Council.[5] But in times of unrest when it was deemed in the public interest that the power of the state should be exerted along this line, parliamentary sanction has always been sought.[6] And

there was no right to deliver up, indeed no means for securing, persons accused of crime committed abroad. Lord Denman said that all Westminister Hall, including the Judicial Bench, were unanimous in holding this view. In 1844, the Court of Queen's Bench (Denman, C.J., Williams, J., Coleridge, J., and Wightman, J.), so laid down the law: *Re Jacques Besset*, 6 Q. B. 481; 14 L. J. M. C. 17, and no doubt has ever been expressed since. See *ante*, p. 141.

[3] *R.* v. *Lundy*, 2 Vent. 314; *R.* v. *Kimberley*, 2 Stra. 848. The Fugitive Offenders Act now covers the ground: see *post*, p. 198.

[4] *Atty.-Gen. (Canada)* v. *Cain & Gilhula* (1906), A. C. 542; 75 L. J. P. C. 81. These two men had entered Canada in contravention of the Alien Labour Act (see *ante*, p. 106); and in an Australian case, *Robtelmes* v. *Brenan* (1906), 4 Comm. L. R. 395, where the alleged alien had entered Australia lawfully, it was urged that *Cain & Gilhula's Case* (*supra*), did not apply to support colonial legislation for his deportation in such a case. The federal legislation, however, was upheld by the High Court of Australia as within colonial competence. Griffith, C.J., speaks of it as "an essential prerogative of a sovereign state to determine who shall be allowed to come within its dominions, share in its privileges, take part in its government, or even share in the products of its soil"; and this sovereign power he held to have passed to the Commonwealth Parliament under the Constitution Act.

[5] "It seems that the Crown enjoyed at common law the right of excluding or expelling from the country any alien"; 2 Steph. Comm. (15th ed.), 509, on the authority of Chitty, 49. *Forsyth* expresses a decided opinion to the contrary: p. 181.

[6] See Steph. Comm. *ubi supra; Forsyth*, 181. The recently enacted War Measures Act, 1914—5 Geo. V., cap. 2 (Dom.)—is a striking instance.

now there is a British statute on the subject of alien immigration.[7]

So far, however, as Canada is concerned, all these topics are covered by legislation, Imperial or colonial; and it may be affirmed in the broadest way that the liberty of no one within Canada may lawfully be interfered with by executive officials except under statutory authority, the limits of which must be strictly observed. All persons actually within Canada are entitled to the benefit of the Writ of Habeas Corpus to test in Court the legality of any constraint of their freedom. The alien, it is true, has no right enforceable by action to enter British territory;[8] but, once within that territory, he is entitled to ask for the writ if detained for deportation.

The only real question for enquiry, therefore, is: How far, if at all, is Canada's freedom of action to legislate as she will upon these subjects curtailed by Imperial Acts?

Exclusion or Expulsion.

There is no restrictive Imperial legislation to cut down the powers bestowed affirmatively by the British North America Act. As between Canada and its component provinces, the federal Parliament has exclusive authority over aliens and a paramount authority over immigration;[9] and the power to make laws in relation to these subjects is limited by no condition which compels discrimination as between one class of aliens and another or others or—in the matter of control of immigration—as between an alien and a British subject. Canadian legislation

[7] The Alien Act, 1905 (5 Edw. VII., c. 13). See also the Imperial War Measures Acts of recent date.

[8] *Musgrove* v. *Chun Teeong Toy* (1891), A. C. 272; 60 L. J. P. C. 28.

[9] B. N. A. Act, sec. 91, No. 25, and sec. 95.

may very naturally and properly draw such distinctions; but as a matter of legislative freedom Canada may do as she will in these matters. For example, the Japanese Treaty Act, 1907,[10] making positive law as to Canada the provisions of the treaty, was the voluntary act of the Parliament of Canada, the general Immigration Act being thereby to that extent modified; but no one suggests that the Act of 1907 could not be repealed either directly or by legislation inconsistent with it.[1]

The judgment of the Privy Council in *Cain & Gilhula's Case*[2] removes any difficulty arising from the necessity in deportation cases of exercising a certain amount of exterritorial constraint of the person. In this connection a word or two may be added. Colonial laws providing for banishment and for punishment in case of return to the colony without leave were treated by the law officers of the Crown in 1838 as unobjectionable; though provision for detention in another colony was considered *ultra vires*.[3] Colonial legislation providing for sentences of transportation—a mode of punishment no longer recognized—or for pardon conditional upon submitting to transportation, were also treated as within colonial competence; and the difficulty as to exterritorial constraint during the voyage to the penal colony was met by a British Act which legalized such restraint in England *en route*.[4] When it

[10] 6 & 7 Edw. VII. c. 50 (Dom.). See *Re Nakane* (1908), 13 B. C. 370; *ante*, p. 143.

[1] See *ante*, p. 142, *et seq.*

[2] (1906), A. C. 542; 75 L. J. P. C. 81; *ante*, p. 106.

[3] *Forsyth*, 465. The opinion was that of Sir John Campbell (afterwards Lord Chancellor), and Sir R. M. Rolfe (afterwards Lord Cranworth, Lord Chancellor). Some at least of those banished from Canada were British subjects.

[4] 5 Geo. IV. c. 84, s. 17. See *Canadian Prisoners' Case* (1839), 5 M. & W. 32, variously reported as *Leonard Watson's Case*, 9

is once definitely settled that under colonial legislation a person may be placed beyond the frontier and may be prevented from returning, all practical difficulty seems to disappear. But, as already submitted, even further exterritorial restraint would in Canadian Courts be deemed legal and could give rise to no action in such Courts, however the Courts and governments of other countries might treat such legislation.

Extradition.

It follows from what has already been said that extradition laws in the British Empire are necessarily statutory. They do not require the support of a treaty, but as a matter of fact they have been enacted in nearly all cases with a view to the carrying out of Extradition Treaties; and they are all of comparatively recent date. Upper Canada has one of the earliest, if not the earliest, enactments on the subject. In 1833, Lord Aylmer, the Governor, refused to hand over to the United States authorities a person accused of having committed crime across the line upon the ground that it was "not competent to the executive in the absence of any regulation by treaty or legislative enactment on the subject to dispense with the provisions of the Habeas Corpus Act."[5] In the same year, the Upper Canadian assembly passed an Extradition Act[6] which while it followed in some respects the phraseology of Jay's Treaty (1794, between Great Britain and

A. & E. 731; *R.* v. *Batchelor*, 1 Perry & Dav. 516; *R.* v. *Alwes*, 8 L. J. Ex. 229; *R.* v. *Wixon*, 8 L. J. Q. B. 129. Some of these men were British subjects and some citizens of the United States; they had all been involved in the Rebellion of 1837.

[5] Quoted in *Clarke* on Extradition, 93. In 1827, Reid, C.J., of Lower Canada, refused to discharge on *habeas corpus* proceedings a person whom the then governor had ordered to be given up to the U. S. officers: *Fisher's Case*, 1 Stuart, L. C. Rep. 245.

[6] 3 Wm. IV. c. 6 (U.C.).

the United States) was general in its application to all foreign countries. As to the United States it was superseded by the Imperial Act [7] passed to carry out the Ashburton Treaty, 1842; but otherwise remained in force until replaced by other Canadian legislation;[8] and, as will appear, the present Canadian Extradition Act makes provision for cases not covered by treaty.[9]

The Extradition Act, 1870,[10] passed by the British Parliament as the first general legislation on the subject, is still in force and is a truly Imperial Act, extending to all parts of the Empire so far as Imperial treaties purport to bind all parts;[10a] and in the absence of approved colonial legislation as contemplated by the Act, it provides for its own enforcement throughout all those parts of the Empire to which treaties may individually extend. It makes no provision for rendition of alleged criminals apart from treaty, in which respect the Canadian Act, as will appear, goes further; but both in England and in Canada no rendition can take place nor can a person be confined except under the Act.[1]

The scheme of the Act may be shortly stated. Where an arrangement has been made with any foreign state—that, of course, is an exclusively Imperial matter—for the surrender of fugitive criminals, an Order in Council may be passed directing that the Act is to apply to such foreign state,[2] and

[7] 6 & 7 Vict. c. 76 (Imp.); *post*, pp. 196-7.

[8] *R.* v. *Tubbee* (1856), 1 U. C. Pract. Rep. 98. And see 23 Vict. c. 41 (Can.).

[9] R. S. C. (1906), c. 155; *post*, p. 197.

[10] 33 & 34 Vict. c. 52 (Imp.). The earlier Acts which were special, are repealed by it. See Appendix. By an amendment in 1906 (6 Edw. VII., c. 15), bribery was added to the list of extradition crimes.

[10a] See *Ex p. Worms* (1876), 22 L. C. Jur. 109.

[1] *Re Jacques Besset* (1844), 6 Q. B. 481; 14 L. J. M. C. 17. See *ante*, pp. 141, 191.

[2] Section 2.

upon the publication of such Order in Council in the London Gazette the Act does so apply so long as the arrangement continues.[3] Where the Act applies in the case of any foreign state, every fugitive criminal of that state who is in or suspected of being in any part of the Empire or in that part covered by the treaty (as the case may be) is liable to be apprehended and surrendered in manner provided by the Act.[4] Then follow provisions for the carrying out of the Act where the fugitive is in the United Kingdom. With regard to other British territory, the Act is to apply with certain necessary modifications;[5] but these need not be detailed in view of Canada's position as worked out under the next section, which is as follows:

"18. If by a law or ordinance made before or after the passing of this Act by the legislature[6] of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this Act in the case of any foreign state, or by a subsequent order, either:

Suspend the operation within any such British possession of this Act, or of any part thereof, so far as it relates to such foreign state and so long as such law or ordinance continues in force there, and no longer;

Or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act."[7]

[3] Section 5.

[4] Section 6: and see sec. 26 for definition of "fugitive criminal" and "fugitive criminal of a state."

[5] Section 17.

[6] "The term 'legislature' . . . where there are local legislatures as well as a central legislature, means the central legislature only": sec. 26. This, of course, gives the exclusive right to the Parliament of Canada.

[7] There were somewhat similar provisions in the earlier Acts passed to give effect to treaties with France (6 & 7 Vict. c. 75),

In Canada's case the first alternative has been adopted and Imperial Orders in Council have passed from time to time suspending the operation within Canada of the Imperial Extradition Act in favour of Canadian legislation. For example, upon the revision of the Canadian statutes in 1886, an Imperial Order in Council of 17th November, 1888, suspended the operation of the Imperial Act as to Canada so long as the Canadian statute—R. S. C. (1886) c.—should continue in force.[8]

Two observations only seem necessary. The first is that the power of the Canadian Parliament to repeal or even to amend the Canadian Extradition Act, though it clearly exists, can be exercised only upon pain of bringing into operation the Imperial Act. The second is, that sec. 18 of the Imperial Act impliedly recognizes an unlimited right in a colonial legislature, prior to the Act of 1870 itself, to legislate generally as to the extradition of fugitive criminals apart from treaty.[8a]

Acting upon such view of its powers, the Parliament of Canada has provided in Part II. of the Canadian Extradition Act for "Extradition irrespective of Treaty." Where treaties exist, the Act —like the British Act—is to be read subject to them;[9] where none exist the practice in treaty cases is to be followed.[10]

The provisions of this part of the Canadian Act, however, are not to come into force with respect to any state except upon proclamation of the Governor-General,[10a] and the list of crimes to be covered by it

with the United States (*ib.*, c. 76), and with Denmark (25 & 26 Vict. c. 70); and those Acts were, in due course, suspended as to Canada in order to give operation to Canadian legislation.

[8] *Quære* as to the revision of 1906.

[8a] See *ante*, p. 194, as to earlier Canadian legislation.

[9] R. S. C. (1906), c. 155, secs. 3 and 4. See *ante*, p. 141.

[10] Section 36, s.-s. 2.

[10a] Section 34.

is specifically set forth in a schedule. The pith of the enactment is to be found in sec. 36:

"36. In case no extradition arrangement exists between His Majesty and a foreign state or in case such an extradition arrangement, extending to Canada, exists between His Majesty and a foreign state, but does not include the crimes mentioned in the third schedule to this Act, it shall, nevertheless, be lawful for the Minister of Justice to issue his warrant for the surrender to such foreign state of any fugitive offender from such foreign state charged with or convicted of any of the crimes mentioned in said schedule." [10b]

And care is to be taken to guard against the trial in the foreign state of the person extradited for any offence other than that on account of which his extradition has been claimed.[10c]

There is no suggestion in either the Imperial or the Canadian Act of reluctance to extradite British subjects, natural-born or naturalized; but, of course, some treaties have been made which do discriminate in favour of the subjects of the contracting powers.[10d]

Fugitive Offenders Acts (Imperial and Colonial).

These may be described as providing for domestic extradition within the Empire. What may be termed the parent Act is the Imperial Fugitive Offenders Act, 1881,[1] and the most striking feature presented by this Act and the various colonial statutes which depend upon it is that they together form one Imperial code recognized and given effect

[10b] *Piggott* on Extradition, p. 181, has some remarks on Canada's position. The earlier pages of the work are valuable for their statement of basic principles.

[10c] Section 39.

[10d] See, *e.g.*, the Swiss Treaty mentioned *ante*, p. 141. See also *ante*, p. 67n.

[1] 44 & 45 Vict. c. 69 (Imp.). In Appendix.

to throughout the Empire and upon the high seas as if contained in one Imperial Act. In the absence of legislation upon the subject in all or any of the colonies, the Imperial Act of 1881 may be enforced *proprio vigore* through all British territories; that is to say it does not, strictly speaking, need aid from colonial legislatures. Section 2 is the key note. It provides that where a person accused of having committed an offence in one part of (His) Majesty's dominions has left that part, such person, if found in another part of (His) Majesty's dominions, shall be liable to be apprehended and returned in manner provided by the Act to the part from which he is a fugitive. The rest of the Act is largely concerned with the machinery for carrying out this declaration and in laying down regulations for its operation throughout the Empire. Under the Colonial Laws Validity Act, 1865, colonial legislation upon the subject matter of an Imperial Act extending to the colony is permissible, so long as and to the extent that the colonial Act is not repugnant to the Imperial Act.[2] But such a colonial Act could not be carried into execution in any other colony or in the United Kingdom, although it would, upon due proof, be recognized elsewhere as the law of the colony which enacted it. Colonial legislation, however, on the subject of fugitive offenders when approved of by the British Government becomes in effect Imperial legislation extending to all parts of the Empire; for the Imperial Fugitive Offenders Act, 1881, provides:

"32. If the legislature of a British possession pass any Act or ordinance—

(1) For defining the offences committed in that possession to which this Act or any part thereof is to apply; or

[2] See *ante* p. 59.

(2) For determining the Court, Judge, magistrate, officer, or person by whom and the manner in which any jurisdiction or power under this Act is to be exercised; or

(3) For payment of the costs incurred in returning a fugitive or a prisoner, or in sending him back if not prosecuted or if acquitted, or otherwise in the execution of this Act; or

(4) In any manner for the carrying of this Act or any part thereof into effect in that possession,

It shall be lawful for Her Majesty by Order in Council to direct, if it seems to Her Majesty in Council necessary or proper for carrying into effect the objects of this Act, that such Act or ordinance, or any part thereof, shall with or without modification or alteration be recognized and given effect to throughout Her Majesty's dominions and on the high seas as if it were part of this Act."

The Canadian Fugitive Offenders Act[3]—duly sanctioned as above indicated—applies, as does also the Imperial Act, only to crimes which by the law of that part of the Empire where they were committed are punishable by imprisonment at hard labour for twelve months or more; but it is not necessary that they should be crimes by the law of that part of British territory—of Canada, for instance, under the Canadian Act—to which the fugitive may have fled; or that, if there treated as crimes, the punishment provided should be as severe as above specified.[4] As already intimated, the clauses in the Canadian Act providing for the transportation of the fugitive from Canada to the place from which he fled are, in effect, Imperial legislation and any objection to them as providing for exterritorial restraint of the fugitive's person is thus met, even if otherwise open.[5]

[3] R. S. C. (1906), c. 154.

[4] R. S. C. (1906), c. 154, ss. 3 and 4. See sec. 9 of the Imperial Act.

[5] See *ante*, p. 194.

CHAPTER XI.

The Army and Navy.

The Army:

The declaration of the Bill of Rights[1] that "the maintenance of a standing army in time of peace without consent of Parliament is contrary to law" applies throughout the Empire. It rests upon two fundamental principles; *first*, that the money necessary for an army's maintenance must be granted by Parliament; and, *second*, that without statutory sanction regulations for the government and discipline of an army would be largely futile as their enforcement involves a radical departure from the ordinary rules of law, and the setting up of tribunals which the common law does not recognize. Since the revolution of 1688, inherited distrust of a standing army has been reconciled with the acknowledged need of a permanent disciplined force by the well-known device of annual legislation. First introduced in 1689, the idea has been carried out, with scarcely a break, ever since by the passage in each year and for one year only of an Act, styled until 1879 the annual "Mutiny Act" and since that date known as the Army (Annual) Act of each year.

It was a recognized prerogative of the Crown in earlier times to promulgate "Articles of War" when war had broken out or was imminent[2] and thus, in effect, to legislate for the maintenance and discipline of the armed forces of the Crown in time of war: and the martial tribunals of those days have become the Courts Martial of to-day. Later, statutory authority was conferred upon the Crown to

[1] 1 Wm. and Mary, st. 2, c. 2.
[2] *Hale*, Hist. of the Common Law, 40.

make Articles of War for the government and discipline of the army both in peace and war. In 1879, the provisions of the Mutiny Act and of the then existing Articles of War were consolidated into a code of military law, and two years later this code was re-enacted with amendments as the Army Act, 1881[3]—the existing code for the government and discipline of the British Army. It is kept in force each year by an Army (Annual) Act, which specifies the number of men to constitute the army for the year, exclusive of the forces employed in India.[4] Thus each year the code of military law comes under the consideration of Parliament which, as Anson says, "no longer gives power to make rules and constitute Courts, but enacts the rules, provides the jurisdiction for enforcing them and the punishment for their breach."[5] In every aspect the maintenance and control of the British Army has passed beyond the region of prerogative. Each annual Act provides that the Army Act, 1881, while in force as specified, shall apply to all persons "subject to military law" whether within or without His Majesty's dominions. But while thus extending to all British colonies, the Army Act, 1881, deals, to put it shortly, only with the British Army.[6] In other words those who are "subject to military law" are specified with much particularity in sections 175 (officers) and 176 (soldiers), and the

[3] 44 & 45 Vict. c. 58 (Imp.).

[4] "The right of the Crown to dispose freely of this force elsewhere than in the United Kingdom must be regarded as an open question, since the highest legal authorities differed irreconcilably in 1878." *Anson*, pt. II., 362. The reference is to the debate on the moving of troops from India to Malta in 1878, when Lords Selborne and Cairns opposed Lord Herschell and Atty.-Gen. Holker.

[5] *Anson*, Law and Custom of the Const., 2nd ed., pt. II., 368n. The Army (Annual) Act, 1913, is printed in the Appendix. Note its recitals.

[6] See *Holmes* v. *Temple* (1882), 8 Que. L. R. 351.

enumeration does not include the officers or men of armed forces raised by colonial governments. "Forces raised by order of Her Majesty beyond the limits of the United Kingdom and India" are mentioned, but, as Anson says, "these are substantially part of the regular forces and are governed by the Army Act."[7] Colonial forces, properly so called, may in certain circumstances in time of war be governed by the Army Act, 1881, as specified in section 177 of the Act; but before dealing with that section, some preliminary observations seem called for.

No suggestion seems ever to have been made that a colonial legislature, empowered to pass laws for the peace, order, and good government of the colony, might not lawfully provide for the maintenance and discipline of an armed force to preserve internal peace or to ward off an actual or threatened invasion. Even in the earlier days when colonial assemblies were enjoined from enacting laws repugnant to the laws of England,[8] defensive measures could hardly fall within that category, whatever might be said of purely offensive warfare. The same fundamental principles which necessitate parliamentary sanction for a disciplined force in the United Kingdom are operative in the self-governing colonies. Legislative action is required in order to the maintenance and due discipline of a colonial force. But that such legislative action is, speaking broadly, within colonial competence has never been doubted; and Imperial legislation is based upon that assumption.[9] The doubts and difficulties which have arisen in reference to colonial forces, organized

[7] *Anson*, pt. II., p. 360. Free use of this work has been made in the preparation of this and other chapters.

[8] See *ante*, pp. 56-7.

[9] See *Egerton*, Short Hist. of Brit. Col. Policy, 365, quoting Resolution of the British Commons in 1862.

under colonial law and properly, that is to say, lawfully, subject to military law and discipline as laid down in colonial enactment, have been chiefly twofold: *First,* as to the position of colonial forces when away from their home limits and, *Second,* as to their control and discipline when co-operating either at home or abroad with the regular forces of the British army.

As to the *first* it was doubtful, to say the least, if the colonial enactments were of binding force beyond the limits of the colony. They would doubtless be enforced and in the colonial Courts such enforcement might be held lawful; but if the question could be brought before tribunals abroad or in other parts of British territory exterritorial enforcement of the colony's military law might be impossible.[10] This difficulty is met by sec. 177 of the Imperial Army Act, 1881, which provides:

177. Where any force of volunteers, or of militia, or any other force, is raised in India, or in a colony, any law of India or the colony may extend to the officers, non-commissioned officers, and men belonging to such force, whether within or without the limits of India or the colony: and where any such force is serving with part of Her Majesty's regular forces, then so far as the law of India or the colony has not provided for the government and discipline of such force, this Act and any other Act for the time being amending the same shall, subject to such exceptions and modifications as may be specified in the general orders of the general officer commanding Her Majesty's forces with which such force is serving, apply to the officers, non-commissioned officers, and men of such force, in like manner as they apply to the officers, non-commissioned officers, and men respectively mentioned in the two preceding sections of this Act.

It would appear therefore that the position of Canadian forces is the same whether serving at

[10] See *ante*, chap. VII., p. 65.

home or abroad. If acting alone they are subject to the law as laid down in Canadian enactments, this section 177 clearly giving such enactments exterritorial efficacy; if serving with regular troops the Army Act, 1881, applies to them so far as Canadian law has not made provision,[1] subject, however, to the power lodged with the general officer commanding to prescribe exceptions to and modifications of this general rule in favour of the colonial forces. If the Canadian disciplinary code purported to be exhaustive, there might be a question as to the operation of the Army Act in matters not touched by the Canadian code; but it would probably be held applicable even in such cases, subject to the judicious exercise of the power of modification vested in the general officer commanding. Of course, if in the case of any colony there were no code of discipline—a most unlikely contingency—the Army Act would apply in its entirety.

Little need be said as to the *second* point. Section 177, above quoted, clearly contemplates that the general officer commanding the regular forces would also be in command of the co-operating colonial forces as well. Section 15 of the British North America Act provides:

"15. The Command-in-Chief of the land and naval militia and of all naval and military forces of and in Canada is hereby declared to continue and be vested in the Queen."

And the Militia Act of Canada provides, perhaps superfluously, that "in time of war when the militia is called out for active service to serve conjointly with His Majesty's regular forces, His Majesty may place in command thereof a senior general officer of His regular army."[2]

[1] See R. S. C. (1906), c. 41, s. 74.
[2] R. S. C. (1906), c. 41, s. 72.

Under the Canadian Militia Act provision is made for a permanent force not (in 1906) to exceed 5,000 men, but further details as to military organization both in the United Kingdom and in Canada would be out of place in this book. As between Canada and its provinces the exclusive power to make laws relating to "Militia, military and naval service, and defence" is with the Parliament of Canada; and there is no Imperial legislation to restrict the power of the Canadian Parliament to legislate fully for the maintenance, government, and discipline within Canada of a Canadian armed force. The existing Militia Act limits the right of the Canadian Government to place the militia on active service beyond Canada by the qualifying phrase "for the defence thereof,"[3] a qualification practically honoured in the breach in the case of the late South African War. As to the discipline of the Canadian Militia that, of course, rests with the Parliament of Canada, subject only to the provisions of sec. 177 (above quoted) of the Imperial Army Act, 1881. Those provisions, as already noticed, enlarge rather than restrict colonial powers of legislation along this line. The existing Militia Act of Canada provides for disciplinary regulations to be formulated by the Governor-General in Council and sec. 74 provides that "the Army Act for the time being in force in the United Kingdom, the King's regulations, and all laws applicable to His Majesty's troops in Canada and not inconsistent with this Act or the regulations made thereunder shall have force and effect as if they had been enacted by the Parliament of Canada for the government of the Militia."

[3] R. S. C. (1906), c. 41, s. 69. *The War Appropriation Act*, 1914,—5 Geo. V., c. 1 (Dom.)—provides, amongst other things, for "the conduct of naval and military operations in or beyond Canada;" but the *Militia Act* was not touched.

The Navy.

The practical difficulty as to the exterritorial enforcement of colonial law, already referred to in connection with land forces, appears in acute form in reference to any naval force provided for by colonial legislation whether for purposes of defence or to form part of the naval strength of the Empire. Whatever the reason—and that is not a proper topic for discussion here—the fact remains that no provision for a naval force was made by Canadian legislation until 1910;[4] and that legislation has become such a controversial topic in Canadian politics that the briefest statement of its provisions so far only as is necessary to indicate the relation it bears to Imperial legislation must suffice.

The maintenance and organization of the British Navy is covered by many statutes which call for no discussion here. Its discipline is provided for by *The Naval Discipline Act,* 1866,[5] which applies wherever the ships or men of the Navy may be throughout the world; and " every person in or belonging to Her Majesty's Navy and borne on the books of any one of Her Majesty's ships in commission " is subject to the Act,[6] and many other persons are also or may be affected by its clauses in all parts of the Empire and beyond.[7]

[4] The " Government Vessels Discipline Act," R. S. C. (1906), c. 111, is the only Act in the Revised Statutes which in any way touches the topic. It applies to " every vessel employed by the Government of Canada." These would include vessels used in Revenue Protection, Fisheries Protection, etc.

[5] 29 & 30 Vict. c. 109 (Imp.). It has undergone little amendment. Its recital is noteworthy: " Whereas it is expedient to amend the law relating to the government of the Navy, whereon, under the good Providence of God, the wealth, safety and strength of the Kingdom chiefly depend."

[6] Section 84.

[7] Section 87, *et seq.*

In the previous year had been passed *The Colonial Naval Defence Act*, 1865,[8] which, with an amendment in 1909,[8a] is still law. While expressly saving "any power vested in or exercisable by the legislature or government of any colony" it provides that in any colony, it shall be lawful for the proper legislative authority, with the approval of Her Majesty in Council, from time to time to make provision at the expense of the colony, for a colonial organized naval force. The discipline of the force "while ashore or afloat within the limits of the colony" may be determined by the colonial legislature, but elsewhere the discipline must be that of the Royal Navy. A perusal of the Act discloses indeed that the powers conferred by it are at all points subject to Imperial control.

The Canadian Act of 1910 already referred to—the "Naval Service Act"[9]—gives power to the Governor-General in Council to organize and maintain a permanent naval force, of which the command-in-chief is to be vested in His Majesty,[10] and which, while primarily designed for the defence and protection of the Canadian coasts and Canadian trade, may be engaged anywhere as the Governor-General in Council may from time to time direct. The Naval Discipline Act, 1866 (Imperial) with its amendments, is to apply "except in so far as they may be inconsistent with this Act or with any regulations made under this Act." The attitude of the Imperial authorities to this Canadian Act appears in an Imperial Act of 1911.[1]

[8] 28 Vict. c. 14 (Imp.). See Appendix.

[8a] 9 Edw. VII., c. 19.

[9] 9 & 10 Edw. VII. c. 43 (Dom.).

[10] A superfluous provision in view of sec. 15 of the B. N. A. Act. See *ante*, p. 205.

[1] 1 & 2 Geo. V. c. 47 (Imp.). "The Naval Discipline (Dominion Forces), Act, 1911." It may be added that this chapter was written before the outbreak of war. Now, doubtless, there will

General Observations.

Apart from the special laws enacted for their government and discipline, officers and men of the Army and Navy are subject to the law of the land as ordinary citizens;[2] and the tribunals—Courts-Martial and Naval Courts—created for the enforcement of the special laws which affect them are subject to the superintending jurisdiction of the ordinary Superior Courts both in the United Kingdom and in the self-governing colonies. If these special tribunals act without or exceed their jurisdiction, their proceedings will be quashed or prohibited, persons improperly detained under their process will be released upon *habeas corpus* proceedings, and an action will lie, as a rule, for damages suffered by any illegal assumption of authority.[3] And where an act which is an offence against the Army Act or the Naval Discipline Act is also an offence by the ordinary law the ordinary Courts may exercise their jurisdiction just as if the offender were not subject to the special law or amenable before a special tribunal. If convicted before such special tribunal and duly punished under its sentence, such sentence and punishment is no bar to a further prosecution before the ordinary Courts; but, under the Army Act, those Courts "shall in awarding punishment have regard to the military punishment he may have already undergone."[4] The Naval

be further legislation, imperial and colonial; and it therefore seems undesirable to enlarge further upon the topics covered by this chapter. The Imperial Act of 1911 is printed in the Appendix.

[2] As to the right to resign at will: see *Anson*, pt. II., 363; *Re Harris* (1909), 19 Man. L. R. 117; and on the general proposition of the text: see *R.* v. *Hill* (1907), 15 Ont. L. R. 406.

[3] *Anson*, pt. II., 371, *et seq.*

[4] Section 162.

Discipline Act, 1866, has no like qualification.[5] On the other hand, an acquittal or conviction before a competent Civil Court is a bar to any prosecution under the Army Act (sec. 162) and the same principle would apply to the Naval Discipline Act.

The Foreign Enlistment Act, 1870, is an Imperial statute extending to all British possessions; but its provisions have already been sufficiently discussed.[6]

[5] Section 101.

[6] See *ante*, p. 82; *R.* v. *Jamieson* (1896), L. R. 2 Q. B. 425; 65 L. J. M. C. 218. See also *R.* v. *Schram* (1864), 14 U. C. C. P. 318.

CHAPTER XII.

Merchant Shipping.

No excuse is offered for dealing with this subject at some length. Canada, with its thousands of miles of ocean front, its great inland lakes, and its very many seaports, is vitally interested in knowing what law governs the ships, British or foreign, which ply on its waters or visit its ports, and the crews which man them; and how far that law may be determined by the Parliament of Canada. As between Canada and its various provinces, the Parliament of Canada has exclusive authority to make laws relating to "Navigation and Shipping;"[1] but as between Canada and the Empire it will develop in the course of this chapter that the power of the Canadian Parliament is much circumscribed by Imperial legislation which extends to this country. For example, it will appear that while Canadians may own ships, and ships may be registered in Canadian ports, there is no such thing in law as a Canadian ship.[2] National character is one apparent aim of the Imperial legislation and all ships registered within the Empire are British ships, some indeed with home ports in the colonies, but all recognized the world over as possessing national character and entitled to fly the British flag. It will further appear that while to some extent colonial legislatures are expressly empowered to deviate generally from the Imperial pattern, they may do so only as to ships registered in the colony.[3] The law to be administered in Canada as to all other ships, British and foreign, is to be looked for in the

[1] B. N. A. Act, 1867, s. 91, No. 10.
[2] See *post*, pp. 215, 231.
[3] See *post*, pp. 213, 229.

first place, in the Imperial Act, which as to many of its provisions is expressly extended to the colonies.[3a]

The existing Imperial statute is the Merchant Shipping Act, 1894,[4] with its amendments; and it will be convenient to consider this Act, in the first place, without regard to the express power of modified repeal given by it to colonial legislatures in relation to ships registered in the colonies. That express power exercised to the full, there yet remains a large part of the Act untouched, as already intimated. In so far as that large part of the Act which Canadian legislation cannot affect is extended to Canada by express words or necessary intendment, Canadian legislation[5] must be tested by the Colonial Laws Validity Act, 1865;[6] it must be read subject to the Imperial Act and to the extent of its repugnancy thereto but not otherwise, it remains void and inoperative. It is of importance, therefore, to ascertain just how far the imperial Merchant Shipping Act, 1894, does extend to Canada; and this necessitates a somewhat extended consideration of its provisions.

Imperial "Merchant Shipping Act, 1894."

"*Part I: Registry:*" *Secs. 1-91.*

This part of the Act applies to the whole of His Majesty's dominions and to all places where His Majesty has jurisdiction.[7] It prescribes, first, the qualification for owning British ships. British subjects by birth, naturalization (either under British

[3a] See *The Rajah of Cochin* (1859), Swab. 473.

[4] 57 & 58 Vict. c. 60 (Imp.). The Act of 1906 (6 Edw. VII., c. 48), should be particularly noted.

[5] Chiefly to be found in the "Canada Shipping Act," R. S. C. (1906), c. 113.

[6] 28 & 29 Vict. c. 63 (Imp.), s. 2. See *ante*, p. 57, *et seq.*

[7] Section 91.

or colonial legislation) or denization,[8] may alone of natural persons, and bodies corporate established under and subject to the laws of some part of British territory and having their principal place of business within such territory [9] may alone of artificial persons own British ships. Every British ship in order to be recognized as such must, with defined exceptions, be registered under the Act.[10] The procedure for registration and for the issue of a "certificate of Registry" is then set forth, followed by provisions as to transfers, transmissions of interest, mortgages,[10b] and certificates relating thereto. There are also provisions relating to a ship's name and to any change in it, to alterations in structure and the consequent changes in her certificate of registry, to measurement, inspection, returns, etc.; and particular provisions as to national character and the use of the British flag. The governor of a British possession [1] occupies the place of the British Commissioners of Customs and it is his duty to name ports for registration and appoint the registrars.[2]

The modified power of repeal given to the Parliament of Canada—to be dealt with later—is limited to "ships registered in that possession" [3] and this

[8] See *ante*, p. 173.

[9] The nationality of the shareholders is immaterial: *R.* v. *Arnaud* (1846), 16 L. J. Q. B. 50; 9 Q. B. 806.

[10] Section 2.

[10b] In British Columbia, ships are specially exempted from the operation of the Bills of Sale Act; and there being no provision in the Merchant Shipping Act penalizing neglect to register a mortgage on a ship, an execution creditor cannot seize and sell as against an unregistered mortgage: *Imp. Timber, etc., Co.* v. *Henderson* (1909), 14 B. C. 216.

[1] Canada, for the purposes of the Act, is one British possession. See the Imperial Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 18 (2), and also The Merchant Shipping (Colonial) Act, 1869 (32 Vict. c. 11).

[2] Sections 4 and 89.

[3] See section 735, quoted *post*, p. 229.

phrase can only refer to registration under the Imperial Act. It would seem therefore that all the provisions of that Act up to the issue of the first certificate of Registry at least, including the requirements as to qualification for ownership, not only extend to Canada but also are not susceptible of repeal by Canadian legislation.[4] Any Canadian enactment as to those matters must, as already pointed out, be read subject to the Imperial Act and be not inconsistent with it. This phase of the question is very lucidly discussed in a judgment of the late Mr. Justice Burbidge of the Exchequer Court of Canada, delivered in 1901.[5] The *Minnie M.*, built in the United States, became the property of Canadian owners who obtained from the British Consul at Chicago a provisional certificate having operation under sec. 22 of the Merchant Shipping Act, 1894, as a temporary certificate of registry. She was then taken to a Canadian port where application was made for her registration as a British ship. The customs' officer there claimed that under the Canadian Customs Tariff, 1897, she was liable "upon application for Canadian register" to duty as a foreign-built ship. Her owners contended that this was an impediment thrown in the way of complete registration, not warranted by, but repugnant to, the provisions of the Imperial Act. It was further argued that upon the proper construction of the Customs Tariff the ship was not liable, and on this point Mr. Justice Burbidge gave judgment against the Crown, and it was upon this that his judgment was reversed.

[4] It was not necessary to decide this in *Algoma Cent. Ry. Co.* v. *R.* (*infra*), and there is no express pronouncement upon it; but it must be confessed that the language of some of the Judges tends to a different conclusion from that expressed in the text: see 7 Exch. Ch. R., at p. 256; 32 S. C. R., at p. 291; and 72 L. J. P. C., at p. 109.

[5] *Algoma Central Ry. Co.* v. *R.*, 7 Exch. Ct. Rep. 239.

His opinion upon the constitutional points involved was upheld both in the Supreme Court of Canada and before the Privy Council.[6] All agreed that the imposition of a duty was not repugnant to the Imperial Act, its payment not being made a condition precedent to registration; the phrase " on application for Canadian register " merely fixing the time for payment of the tax. It had also been argued that there had been no application for " Canadian register," that the application had been for registry as a British ship under the Imperial Act; and as to this all agreed that the only registration possible was as a British ship and that the phrase " application for Canadian register " necessarily meant " application for British register in Canada."[7]

" Part II: Masters and Seamen." (*92-266*)

The scope of this part is sufficiently indicated for our purpose by section 261, which prescribes the extent to which it is to apply in the case of ships registered out of the United Kingdom. It applies, of course, to all sea-going ships registered in the United Kingdom[8] and many of its provisions have reference to transactions in colonial and foreign ports touching the members of the crew of such ships.[9] Section 261 is as follows:

261. This Part of this Act shall, unless the context or subject-matter requires a different application, apply to all sea-going British ships registered out of the United Kingdom, and to the owners, masters, and crews thereof as follows; that is to say,

[6] 32 S. C. R. 277 ;72 L. J. P. C. 108. See *ante*, p. 53.
[7] 72 L. J. P. C., at p. 109.
[8] Section 260.
[9] *E.g.*, ss. 124, 125, 164, 165, *et seq.*; 169 *et seq.*; 186, etc.

(a) the provisions relating to the shipping and discharge of seamen in the United Kingdom and to volunteering into the Navy shall apply in every case;

(b) the provisions relating to lists of the crew and to the property of deceased seamen and apprentices shall apply where the crew are discharged, or the final port of destination of the ship is, in the United Kingdom; and

(c) all the provisions shall apply where the ships are employed in trading or going between any port in the United Kingdom, and any port not situate in the British possession or country in which the ship is registered; and

(d) the provisions relating to the rights of seamen in respect of wages, to the shipping and discharge of seamen in ports abroad, to leaving seamen abroad and to the relief of seamen in distress in ports abroad, to the provisions, health, and accommodation of seamen, to the power of seamen to make complaints, to the protection of seamen from imposition, and to discipline,[10] shall apply in every case except where the ship is within the jurisdiction of the government of the British possession in which the ship is registered.

Extended reference in detail to these various matters is not in place here; but it may be pointed out that under (c) the law which governs, for example, the numerous lines of British ships, registered elsewhere than in Canada, which ply to Canadian ports is the law enacted by this Part as to matters covered by it; while clause (d) also covers a large field, a closer examination of which is beyond the scope of this work.

With section 261 should also be read sections 264 and 265, as follows:

264. If the legislature of a British possession, by any law, apply or adapt to any British ships registered at, trading

[10] See *R.* v. *Martin* (1904), 36 N. B. 448, and *R.* v. *O'Dea* (1899), 3 Can. Crim. Cas. 402. And see also sec. 238 as to deserters from foreign ships; one instance of a statutory power to interfere with a person's freedom under circumstances where the common law would deny the right: see *Forsyth*, 468.

with, or being at, any port in that possession, and to the owners, masters, and crews of those ships, any provisions of this part of this Act which do not otherwise so apply, such law shall have effect throughout Her Majesty's dominions, and in all places where Her Majesty has jurisdiction in the same manner as if it were enacted in this Act.

265. Where in any matter relating to a ship or to a person belonging to a ship appears to be a conflict of laws, then, if there is in this Part of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

Certificates of Competency.

This Part also prescribes conditions as to competency of masters, mates, and engineers and for examinations under the supervision of the British Board of Trade to test such competency and for the issue of certificates of competency; and section 102 provides:

102. Where the legislature of any British possession provides for the examination of, and grant of certificates of competency to, persons intending to act as masters, mates, or engineers on board ships; and the Board of Trade report to Her Majesty that they are satisfied that the examinations are so conducted as to be equally efficient with the examinations for the same purpose in the United Kingdom under this Act, and that the certificates are granted on such principles as to shew the like qualifications and competency as those granted under this Act, and are liable to be forfeited for the like reasons and in the like manner, Her Majesty may by Order in Council,—

(i) declare that the said certificates shall be of the same force as if they had been granted under this Act: and

(ii) declare that all or any of the provisions of this Act, which relate to certificates of competency granted under this Act, shall apply to the certificates referred to in the Order: and

(iii) impose such conditions and make such regulations with respect to the certificates, and to the use, issue, delivery, cancellation, and suspension thereof, as Her Majesty may think fit, and impose fines not exceeding fifty pounds for the breach of those conditions and regulations.

This section has been acted upon in Canada's case and Canadian certificates are now recognized as of equal efficacy to British certificates.

"Part III: Passenger and Emigrant Ships." (*267-368*)

In section 735, which gives to colonial legislatures a modified power to repeal the provisions of the Imperial Act in relation to ships registered in the colonies respectively, the provisions as to emigrant ships are expressly excepted;[1] and section 364 enacts that those provisions shall apply to all voyages from the British isles to any port out of Europe, while section 365 enacts that this Part III. shall, so far as applicable and with certain modifications, apply to every ship carrying steerage passengers on a colonial voyage as defined in the Act. A "colonial voyage" is defined in section 270 as a voyage from any port in a British possession (other than British India and Hong Kong) to any port whatever where the distance between such ports is over 400 miles or the duration of the voyage is over three days; and by section 366 colonial governments may determine what is to be deemed the length of any colonial voyage and make provision as to "dietary scales," medical stores, and medical treatment. Subject to these exceptions, colonial legislatures may not repeal even as to ships registered in the colonies respectively the provisions of the Act as to emigrant

[1] See *post*, p. 229.

ships, though, as already indicated, they may make implementing provisions.[2]

With regard to passenger steamers, there are provisions as to survey and the grant of certificates as to carrying capacity, etc.; and in reference to these matters section 284 provides for the acceptance of colonial certificates in certain cases. The clause is in its phraseology very like section 102 (quoted above) [3] dealing with certificates of competency for masters, mates, and engineers.

In this part, as indeed all through the Act, are provisions as to the enforcement of the Act before colonial tribunals, and by colonial administrative officials.[4]

"Part IV: Fishing Boats."
(369-417)

This Part does not apply to any British possession (sec. 372); but section 744 provides that ships engaged in the whale, seal, walrus, or Newfoundland cod-fisheries are not to be deemed fishing boats, with the exception, as to the cod-fisheries, of ships belonging to ports in Canada or Newfoundland.

"Part V: Safety."
(418-463)

This part contains provisions aimed at preventing collisions, at securing reports of accidents, as to the carrying of proper life-saving appliances and general equipment, signals of distress, draught of water and load lines, the carriage of dangerous goods, the loading of timber, carriage of grain, and for preventing unseaworthy ships proceeding to

[2] *Ante*, p. 212.
[3] *Ante*, p. 217.
[4] *E.g.*, secs. 355, 356.

sea; and upon these various matters the Canadian Parliament has largely legislated both under the modified power of repeal given by section 735 and by way of implementing provisions. Upon only one or two matters is further reference here considered desirable, in order merely to draw attention to the possible differences in the law, Imperial or Canadian, which may govern in individual cases.

Collision Regulations:—

Sections 418 and 424 provide as follows:

418.—(1) Her Majesty may, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, make regulation for the prevention of collisions at sea, and may thereby regulate the lights to be carried and exhibited, the fog signals to be carried and used, and the steering and sailing rules to be observed by ships, and those regulations (in this Act referred to as the collision regulations) shall have effect as if enacted in this Act.

(2) The collision regulations, together with the provisions of this Part of this Act relating thereto, or otherwise relating to collisions, shall be observed by all foreign ships within British jurisdiction,[5] and in any case arising in a British Court concerning matters arising within British jurisdiction foreign ships shall, so far as respects the collision regulations and the said provisions of this Act, be treated as if they were British ships.

424. Whenever it is made to appear to Her Majesty in Council that the government of any foreign country is willing that the collision regulations, or the provisions of this Part of this Act relating thereto or otherwise relating to collisions, or any of those regulations or provisions should apply to the ships of that country when beyond the limits of British jurisdiction, Her Majesty may, by Order in Council, direct that those regulations and provisions shall, subject to any limitation of time conditions and qualifications contained in the Order, apply to the ships of the said foreign country.

[5] A phrase of dubious import: see *post*, p. 244.

whether within British jurisdiction or not, and that such ships shall for the purpose of such regulations and provisions be treated as if they were British ships.

Section 419 enacts that all owners and masters of ships shall obey the collision regulations; and the language is sufficiently wide to cover all British ships everywhere; and, apart from action under section 424, the regulations are binding, so far as British Courts are concerned, on foreign ships within British jurisdiction.[6]

The two sections, 418 and 424, have been carried out by concerted action on the part of the British and Canadian Governments [7] as well as of the leading powers, with the result that the navigation of the high seas and of Canadian waters other than the Great Lakes and the St. Lawrence above Montreal, is governed as to all British ships and most foreign ships[8] by what are called "International Rules of the Road," while Canadian regulations govern as to the excepted waters, that is, as to the inland waters of Canada. There is a difference, again, as to the statutory provisions which govern.[9] Upon the high seas beyond the three-mile limit the Imperial Act applies; while within Canadian territorial waters—i.e. within 3 miles of the coast, and on all inland waters—the Canadian statute governs; and there is some, though not a great, difference in the statutory provisions. For example, under the Imperial Act where a collision occurs and there is evidence of a breach of any

[6] *Coulson & Forbes*, Law of Waters (1902), p. 413. See *ante*, p. 77, *et seq.*

[7] The Canadian regulations are as prescribed by Order in Council of 20th April, 1905 (Dom.), and are to be found in Dom. Stats. 4 & 5 Edw. VII., at p. lx.

[8] See *Coulson & Forbes*, *ubi supra*, for the list. France and Germany are the only great powers not appearing in it (1902).

[9] As to the care to be taken apart from express statutory regulations: see *Graham* v. *The Ship* "*E. Mayfield*" (1913), 14 Exch. Ct. R. 331; *per* Drysdale, J.

of the collision regulations "the ship by which the regulation has been infringed shall be deemed to be in fault, unless it be shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary;"[10] while the Canadian statute does not go so far.[1] "The effect of the statute," said Mr. Justice Burbidge,[2] speaking of the Imperial Act, "is to impose on a vessel that has infringed a regulation which is *prima facie* applicable to the case the burden of proving, not only that such infringement did not, but that it could not by possibility have contributed to the accident. That is the rule no doubt to be followed in Canadian Courts in cases of collision occurring on the high seas; but it is not applicable where the collision occurs in Canadian waters. Where that happens the rule to be followed is that established by the earlier cases."[3] This is given merely as one instance of difference. There are, of course, others; but it is obviously beyond the scope of this work to do more than indicate in some of the leading matters the relation which Canadian legislation bears to the Imperial Act.

Load Lines:—

The Canadian Parliament has legislated[4] as to load-lines under the authority conferred by sec. 444, which provides:

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[10] Section 419 (4).

[1] R. S. C. (1906), c. 113, ss. 914-918.

[2] *Hamburg Packet Co.* v. *Derochers* (1903), 8 Exch. Ct. R., at p. 304, where the cases are collected. See also *Harbour Commrs. Montreal* v. *The "Albert M. Marshall"* (1908), 12 Exch. Ct. R. 178.

[3] He cites *The Cuba*, 26 S. C. R. 661, and *The Ship Porter* v. *Heminger*, 6 Exch. Ct. R. 210, 211. The "Maritime Conventions Act, 1911" (Br.), has, apparently, restored the old rule in most cases: see *The Enterprise* (1913), 82 L. J. P. 1.

[4] R. S. C. (1906), c. 113, s. 930-951. See particularly sec. 950. As to sec. 951, see *post*, p. 229.

444. Where the legislature of any British possession by any enactment provides for the fixing, marking, and certifying of load-lines on ships registered in that possession, and it appears to Her Majesty the Queen that that enactment is based on the same principles as the provisions of this Part of this Act relating to load-lines, and is equally effective for ascertaining and determining the maximum load-lines to which those ships can be safely loaded in salt water, and for giving notice of the load-line to persons interested, Her Majesty in Council may declare that any load-line fixed and marked and any certificate given in pursuance of that enactment shall, with respect to ships so registered, have the same effect as if it had been fixed, marked, or given in pursuance of this Part of this Act.

"*Part VI: Special Shipping Inquiries and Courts.*" (*464-491*)

This Part contains no general clause as to its territorial application; but under it jurisdiction is conferred upon colonial tribunals, and the provisions as to Naval Courts on the high seas and abroad apply to British ships registered in Canada when not within Canadian territorial waters.[5]

As to enquiries into shipping casualties, section 478 makes these provisions:

478. (1) The legislature of any British possession may authorize any Court or tribunal to make enquiries as to shipwrecks, or other casualties affecting ships, or as to charges of incompetency, or, misconduct on the part of masters, mates, or engineers of ships, in the following cases, namely:—

(a) where a ship-wreck or casualty occurs to a British ship on or near the coasts of the British possession or to a British ship in the course of a voyage to a port within the British possession;

(b) where a ship-wreck or casualty occurs in any part of the world to a British ship registered in the British possession;

[5] Section 486.

(c) where some of the crew of a British ship which has been wrecked or to which a casualty has occurred, and who are competent witnesses to the facts, are found in the British possession;

(d) where the incompetency or misconduct has occurred on board a British ship on or near the coasts of the British possession, or on board a British ship in the course of a voyage to a port within the British possession;

(e) where the incompetency or misconduct has occurred on board a British ship registered in the British possession;

(f) when the master, mate, or engineer of a British ship who is charged with incompetency or misconduct on board that British ship is found in the British possession.

(2) A Court or tribunal so authorized shall have the same jurisdiction over the matter in question as if it had occurred within their ordinary jurisdiction, but subject to all provisions, restrictions, and conditions which would have been applicable if it had so occurred.

(3) An inquiry shall not be held under this section into any matter which has once been the subject of an investigation or inquiry and has been reported on by a competent Court or tribunal in any part of Her Majesty's dominions, or in respect of which the certificate of a master, mate, or engineer has been cancelled or suspended by a Naval Court.

4. Where an investigation or inquiry has been commenced in the United Kingdom with reference to any matter, an inquiry with reference to the same matter shall not be held, under this section, in a British possession.

5. The Court or tribunal holding an inquiry under this section shall have the same powers of cancelling and suspending certificates, and shall exercise those powers in the same manner as a Court holding a similar investigation or inquiry in the United Kingdom.

6. The Board of Trade may order the re-hearing of any inquiry under this section, in like manner as they may order the rehearing of a similar investigation or inquiry in the United Kingdom, but if an application for re-hearing either is not made or is refused, an appeal shall lie from any order or finding of the Court or tribunal holding the inquiry to the

High Court in England: provided that an appeal shall not lie—

(a) from any order or finding on an inquiry into a casualty affecting a ship registered in a British possession, or

(b) from a decision affecting the certificate of a master, mate, or engineer, if that certificate has not been granted either in the United Kingdom or in a British possession, under the authority of this Act.

(7) The appeal shall be conducted in accordance with such conditions and regulations as may from time to time be prescribed by rules made in relation thereto under the powers contained in this part of this Act.

"Part VII: Delivery of Goods."
(492-501).

This part is not apparently of colonial application; and the subject, moreover, is dealt with by Canadian legislation.

"Part VIII: Liability of Shipowners."
(502-509).

This part extends "to the whole of Her Majesty's Dominions" (sec. 509);[5a] but Canadian legislation has dealt with it under the power conferred by sec. 735 to repeal the provisions of the Imperial Act in their relation to ships registered in Canada. As to all others the Imperial Act applies.[6]

"Part IX: Wreck and Salvage."
(510-571)

This part is apparently of local application only to the United Kingdom.

[5a] See *Georgian Bay Transp. Co.* v. *Fisher*, 5 Ont. App. R. 383.

[6] This subject has already received some attention: see *ante*, p. 77, *et seq.* As to the course of Canadian legislation: see *Waldie* v. *Fullum* (1909), 12 Exch. Ct. R. 325.

"Part X: Pilotage."
(572-633).

This part extends only to United Kingdom and the Isle of Man, but applies to all ships, British or foreign (sec. 572). Canada has legislated fully upon the topic.[6a]

"Part XI: Lighthouses."
(634-675).

This part is almost entirely of local application, though there are some secs. (670-675) as to lighthouses erected "on or near the coast of any British possession by or with the consent of the legislature of that possession," in regard to which orders in Council (Imperial) may impose dues payable by all ships passing it or deriving benefit from it; but none such are to be imposed except on address from the colonial legislature.

Under the British North America Act, 1867,[7] "beacons, buoys, lighthouses, and Sable Island," are among the specifically enumerated subjects committed to the Parliament of Canada; and there are Canadian statutes dealing fully with these subjects.

"Part XII: Mercantile Marine Fund."
(676-679)

This part is local to the United Kingdom, and calls for no further remark here.

"Part XIII: Legal Proceedings."
(680-712).

This part applies to "the whole of Her Majesty's Dominions" (sec. 712); and sec. 711 provides:

[6a] See *The Farwell* (1881), 7 Que. L. R. 380.
[7] Section 91, No. 9.

711. Any offence under this Act shall, in any British possession, be punishable by any Court or magistrate by whom an offence of a like character is ordinarily punishable, or in such other manner as may be determined by any Act or ordinance having the force of law in that possession.

As has already been intimated, the principle ordinarily recognized in British jurisprudence that crime and the jurisdiction over crime is local, is freely ignored in this part of the Act; and British law is enacted, not merely to govern British subjects without the realm, but to punish foreigners for acts committed abroad.

684. For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be.[8]

685.—(1) Where any district within which any Court, Justice of the Peace, or other Magistrate, has jurisdiction, either under this Act or under any other Act, or at common law, for any purpose whatever, is situate on the coast of any sea, or abutting on or projecting into any bay, channel, lake, river, or other navigable water, every such Court, Justice, or Magistrate, shall have jurisdiction over any vessel being on, or lying or passing off, that coast, or being in or near that bay, channel, lake, river, or navigable water, and over all persons on board that vessel or for the time being belonging thereto, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the Court, Justice, or Magistrate.

(2) The jurisdiction under this section shall be in addition to and not in derogation of any jurisdiction or power of a Court under the Summary Jurisdiction Acts.

686.—(1) Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port, or

[8] See *Dunbar Dredging Co.* v. "*The Milwaukee*" (1907), 11 Exch. Ct. R. 179. See also the Courts (Colonial) Jurisdiction Act, 1874: 37 & 38 Vict., c. 27 (Imp.).

harbour, or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any Court in Her Majesty's Dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that Court shall have jurisdiction to try the offence as if it had been so committed.

(2) Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849.

687. All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's Dominions by any master, seaman, or apprentice, who at the time when the offence is committed is, or within three months previously has been employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same Courts and in the same places as if those offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.

And sec. 688 provides for the detention upon its arrival in a port of the United Kingdom or within three miles of its coasts, of any foreign ship which "in any part of the world" has caused injury to any of His Majesty's subjects, until security be given for payment of the amount of loss suffered, such amount to be fixed, of course, by appropriate legal proceedings.

Provision is made also for the arrest of persons committing offences wherever they may be found, and for their transportation to the most convenient place for trial; and for the use, under safeguards, of depositions taken elsewhere than at the place of trial.

" Part XIV: Supplemental."
(713 to end).

Under the heading:—

" POWERS OF COLONIAL LEGISLATURES."

Sections 735 and 736, provide as follows:—

735.—(1) The legislature of any British possession may by any Act or Ordinance, confirmed by Her Majesty in Council, repeal, wholly or in part, any provisions of this Act (other than those of the third part thereof, which relate to emigrant ships), relating to ships registered in that possession; but any such Act or Ordinance shall not take effect until the approval of Her Majesty has been proclaimed in the possession, or until such time thereafter as may be fixed by the Act or Ordinance for the purpose.

(2) Where any Act or Ordinance of the legislature of a British possession has repealed in whole or in part as respects that possession any provisions of the Acts repealed by this Act, that Act or Ordinance shall have the same effect in relation to the corresponding provisions of this Act as it had in relation to the provision repealed by this Act.[9]

Coasting Trade.

736. The legislature of a British possession may, by any Act or Ordinance, regulate the coasting trade of that British possession, subject in every case to the following conditions:

[9] In the Revised Statutes of 1906, a curious error was apparently committed. The method adopted by the Parliament of Canada to carry out the idea of sec. 735 (sec. 547 of the Act of 1854), was to legislate generally to the extent thought desirable and within her power, and then to repeal in general terms all the provisions of the Imperial Act which conflicted with the Canadian legislation. Section 951 of R. S. C. (1906), c. 113, by the use of the word "Part" instead of "Act" limits the repeal to matters covered by Part XV. of the Canadian Act, "Deck and Load Lines." Any general repealing clause, however, may perhaps be unnecessary. See *Waldie* v. *Fullum* (1909), 12 Exch. Ct. R., at p. 364.

(a) the Act or Ordinance shall contain a suspending clause providing that the Act or Ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed:

(b) the Act or Ordinance shall treat all British ships (including the ships of any other British possession), in exactly the same manner as ships of the British possession in which it is made;

(c) where by treaty made before the passing of the Merchant Shipping (Colonial) Act, 1869 (that is to say, before the thirteenth day of May, eighteen hundred and sixty-nine), Her Majesty has agreed to grant to any ships of any foreign State any rights or privileges in respect of the coasting trade of any British possession, those rights and privileges shall be enjoyed by those ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the Act or Ordinance to the contrary notwithstanding.

The effect of sec. 735 has already been incidentally touched upon. The position may be summarized briefly:—

The power of repeal given to the Parliament of Canada by sec. 735, is limited in three ways:

1. Only ships registered in Canada can be affected by such repealing legislation.

2. Part III. of the Imperial Act, relating to emigrant ships, is expressly excepted. To such ships, even when registered in Canada, the Imperial Act extends, so far as it purports so to extend.

3. Canadian legislation requires to be confirmed by Imperial Order in Council, i.e., by the British government, and does not become operative until such approval has been proclaimed in Canada.

No power is given to repeal the provisions of the Imperial Act as to registration. The phrase "registered in that possession," can only refer to

registry under the Imperial Act. All the essential requirements preliminary to registry, including the possession on the part of the owners of the qualifications for owning British ships, must be determined by the British statute. In the British mercantile marine there are none but British ships, with home ports, it is true, in all parts of the Empire, but with a British registry under one uniform law operative wherever His Majesty reigns or has jurisdiction. Any Canadian legislation, therefore, on the subject of registration derives no efficacy from sec. 735. It must stand or fall by the Colonial Laws Validity Act, 1865. To the extent, but only to the extent, of its repugnancy to the provisions of the Merchant Shipping Act, 1894, it is void and inoperative. It must be read subject to the Imperial Act.

Section 735 allows colonial legislation (to the extent and subject to the conditions therein mentioned) repugnant to the Imperial Act. The Colonial Laws Validity Act, 1865, allows colonial legislation on the subject matter of the Imperial Act (without any condition as to the approval of the British government), so long as and to the extent that such colonial legislation is not repugnant to the Imperial Act.

With reference to the coasting trade of Canada the power conferred by sec. 736 has been freely exercised on lines duly approved of by the Imperial authorities.[10]

The law which is in force on a British ship—no matter where registered—upon the high seas is the law of her flag, that is to say, British law.[1] Nice questions as to private international law might thus

[10] See R. S. C. (1906), c. 113, Part XVI: "Coasting Trade."

[1] *Per Cockburn*, C.J., in *R.* v. *Keyn* (1876), L. R. 2 Ex. D. 152; 46 L. J. M. C. 17, at p. 64. See also *Dicey*, Private International Law (1896), 633.

arise; as if, for instance, a foreigner upon a British ship should make his will there. As to the position of colonial British subjects at sea upon a British ship, a quotation from *Hall* will suffice to suggest the somewhat anomalous conditions:[2]

"British jurisdiction is naturally felt in its largest extension by British subjects sailing in British vessels. On board such vessels no competing law is possible. Whether they are commissioned vessels of the State or whether they are in the less intimate relation to it of merchant ships, they are entirely covered by the national sovereignty in places where no equal or superior sovereignty exists. British subjects therefore are solely governed on board British ships by whatever law is able to accompany them on leaving the shores of the British Dominions. With regard to the nature and extent of this law, it is enough to repeat that the common law of England reigns, in so far as the ordinary statute law does not operate outside of the United Kingdom, and in so far as special laws such as the Merchant Shipping Act, or the Slave Trade Acts, fail to reach;[3] and to point out that since the laws enacted by the governments of India and the colonies take effect only within the territories which they are expressly made to touch an Indian or colonial subject of the Crown on embarking in a British ship leaves behind him all laws under which he was locally placed that are not identical with the law of England."[4]

Admiralty Jurisdiction.

(1) *Criminal*: "The administration of the criminal law of England was formerly distributed among two tribunals; the Court of Oyer and Terminer took cognizance of offences committed in the body of a

[2] *Hall*, 239, *et seq.*

[3] See *Tomalin* v. *Pearson* (1909), 2 K. B. 61; 78 L. J. K. B. 863.

[4] By the Commonwealth of Australia Constitution Act, 1900—63 & 64 Vict. c. 12 (Imp.)—provision is made (sec. 5), that "the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth."

county, the Court of the Lord High Admiral of those committed on the sea. A *divisum imperium* existed with respect to rivers and arms of the sea within the body of a county; each Court claimed concurrent jurisdiction over those waters."[5] In Richard II.'s time statutes were passed to restrain the exercise of jurisdiction by the Court of the Admiral to "only of a thing done upon the sea;"[6] admirals and their deputies were not thenceforth to "meddle of anything done within the realm." This prohibition is thus elaborated in the later statute:[7]

"Of all manner of contracts, pleas, and quarrels and all other things rising within the bodies of the counties as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power, nor jurisdiction . . . nevertheless of the death of a man and of a maihem done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the Admiral shall have a cognizance."

In England the criminal jurisdiction of the Court of the Admiral was transferred to Commissioners in the reign of Henry VIII.,[8] was regulated from time to time by statutes and, with the passing of the Act of 1844 entitled "An Act for the more speedy trial of offences committed on the High Seas,"[9] it may be said to have become part of the ordinary administration of the criminal law.

In the colonies the Admiral's criminal jurisdiction was exercised in Vice-Admiralty Courts until the time of William III., when it was transferred to Commissioners to be administered according to the

[5] *Per* Phillimore, J., in *R.* v. *Keyn* (1876), L. R. 2 Ex. D. 152; 46 L. J. M. C. 17, at p. 18.
[6] 13 Rich. II., st. 2, c. 5.
[7] 15 Rich. II. c. 3.
[8] 28 Hen. VIII. c. 15.
[9] 7 & 8 Vict. c. 2.

civil law.[10] In 1806, "the course of the laws of this realm used for offences committed upon the land within this realm," was substituted for the civil law.[1] And in 1849, "an Act to provide for the prosecution and trial in Her Majesty's colonies of offences committed within the jurisdiction of the Admiralty,"[6] was passed by the Imperial Parliament, and this Act is still in force, being expressly saved by the Merchant Shipping Act, 1894.[6a] The language of the Act of 1849, is of the widest scope; but, being limited to offences within the jurisdiction of the Admiralty, it did not when passed apply to offences upon other than British ships,[7] though now it covers, as well, all offences on foreign ships within British territorial waters.[8] As to offences upon British ships the jurisdiction of colonial Courts is complete, no matter where upon the high seas the offence may have been committed; but the punishment to be awarded is to be as if the conviction had taken place in England (sec. 2). And where death takes place in a colony following "stroke, poisoning, or hurt" at sea, the homicide is to be deemed to have been committed wholly within the colony (sec. 3).[8a]

The process of the Vice-Admiralty Courts existing in Canada prior to 1890, did not extend to the inland waters of Canada.[2] Ontario had its Maritime

[10] 10 & 11 Wm. III. c. 7. The enforcement of the civil law rather than the common law of England in the Courts of the Admiral appears all through as one ground of complaint, as the preambles to the various statutes shew.

[1] 46 Geo. III. c. 54.

[6] 12 & 13 Vict., c. 96 (Imp.). See Appendix.

[6a] Section 686: see *ante*, pp. 227-8.

[7] *R.* v. *Keyn*, *supra*.

[8] See *post*, p. 243.

[8a] Colonial legislatures are empowered to deal with the converse case: see 23 & 24 Vict. c. 102 (Imp.).

[2] See *post*, p. 238.

Court under an Act of the Parliament of Canada;[3] but Manitoba and the North-West Territories were without tribunals possessing admiralty jurisdiction.[4] Now, as will appear, the jurisdiction of the Exchequer Court of Canada in Admiralty extends to the whole of Canada over all waters, tidal or non-tidal or naturally navigable or artificially made so."[5]

Whatever jurisdiction in criminal matters, properly so called, these Acts may have left with Vice-Admiralty Courts in the colonies has been practically taken from them by the Colonial Courts of Admiralty Act, 1890,[9] which provides that a Colonial Court of Admiralty shall not have jurisdiction under this Act to try or punish a person for an offence which according to the law of England is punishable on indictment.[10] Any jurisdiction of a penal character, therefore, exerciseable by a Colonial Court of Admiralty is to be found in special legislation affecting such Courts;[1] so that it may be said, speaking generally, that the jurisdiction of Colonial Courts of Admiralty is now a civil jurisdiction only.

Admiralty Jurisdiction: (2) Civil.

The statutes of Richard II. touched the civil as well as the criminal jurisdiction of the Admiral's Courts; and many matters relating to shipping were cognizable only by the ordinary Courts of the realm.[2] What these were appears to some extent in the various statutes by which from time to time, the

[3] See *The Picton* (1879), 4 S. C. R. 648; *Monaghan* v. *Horn* (1881), 7 S. C. R. 409.

[4] *Bergman* v. *The "Aurora"* (1893), 3 Exch. Ct. R. 228.

[5] *Post*, p. 239.

[9] 53 & 54 Vict. c. 27 (Imp.). In Appendix.

[10] Section 2, s.-s. 3 (c).

[1] *E.g.*, The Fisheries Protection Act, Behring Sea Award Act, etc.

[2] *Ante*, p. 233.

civil jurisdiction of the Courts of Admiralty was extended. Full treatment of this topic is not attempted here. Suffice it to say, that, apart from these statutes, the jurisdiction very often depended upon very fine distinctions. For example, wages due upon a parole contract for service at sea could be sued for in the Court of Admiralty; while if they were due by a contract under seal only the common law Courts could entertain the action.[3] Salvage or towage services rendered or necessaries furnished upon the high seas were proper subjects of Admiralty jurisdiction; rendered or furnished within the body of a country—which would include navigable rivers and many harbours—only a Court of common law could enforce recompense. In 1840, an Act was passed "to improve the practice and extend the jurisdiction of the High Court of Admiralty in England,"[4] under which claims upon mortgages could, for the first time, be adjusted in the Admiralty Court, but only where the ship was under arrest or the proceeds of her sale were in Court;[5] and recompense for salvage or towage services and payment for necessaries was no longer to depend in the High Court of Admiralty upon where they were rendered or furnished. In 1861, the jurisdiction of the Court was still further extended[6] to cover, for example, claims for building, equipping, or repairing any ship, if the ship were under arrest when the cause was instituted; "any claim for damage done by any ship;" questions between co-owners; enforcement of mortgages and several other matters as to which theretofore jurisdiction had been denied

[3] See *Beaton* v. "*Christine*," 11 Exch. Ct. R. 167.

[4] 3 & 4 Vict. c. 45 (Br.).

[5] Now these limitations no longer exist.

[6] 24 & 25 Vict. c. 10 (Br.). It was in some respects, indeed, restrictive. See sec. 5 as to necessaries furnished: *Rochester Coal Co.* v. "*Garden City*" (1901), 7 Exch. Ct. R. 34.

or was doubtful. For further information as to the jurisdiction of the High Court of Admiralty in England, there are well known works to be consulted.[7]

Colonial Admiralty Courts and Jurisdiction.

So far as concerns the Constitution of these Courts, the position is thus shortly put by Anson:[8]

"Admiralty Courts in the colonies have had a different history to others. Admiralty jurisdiction existed to deal with matters arising at sea, outside the purview of other Courts. So the creation of Vice-Admiralty Courts in the colonies was not the establishment of a new jurisdiction, but a machinery for giving effect to one already existing. Acts of 1863 and 1867[9] gave facilities for establishing such Courts in all the colonies by instrument under the seal of the Admiralty and these Vice-Admiralty Courts were emanations of the Admiralty Court at home. But in 1890 these Imperial Courts, existing side by side with the colonial Courts, were abolished[10] and their duties and powers transferred, or the colonial legislatures were empowered to transfer them, to the colonial Courts."

The jurisdiction of the Vice-Admiralty Courts in Canada prior to 1890 is particularly specified in the

[7] The following cases from the Exch. Ct. Reports may usefully be noted:

1. *As to wages*: *Burke* v. "*Vipond*" (1913), 14 E. C. R. 326; *Beaton* v. "*Christine*," 11 E. C. R. 167; *Gagnon* v. "*Savoy*" (1904), 9 E. C. R. 238.

2. *As to equipment*: *Judge* v. "*John Irwin*" (1911), 14 E. C. R. 20.

3. *As to actions between co-owners*: *Heater* v. *Anderson* (1910), 13 E. C. R. 417.

4. *As to "damage done by any ship"*: *Barber* v. "*Nederland*" (1909), 12 E. C. R. 252; *Wyman* v. "*Duart Castle*" (1899), 6 E. C. R. 387.

5. *As to necessaries furnished*: *Rochester, etc., Co.* v. "*Garden City*" (1901), 7 E. C. R. 34.

[8] Law and Custom of the Const., pt. II., 462.

[9] 26 & 27 Vict. c. 24 (Imp.); 30 & 31 Vict. c. 45 (Imp.).

[10] 53 & 54 Vict. c. 27 (Imp.). See Appendix.

Imperial "Vice-Admiralty Courts Act, 1863."[1] Now under the legislation of 1890, it is as wide as that of the High Court of Admiralty in England; as will appear.

The Colonial Courts of Admiralty Act, 1890,[2] provides (sec. 3), that the legislature of any British possession may by any Colonial law[3] (a) declare any Court of unlimited civil jurisdiction—unlimited, that is, as to value or amount recoverable—whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such Court of its jurisdiction under the Act, and limit territorially or otherwise the extent of such jurisdiction; and (b) confer upon any other inferior or subordinate Court in the possession such partial or limited Admiralty jurisdiction under such regulations, and with such appeal (if any) as may seem fit: Provided that any such colonial law shall not confer any jurisdiction which is not by the Act conferred upon a Colonial Court of Admiralty.

The Parliament of Canada is the proper "legislature of a British possession" to act under this provision,[4] and by "The Admiralty Act, 1891,"[5] the

[1] At that date there were six Vice-Admiralty Courts in the colonies now forming Canada, namely: British Columbia; Vancouver Island; Lower Canada, otherwise Quebec; New Brunswick; Nova Scotia; and Prince Edward Island. As to the position of Manitoba and the North-West Territories, prior to 1890: see *Bergman* v. "*Aurora*" (1893), 3 Exch. Ct. R. 228. Ontario was given a Maritime Court in 1877 (40 Vict. c. 21, Dom.): see *The Picton* (1879), 4 S. C. R. 648. In *R.* v. *Sharp*, 5 Ont. Pract. R. 135, Wilson, J., held that the Great Lakes of Canada were "high seas" within the jurisdiction of the Admiralty; but the process of the Quebec Vice-Admiralty Court did not extend to them.

[2] 53 & 54 Vict. c. 27 (Imp.). See Appendix.

[3] The provisions of sec. 4 (as to approval of such colonial law by Her Majesty in Council), and of sec 7 (as to a like approval of Rules of Court), have been duly complied with as to Canada. See 3 Exch. Ct. R.; appendix.

[4] See The Interpretation Act, 1889 (Imp.), cap. 63, s. 18 (2).

[5] 54 & 55 Vict. c. 29 (Dom.).

Exchequer Court of Canada was declared to be, within Canada, a Colonial Court of Admiralty, with all the jurisdiction, powers, and authority conferred by the Act or by the Imperial statute upon which it is founded. So far from limiting the Court's jurisdiction, territorially or otherwise, the Act provides:

"4. Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so; and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any Vice-Admiralty Court as elsewhere therein, have all rights and remedies in all matters (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with shipping, trade or commerce, which may be had or enforced in any Colonial Court of Admiralty under The Colonial Courts of Admiralty Act, 1890."

The Canadian Act provides also for the constitution of Admiralty Districts with Local Judges in Admiralty; and each such Local Judge has within his District the full jurisdiction of the Judge of the Exchequer Court in Admiralty, but subject to appeal to such Judge.

The jurisdiction of the Exchequer Court in Admiralty is provided for in the Imperial Act as follows:

"2.—(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act,[6] be over the like places, persons, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise; and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England and

[6] As to limiting such jurisdiction, territorially or otherwise, by colonial law (sec. 3, *ante*, p. 238). Under the proviso to sec. 3, it cannot be extended beyond the limits indicated in sec. 2.

shall have the same regard as that Court to international law and the Comity of Nations."

Collision Cases: These have been said to be *communis juris*,[7] and the jurisdiction of the Admiralty Division of the High Court in England does not depend upon the place of collision. But where a collision took place in the harbour of Sandusky, Ohio, between two United States ships, it was held by the Supreme Court of Canada that the Exchequer Court of Canada in Admiralty had no jurisdiction; at least, under the circumstances. The proceedings had been instituted, and the warrant for the ship's arrest issued before she came into Canadian waters; and when she did come into those waters it was only casually, as it were, in the course of a voyage from one United States port on the lakes to another. She was arrested, too, in one of the channels of the Detroit River as to which the Ashburton Treaty of 1842 provides that they should be "equally free and open to the ships, vessels, and boats of both parties."[8] This judgment must be taken to affirm that each one of these circumstances was sufficient ground for denying jurisdiction to the Exchequer Court in Admiralty.[9]

[7] See *ante*, p. 79n. For example, see *The Kaiser Wilhelm der Grosse* (1907), 76 L. J. P. 138, where the collision took place in French territorial waters between a British and a German ship.

[8] *The "D. C. Whitney"* (1907), 38 S. C. R. 303.

[9] Hodgins, Lo.J., whose judgment in this case (10 Exch. Ct. R. 1), was reversed by the Supreme Court of Canada, remained, evidently, unconvinced, and in *Dunbar Dredging Co.* v. *The "Milwaukee"* (1907), 11 Exch. Ct. R. 179, discussed the questions involved at some length. So far as treaty obligations affect the matter, the same question might arise as to the navigation of the Pacific Coast, and particularly of the waters of the Gulf of Georgia, lying inside Vancouver Island, to the west and north of the international boundary line between the United States and Canada as settled by the Treaty of Washington and the award thereunder. As pointed out by Hodgins, Lo.J., the treaty articles dealing with the question of free navigation have not had parliamentary confirmation and, therefore, cannot affect private

As illustrating the fine distinctions which even yet may be drawn in order to determine Admiralty jurisdiction, reference may be had to a case which was decided in 1909 by the Privy Council on appeal from the Canadian Courts.[10] The appellants built the ship in Scotland, taking a mortgage to secure the unpaid balance of her purchase price; and on this mortgage proceedings were instituted in the British Columbia Admiralty District against the ship after her delivery to the owners in that province. The owners complained that she was not up to specifications and set up as a defence *pro tanto* that by reason of the builders' breach of contract the ship was worth less than the ship for which they had bargained. It was held that this defence raised a question which the Exchequer Court could not entertain by way of counterclaim; and, this being so, the doctrine or practice which permitted it to be raised by way of defence in the common law Courts (which had jurisdiction over both claim and counterclaim) could not be invoked in favour of the ship-owners.

Notwithstanding the provision in the Canadian Exchequer Court Act making a judgment of the Supreme Court of Canada on appeal from the Exchequer Court "final and conclusive," there is an appeal *as of right* to the Privy Council under the Imperial Colonial Court of Admiralty Act, 1890.[1]

rights: see *ante*, p. 136. See also the judgment of Mr. Justice Garrow in *Dunbar, etc. Co.* v. "*Amazonas*," *et al.* (1911), 13 Exch. Ct. R., at p. 498.

[10] *Bow, McLachlan & Co.* v. *The* "*Camosun*" (1910), A. C. 597; 79 L. J. P. C. 17.

[1] *Richelieu Nav. Co.* v. *The* "*Cape Breton*" (1907), A. C. 112; 76 L. J. P. C. 14. See *ante*, p. 157, *et seq.*

Canadian Territorial Waters.

(1) *On the Sea Coast*:

The "realm of England" extends only to low water mark; all beyond is "the high seas," the common highway for the ships of all nations. International law or the custom of nations recognizes the right of a maritime state to exercise jurisdiction for certain purposes looking to self protection over that portion of the high seas which washes its shore;[2] to what distance is not settled, though custom tends to stretch it to whatever distance is reasonably necessary for those purposes. But the recognition falls short of according that full territorial sovereignty which would warrant interference with the peaceful enjoyment by other nations of the common highway "upon their lawful occasions." The soil beneath the water beyond low water mark is often appropriated in the erection of piers, wharves, lighthouses, etc., but as these are usually in aid of navigation and useful to all nations no objection is raised. What international trouble might be caused by appropriation for other purposes need not be discussed;[3] for, so far as the Courts of the appropriating state are concerned, the state legislature may make the appropriation lawful.

Apart from legislation, British Courts have no criminal jurisdiction over the acts of persons on the high seas upon other than British ships. These for many purposes are "floating islands" of the Empire and, there being no other law to come into competition with the law of the flag, that law governs and the jurisdiction to enforce it rested, as has been seen.

[2] This has already been sufficiently discussed: see *ante*, pp. 108-9.

[3] *Coulson and Forbes*, Law of Waters, 2.

with the Courts of the Lord High Admiral of England. But in the well-known case arising from the sinking of the British ship "Strathclyde" by the German ship "Franconia" off Dover pier in 1876, it was held[4] that the Central Criminal Court—in which was vested the criminal jurisdiction of the Admiralty—could not try the captain of the German ship for manslaughter of a British subject drowned as the result of the collision. In the judgment in that case the various propositions so far stated were affirmed. The collision, though within the three-mile limit off the British coast, was held not to have occurred in British territory; and, in the absence of legislation, the alleged crime, having been committed abroad by a foreigner,[5] could not be enquired of in a British Court.

The power of the British Parliament to legislate on the subject, "to extend the realm," as Chief Justice Coleridge put it, "how far so ever it pleases to extend it by its enactments, at least so far as to bind the tribunals of this country"[6] was freely admitted; and this power was at once exercised in the passing of the Territorial Waters Jurisdiction Act, 1878,[7] but only for the purposes of the criminal law.

The statute, indeed, contains a recital that "the rightful jurisdiction of Her Majesty, Her heirs and successors extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions;" but the

[4] *R.* v. *Keyn* (1876), L. R. 2 Ex. D. 152; 46 L. J. M. C. 17; a veritable mine of learning on the subject of territorial extension and admiralty jurisdiction. See *ante*, p. 90n.

[5] At that time a British subject could be tried for offences abroad: see *ante*, p. 227. But this was by statute.

[6] See *ante*, p. 88, *et seq.*

[7] 41 & 42 Vict. c. 73 (Imp.). In Appendix.

title is merely " An Act to regulate the law relating to the trial of offences committed on the sea within a certain distance of the coasts of Her Majesty's dominions " and the enacting clauses deal only with the exercise of criminal jurisdiction.

An offence committed by a person, whether he is or is not a British subject, on the open sea within the " territorial waters " of the Empire, is declared to be within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship; and the person who committed the offence may be arrested, tried and punished accordingly. This enactment suffices to bring such an offence within the Admiralty Offences (Colonial) Act, 1849, already discussed on a previous page;[8] but no prosecution of a foreigner under the Act is to take place without the consent of one of the secretaries of state (in the United Kingdom) or of the Governor-General of Canada or the proper provincial Lieutenant-Governor (in Canada).

What are " territorial waters of Her Majesty's dominions " is defined in the Act to mean such part of the sea adjacent to British territory " as is deemed by international law to be within the territorial sovereignty of Her Majesty;" but this would leave the matter too doubtful and therefore the definition proceeds: " and for the purposes of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low water mark shall be deemed to be open sea within the territorial waters of Her Majesty."

The Parliament of Canada in legislating (needlessly perhaps) on this topic repeated the language of the British Act, but left out the clause in section 4 which provides that proceedings before a Justice

[8] *Ante*, p. 234.

previous to committal for trial should not be deemed proceedings for the trial of the offence so as to require the consent of the Governor, etc. This, however, was held to be immaterial as the British Act is clearly Imperial, extending *proprio vigore* to Canada, and the omitted clause therefore fully operative here.[9]

The result then is that all offences committed within the "three-mile limit" are cognizable by Canadian Courts under this Act, by whomsoever committed; while as to the open sea beyond that limit only such offences as are committed on board British ships are within the jurisdiction of the Admiral and as such cognizable in Canadian Courts under the "Admiralty Offences (Colonial) Act, 1849." And, as has already appeared,[10] the Merchant Shipping Act, 1894, appreciably extends the jurisdiction of British Courts over offences committed abroad by members or ex-members of the crew of a British ship.

With regard to narrow arms of the sea running into British territory, bays, inlets, etc., *inter fauces terrae* British law asserts absolute territorial sovereignty; but here again there is no unanimity among international jurists as to the width of the entrance which will suffice to bring the principle into operation. Where the British legislature has by its enactments treated an arm of the sea as British territory that is sufficient for a British Court, as in the case, for example, of Conception Bay in Newfoundland, which was on this principle, held to be British territory by the Privy Council in 1877.[1] In the judgment of the Board, delivered by Lord

[9] *R.* v. *Tano* (1909), 14 B. C. Rep. 200.

[10] *Ante*, p. 227.

[1] *Direct U. S. Cable Co.* v. *Anglo-Amer, Tel. Co.* (1877), L. R. 2 App. Cas. 394; 46 L. J. P. C. 71. As to the Bay of Chaleurs: see *Mowat* v. *McPhee*, 5 S. C. R. 66.

Blackburn, the whole question is discussed and more extended treatment of it is not called for here.

It would seem clear that the soil beneath the waters of such arms of the sea on the Canadian coast would be part of the Crown lands of the province into which they penetrate, except in the case of public harbours,[1a] though it may be presumptuous to express too decided an opinion upon the point. The proprietary interest of the Crown in the soil below low water mark along other parts of the coast is of a very doubtful character, apart from express legislative declaration;[2] and, as already pointed out, the Territorial Waters Jurisdiction Act, 1878, is silent as to proprietary interest. There is merely an assertion of jurisdiction, both past and present, for purposes of defence and security.[3]

(2) *Inland Waters*:

The waters of the Great Lakes which lie along the boundary between Canada and the United States are usually spoken of as inland waters and the Canadian "realm" extends to the international line, with as full territorial sovereignty as over waters strictly inland.[4] By treaty conventions with the United States the free navigation of these boundary waters is open to the ships of both countries.

Criminal jurisdiction has been asserted and provided for by Canadian statutes from early times

[1a] B. N. A. Act, sec. 108, schedule 3.

[2] This question is much discussed in *R.* v. *Keyn*, *ubi supra*, and proprietary interest in the Crown denied. See also judgment of Duff. J., in *Re British Columbia Fisheries* (1913), 47 S. C. R., at p. 502.

[3] On this question of title, see also *Coulson and Forbes*, Law of Waters, 8, *et seq.*

[4] *The Grace* (1894), 4 Exch. Ct. R. 283; *Dunbar Dredging Co.* v. *The "Milwaukee"* (1907), 11 Exch. Ct. R. 179. As to the Bay of Chaleurs: see *Mowat* v. *McPhee* (1880), 5 S. C. R. 66.

and the boundary lines of townships extend to the international line.[5] It has also been held that the Great Lakes are " high seas " within the jurisdiction of the Admiral,[6] so that the Imperial statutes of 1849 and 1878 would convey jurisdiction to Canadian Courts over offences committed on those waters, even if the exercise of criminal jurisdiction had not been fully provided for by Canadian legislation.

The same territorial sovereignty with proprietary ownership of the underlying soil exists, it would seem, in regard to the waters of the Gulf of Georgia lying behind Vancouver Island and to the north and west of the international boundary line and as far out as the seaward entrance to the Straits of Juan de Fuca. These are Canadian territorial waters apart altogether from the Territorial Waters Jurisdiction Act, 1878; for they are not " open " sea and it is only as to a three-mile belt of open sea that the Act of 1878 was necessary. These waters are " within the realm " and the underlying soil is part of the province of British Columbia and held by the Crown, it seems clear, in right of that province; just as the soil beneath the waters of strictly inland lakes is so held.[7]

[5] See 11 Exch. Ct. R., at p. 181-2.

[6] *R.* v. *Sharpe*, 5 Ont. Pract. R. 135: see *ante*, p. 238.

[7] As to public rights of fishing and of navigation in strictly inland waters: see *Re B. C. Fisheries* (1912), 47 S. C. R. 493.

CHAPTER XIII.

Miscellaneous Imperial Statutes.

Bankruptcy Acts.

The extent to which the British Acts are of colonial application has been considered by the Privy Council and the House of Lords. The Act of 1869 was held to vest in the assignee in bankruptcy real estate of the bankrupt situate in a colony.[1] The words of the particular sections were "lands and every description of property whether real or personal" and "all such property as may belong to or be vested in the bankrupt." There being thus no "express words," the question was whether there was the "necessary intendment" required by the Colonial Laws Validity Act.[2] It was held that "if a consideration of the scope and object of a statute leads to the conclusion that the legislature intended to affect a colony, and the words used are calculated to have that effect they should be so construed." The scope and object of the statute was determined, not only on the language of the Act itself, but on their Lordships' view of the policy of the whole series[3] of Bankruptcy Acts as being in *pari materia,* and it was held that "there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony."

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[1] *Callender* v. *Col. Sec'y Lagos* (1891), A. C. 460; 60 L. J. P. C. 33. A Scotch bankruptcy under the Act of 1856 (19 & 20 Vict. c. 79), would seem to have the same effect: see sec. 102.

[2] 28 & 29 Vict. c. 63 (Imp.); see Appendix.

[3] The Act of 1849 had been held not to extend to New Zealand; *Bunny* v. *Hart,* 11 Moo. P. C. 189.

The natural result would follow that the discharge of a bankrupt under the Imperial Act may be pleaded as a defence to an action in a colonial Court.[4]

On the other hand, it has recently been held by the House of Lords[5] that a foreigner cannot be adjudicated a bankrupt under the Imperial Act for an act of bankruptcy committed abroad. In that case certain United States merchants carried on business, through a manager, in England. Being in financial difficulties they executed in the United States a deed of assignment for the benefit of creditors. This would have been an act of bankruptcy under the Imperial statute had the assignment been executed in England; but its execution abroad was held not to bring them within the Act. A resident of a colony is a "foreigner" within the meaning of this decision.[6]

Buying and Selling Offices.

The statute of Edward VI[7] against trafficking in public offices was expressly extended to the colonies by an Act of Geo. III.[8]

[4] *Ellis* v. *McHenry*, L. R. 6 C. P. 228; 40 L. J. P. C. 109. See also *Nicholson* v. *Baird*, N. B. Eq. Cas. (Trueman), 195; *Fraser* v. *Morrow*, 2 Thomp. (N.S.), 232; *Hall* v. *Goodall*, 2 Murd. Epit. (N.S.), 149; ——— v. *Irving*, 1 P. E. I. Rep. 38.

[5] *Cooke* v. *Chas. A. Vogeler Co.* (1901), A. C. 102; 70 L. J. K. B. 181. See *ante*, p. 84. See, however, 3 & 4 Geo. V., c. 34, sec. 8 (Br.), which extends the meaning of the word 'debtor,' as used in the Acts of 1883 and 1890, to persons carrying on business in England by an agent or manager, etc.

[6] See *Colquhoun* v. *Brooks* (1888), L. R. 21 Q. B. D. 65; 57 L. J. Q. B. 70, 439.

[7] 5 & 6 Ed. VI. c. 16.

[8] 49 Geo. III. c. 126, sec. 1. See *R.* v. *Mercer*, 17 U. C. Q. B. 602; *R.* v. *Moodie*, 20 U. C. Q. B. 389.

Companies' Acts.

Neither the Joint Stock Companies' Arrangement Act, 1870, nor the other Companies' Acts with which it must be read and construed, extend to the colonies or are intended to bind the colonial Courts; and proceedings in an English Court under those Acts cannot be pleaded in a colony as a defence to an action by a colonial creditor.[9]

"It is impossible to contend that the Companies' Acts as a whole extend to the colonies, or are intended to bind the colonial Courts. The colonies possess and have exercised the power of legislating on these subjects for themselves, and there is every reason why legislation of the United Kingdom should not unnecessarily be held to extend to the colonies, and thereby overrule, qualify, or add to their own legislation on the same subject. It is quite true that the provisions of the Arrangement Act are expressed to extend to all creditors, and so they do to foreign as well as to colonial creditors, but only when their rights are in question in the Courts of the United Kingdom. . . . Nor do their Lordships think that any assistance is to be derived from what has been held with regard to the application of the Bankruptcy Act to the colonies. It has been decided that by the express words [10] of the Bankruptcy Acts all the property, real and personal, of an English bankrupt in the colonies as well as in the United Kingdom is vested in his assignees or trustees. Their title must therefore receive recognition in the colonial Courts, from which it has been considered to follow that the bankrupt, being denuded of his property by the English law, is also entitled to plead the discharge given him by the same law. But how does this assist the appellants? We have to deal with the winding-up of a company, not with bankruptcy, and there is a material distinction between the effect of bankruptcy and that of winding-up. In the former case the whole property of the bankrupt is taken out of him, whilst

[9] *New Zealand Loan Co.* v. *Morrison* (1898), A. C. 349; 67 L. J. P. C. 10.

[10] But see *ante*, p. 248.

in the latter case the property remains vested in title and in fact in the company, subject only to its being administered for the purpose of the winding-up under the direction of the English Courts."

And the respondent held her judgment, obtained in the Victorian Courts, for moneys deposited with the appellants in Victoria before the making of the English winding-up order.

If a winding-up of a company incorporated under the Imperial Acts is desired in and for a colony, it must be decreed by the colonial Court under colonial legislation.[1]

"The Companies Seals Act, 1864,"[2] is not, strictly speaking, an Imperial statute. It applies only to companies incorporated under the British Act of 1862 and empowers them to adopt and use a special seal for transactions outside of the United Kingdom. The reverse method appears in an Imperial Act of 1908[2a] which empowers companies incorporated in British Possessions to hold land on complying with certain provisions of the (Imperial) Companies Act.

Copyright.

To what extent the Imperial Copyright Act of 1842[3] was operative in Canada was considered by the House of Lords in 1868.[4] The precise case, as stated by the Lord Chancellor (Lord Cairns), was whether an alien friend publishing a work in England during the time of his or her temporary sojourn in a British colony was entitled to the protection

[1] *Allen* v. *Hanson* (1890), 18 S. C. R. 667; 4 Cart. 470.

[2] 27 & 28 Vict. c. 19 (Br.). See also the Companies Act, 1862, sec. 55, as to appointing agents abroad.

[2a] 8 Edw. VII., c. 12.

[3] 5 & 6 Vict. c. 45 (Imp.).

[4] *Routledge* v. *Low*, L. R. 3 E. & I. App. 113; 37 L. J. Chy. 454.

given by the Act. The facts were that an American authoress had crossed into Canada and her book was published in London during her few days' stay in Montreal. Three questions were considered: First, where must the publication take place? Secondly, what is the area over which the protection of the Act extends? Thirdly, who is entitled to that protection? Although the Act expressly provides[5] that it shall extend to "every part of the British Dominions," it was held to protect those works only which were published in the United Kingdom for reasons thus summed up by Lord Westbury: "This results from various provisions and conditions contained in the Act which could not possibly be complied with if the first publication was to take place in distant parts of the British Empire." As to the area over which the protection afforded by the Act was to extend, the language of the statute[6] was express that the copyright when created should extend to every part of the British Dominions. The third question as to what authors could procure the protection of the Act has already been fully discussed.[7]

Upon the question of chief importance from a Canadian standpoint, the operation of the Act in a colony having copyright legislation of its own, the language of Lord Cranworth and of Lord Chelmsford may be quoted:

"The decision of your Lordships' House in *Jeffreys* v. *Boosey*[8] rested on the ground that the statute of Anne, then alone in question, must be taken to have had reference exclusively to the subjects of this country, including in that description foreigners resident within it, and not to have contemplated the case of aliens living abroad beyond the auth-

[5] Section 29.
[6] Sections 15 and 29.
[7] See *ante* p. 72, *et seq.*
[8] (1855), 4 H. L. Cas. 815; 24 L. J. Ex. 81.

ority of the British legislature. The British Parliament in the time of Queen Anne must be taken *prima facie* to have legislated only for Great Britain, just as the present Parliament must be taken to legislate only for the United Kingdom.[9] But though the Parliament of the United Kingdom must *prima facie* be taken to legislate only for the United Kingdom and not for the colonial Dominions of the Crown, it is certainly within the power of Parliament to make law for every part of Her Majesty's Dominions, and this is done in express terms by the 29th section of the Act, now in question. Its provisions appear to me to show clearly that the privileges of authorship, which the Act was intended to confer or regulate in respect to works first published in the United Kingdom, were meant to extend to all subjects of Her Majesty in whatever part of her dominions they might be resident, including under the term 'subjects' foreigners resident there and so owing to her a temporary allegiance. That Her Majesty's colonial subjects are by the statute deprived of rights they would otherwise have enjoyed is plain, for the 15th section prohibits them from printing or publishing in the colony, whatever may be their own colonial laws, any work in which there is a copyright in the United Kingdom. It is reasonable to infer that the persons thus restrained were intended to have the same privileges as to works they might publish in the United Kingdom as authors actually resident therein."—*Per* Lord Cranworth.

"Our attention was called to a local law of Canada with regard to copyright; but it was not contended that it would prevent a native of Canada from acquiring an English copyright which would extend to Canada as well as to all other parts of the British Dominions, although the requisitions of the Canadian law had not been complied with. It is unnecessary to decide what would be the extent and effect of a copyright in [10] those colonies and possessions of the Crown which have local laws upon the subject. But even if the Imperial statute applies at all to such a case, I do not see how such a copyright can extend beyond the local limits of the law which creates it."—*Per* Lord Chelmsford.

[9] See *ante*, p. 69.

[10] "In" clearly means "under the laws of."

The question was afterwards litigated in Canadian Courts,[1] and the view of Lord Cranworth adopted, that the prohibition against printing or publishing in a colony a work protected by British copyright applies even to a colony having its own Copyright Act. But it should be noted that as late as 1905 the Supreme Court of Canada[2] expressly reserved the right to reconsider this decision, saying that it was still open to discussion whether the Parliament of Canada might not be able to override Imperial legislation on the subject of 'copyright' passed prior to 1867.[2a]

The question is not now likely to arise—at least, as to copyright[2b]—as the recent consolidating British "Copyright Act, 1911,"[3] contains these careful provisions as to the application of the Act to the self-governing dominions:

APPLICATION TO BRITISH POSSESSIONS.

25. (1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

(2) If the Secretary of State certifies by notice published in the London Gazette that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects

[1] *Smiles* v. *Belford*, 1 Ont. App. R. 436.

[2] *Imp. Book Co.* v. *Black*, 35 S. C. R. 488; affirming 8 Ont. L. R. 9. The Privy Council refused leave to appeal.

[2a] See *ante*, p. 63.

[2b] But see *ante*, p. 63.

[3] 1 & 2 Geo. V., c. 46 (Imp.).

resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this act extends, enjoy within the dominion rights substantially identical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

26. (1) The Legislature of any self-governing dominion may, at any time, repeal all or any of the enactments relating to copyright passed by Parliament (including this Act) so far as they are operative within that dominion: Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that, on this Act or any part thereof being so repealed by the Legislature of a self-governing dominion, that dominion shall cease to be a dominion to which this Act extends.

(2) In any self-governing dominion to which this Act does not extend, the enactments repealed by this Act shall, so far as they are operative in that dominion, continue in force until repealed by the Legislature of that dominion.

(3) Where His Majesty in Council is satisfied that the law of a self-governing dominion to which this Act does not extend provides adequate protection within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere than in that dominion, His Majesty in Council may, for the purpose of giving reciprocal protection, direct that this Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein, shall, within the parts of His Majesty's dominions to which this Act extends, apply to works the authors whereof were, at the time of the making of the work, resident within the first-mentioned dominion, and to works first published in that dominion; but, save as

provided by such an Order, works the authors whereof were resident in a dominion to which this Act does not extend shall not, whether they are British subjects or not, be entitled to any protection under this Act except such protection as is by this Act conferred on works first published within the parts of His Majesty's dominions to which this Act extends:—

Provided that no such Order shall confer any rights within a self-governing dominion, but the Governor in Council of any self-governing dominion, to which this Act extends, may, by Order, confer within that dominion the like rights as His Majesty in Council is, under the foregoing provisions of this sub-section, authorised to confer within other parts of His Majesty's dominions.

For the purposes of this sub-section, the expression "a dominion to which this Act extends" includes a dominion which is for the purpose of this Act to be treated as if it were a dominion to which this Act extends.

27. The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but, except so far as such modifications and addition relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

28. His Majesty may by Order in Council, extend this Act to any territories under his protection and to Cyprus, and, on the making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty's dominions to which this Act extends. . . .

Part II.—International Copyright.

30. (1) An Order in Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends except self-governing dominions and any other possessions specified in the Order with respect to which it appears to His Majesty expedient that the Order should not apply.

(2) The Governor in Council of any self-governing dominion to which this Act extends may, as respects that dominion make the like orders as under this Part of this Act His Majesty in Council is authorised to make with respect to His Majesty's dominions other than self-governing dominions, and the provisions of this Part of this Act shall, with the necessary modifications, apply accordingly.

(3) Where it appears to His Majesty expedient to except from the provisions of any order any part of his dominions not being a self-governing dominion, it shall be lawful for His Majesty by the same or any other Order in Council to declare that such order and this Part of this Act shall not, and the same shall not, apply to such part, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order.

35. (1) "Self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

The Copyright (Works of Art) Act, 1862,[4] does not extend to the colonies.[5]

"*Colonial Boundaries Act, 1895.*"

Under this Act[6] power is given to the Crown in Council (Imperial) to alter the boundaries of British colonies; but not without the consent of the colony in the case of the self-governing colonies set out in the schedule, Canada being one of those named.[7]

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[4] 25 & 26 Vict. c. 68 (Br.).

[5] *Graves* v. *Gorrie*, 72 L. J. P. C. 95.

[6] 58 & 59 Vict. c. 34.

[7] See *post*, Chap. XVI., as to the alteration of boundaries by mere prerogative in the early days of colonial history.

Demise of the Crown.

By the "Demise of the Crown Act, 1901,"[7a] it is provided:

"1. The holding of any office under the Crown whether within or without His Majesty's dominions shall not be affected, nor shall any fresh appointment thereon be rendered necessary, by the demise of the Crown."

Evidence: British, Foreign, and Colonial Law.

It may happen that in a case before a Canadian Court, the law to be applied is the law written or unwritten, of a foreign country, of some other British colony, or of the United Kingdom. Where the law which governs is to be found in an Imperial enactment extending to Canada, judicial notice must be taken of such enactment; but in the case of statutory law of local application merely in the United Kingdom that law, as in the case of foreign or other colonial law, must be proved as fact. Apart from Canadian legislation, both federal and provincial, as to the mode of proof—a topic not within our range here—there are several Imperial enactments upon the subject which are or have been in force in Canada.

A statute of George II.[8] provided an easy method of proof by affidavit of debts sued for by British merchants in the colonies and plantations in America;[9] but this was repealed by the Statute Law Revision Act, 1887 (Imp.).

Colonial enactments providing for admission of the unsworn testimony of the heathen aborigines

[7a] 1 Edw. VII., c. 5.
[8] 5 Geo. II. c. 7 (Imp.).
[9] See *Gordon* v. *Fuller*, referred to *ante*, p. 61.

were considered of doubtful validity as being "repugnant to the law of England,"[10] and an Imperial statute was passed in 1843 to quiet such doubts.[1]

By an Imperial Act of 1851, every document admissible in England without proof of the seal, or stamp, or signature authenticating it, or of the judicial or official character of the person appearing to have signed it, is to be admitted in evidence in the same way in colonial Courts.[2] The provision in the Canada Evidence Act as to giving notice of intention to use certified copies of such documents was held by the Supreme Court of the North-West Territories not repugnant to this Imperial Act.[3]

The Documentary Evidence Act, 1868,[4] providing for proof of Orders in Council and departmental regulations, applies to all British colonies, but "subject to any law that may be from time to time made by the legislature of any British colony or possession." One method of proof open in a colonial Court is by production of a copy purporting to have been printed under the authority of the colonial legislature. The practice of printing such orders and regulations with the Dominion Statutes facilitates this method of proof.

Under the Colonial Laws Validity Act, 1865,[5] a simple method of proof of a colonial statute is provided, viz., a copy of the Act certified by the proper officer of the legislature enacting it; and this provision applies, it would seem, to proceedings in the Courts not only of the United Kingdom but of all

[10] See *ante*, p. 57.

[1] 6 & 7 Vict. c. 22.

[2] 14 & 15 Vict. c. 99, s. 11 (Imp.). The provisions of sec. 12 as to proof of registry of a British ship, are now to be found in the Merchant Shipping Act, 1894.

[3] *Stevens* v. *Olson* (1904), 6 Terr. L. R. 106 (Full Ct.).

[4] 31 & 32 Vict. c. 37.

[5] 28 & 29 Vict. c. 63 (Imp.), sec. 6. See Appendix.

other British colonies. An Act of 1907 [5a] provides for proof in the United Kingdom of colonial statutes by production of a copy purporting to be signed by the King's Printer in the colony. The Act is not to be taken as affecting the operation of the Colonial Laws Validity Act, 1865.

Colonial law, statutory and common, is entitled in cases where it applies to at least as full recognition as is accorded in British Courts to foreign law on principles of international comity.[6] In Admiralty Courts, which are really Imperial tribunals, colonial enactments are of binding authority in all cases to which they apply and judicial recognition would be accorded them;[7] just as judicial recognition is taken by the Privy Council on colonial appeals.[8]

In 1859 an Imperial Act was passed "to afford better facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof." [9] It provides for the transmission of a settled case for the opinion of a Superior Court of the colony the law of which is in question and for the hearing of the parties by counsel in such Court. Upon receipt of such opinion the Court which asked for it is to apply it to the case before them. In the event of an appeal to the Privy Council the Board are not bound by the opinion so obtained and may either adopt it or reject it "as the same shall appear to them to be well founded or not in law." In other words, the Privy Council as the ultimate Imperial Court of Appeal for the Empire must decide for itself what the law is in any and all parts of the

[5a] 7 Edw. VII., c. 16.

[6] *Phillips* v. *Eyre*, L. R. 4 Q. B., at p. 241; *R.* v. *Brierly*, 14 Ont. R., at p. 534.

[7] *Redpath* v. *Allen*, L. R. 4 P. C. 511; 42 L. J. Adm., 8.

[8] *Cameron* v. *Kyte*, 3 Knapp P. C., at p. 345.

[9] 22 & 23 Vict. c. 63 (Imp.). See Appendix.

Empire, taking judicial notice of that law both statutory and unwritten.

In 1861, the principle of the statute just referred to was applied for the better ascertainment of foreign law "when pleaded in Courts within Her Majesty's dominions."[10] The procedure is along the same lines as that of the earlier Act; but there is a clause providing for reciprocal action by British Courts at the request of a foreign Court. The statute, however, only applies to those foreign countries with which a convention has been entered into to that end by the British Government.

"An Act to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals"[1] was passed by the Imperial Parliament in 1856. Under it an order may be made for the examination of a witness or witnesses whose evidence may be desired by a foreign tribunal before some person to be named in the order; and any such order may be enforced as if made in a cause depending in the Court which made it. The statute, it will be noticed, does not apply to criminal cases. "Every Supreme Court in any of Her Majesty's colonies or possessions abroad" has authority under this Act.[2]

In 1859, a somewhat similar Act was passed to facilitate the taking of evidence in one part of the Empire for use before a tribunal in some other part.[3]

The Parliament of Canada has enacted legislation along similar lines[4] and its power in that regard

[10] 24 Vict. c. 11 (Imp.). See Appendix.

[1] 19 & 20 Vict. c. 113 (Imp.). See Appendix.

[2] See *Eccles* v. *Louisville, &c., Ry. Co.* (1912), 1 K. B. 135; 81 L. J. K. B. 445, where the principles upon which British Courts should act under this statute are discussed.

[3] 22 Vict. c. 20 (Imp.). See Appendix.

[4] See R. S. C. (1906), c. 145.

has been upheld in Ontario.[5] The view was expressed that provincial legislatures could not enact such laws as being of extra-provincial pertinence; but in a recent case in Manitoba this view was not adopted, and an Act of the legislature of that province providing for the taking of evidence there for use in another province was upheld as within provincial competence.[6] In neither of these cases was the Imperial Act discussed, though it would appear sufficient to uphold the proceedings in each of them.

Floating Derelicts.

The Derelict Vessels (Report) Act, 1896, requires the master or person in command of any British ship who shall become aware of the existence on the high seas of any floating derelict vessel to notify Lloyd's agent at the next port of call or, if there be no agent at such port, to send a report to the Secretary of Lloyd's, London; under penalty not exceeding five pounds.

Geneva or Red Cross.

The Geneva Convention Act, 1911,[7a] prohibits the use of the Red or Geneva Cross for trade or other commercial purposes, under penalty. It extends to "His Majesty's possessions outside the United Kingdom, subject to such necessary adaptations as may be made by order-in-council."

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[5] *Re Wetherell & Jones*, 4 Ont. R. 713.

[6] *Re Alberta & Great Waterways Ry. Co.* (1910), 20 Man. L. R. 697; agreeing with the view expressed in the 2nd ed. of this book, p. 182. See also *Ex p. Smith*, L. C. Jur. 140; 2 Cart. 330.

[7] 59-60 Vict. c. 12 (Imp.).

[7a] 1 & 2 Geo. V., c. 20.

Marriage. "The Foreign Marriage Act, 1892."

For obvious reasons, the Royal Marriage Act of George III.[8] applies to all marriages wheresoever solemnized;[9] while the Act forbidding marriage with a deceased wife's sister [10] was confined in its operation to persons domiciled in the United Kingdom and was held not to apply to a foreign or colonial marriage of persons not domiciled in England.[1] In an early Canadian case it was expressly held not to be in force in Canada as "the colonies are not mentioned in the Act nor included by any necessary or even strong intendment."[2] An Act of 1906[2a] passed for removing doubts makes such colonial marriages valid in the United Kingdom where both parties were domiciled in the colony. And in 1907,[2b] the "Deceased Wife's Sister Act" makes valid all such marriages "heretofore or hereafter contracted . . . within the realm or without."

Beginning in 1823, there are a series of British statutes passed with the view of validating marriages of British subjects solemnized abroad by consular and naval and military officers or army chaplains according to English forms and not in conformity with the *lex loci celebrationis*, which in international law as adopted by the municipal law of England is the law upon which, speaking generally, the validity of a marriage depends.[3] Extended treatment of this topic is not to be expected here; but it

[8] 12 Geo. III. c. 11 (Imp.).

[9] *Sussex Peerage Case* (1844), 11 Ch. & F. 146.

[10] 5 & 6 Wm. IV. c. 54 (Br.), commonly called Lord Lyndhurst's Act.

[1] *Brook* v. *Brook*, 9 H. L. Cas. 193.

[2] *Hodgins* v. *McNeil*, 9 Grant 305 (U.C.).

[2a] 6 Edw. VII., c. 30.

[2b] 7 Edw. VII., c. 47 (Imp.).

[3] 4 Geo. IV. c. 91; 12 & 13 Vict. c. 68. (The Consular Marriage Act, 1849); 31 & 32 Vict. c. 61 (The Consular Marriage Act,

may be remarked that the question as to the operation of these statutes in the colonies and as to British subjects there presents at least three aspects: *First*, to what extent are such marriages to be held valid in colonial Courts? *Second*, to what extent did those Acts, and does now the Act of 1892, cover marriages celebrated in a colony? and *Third*, what is the position of a colonially naturalized British subject in reference to taking the benefit of the Act? This last question has already been dealt with.[4] The second question seems to present no difficulty as the only marriages which under the Act could take place in a colony would be marriages on board ship in a colonial port or marriages within the lines of the army, and these are expressly dealt with by the Act itself, which is in this respect clearly an Imperial enactment. As to the first question, the proper answer would seem to be that such marriages would be held valid everywhere within British dominions, at least. They are based on a fiction of extended territoriality; and are considered as really made in British territory.[5] The Acts prior to 1890 provide that such marriages are to be "valid in law as if the same had been solemnized within (His) Majesty's dominions with a due observance of all forms required by law." In the Acts of 1890, 1891, and 1892 the expression is "within the United Kingdom." Reading all the Acts as *in pari materiâ*, however, and in the light of the fictional idea underlying them all, the intent would seem to be of Imperial scope.

1868); 53 & 54 Vict. c. 47 (The Marriage Act, 1890); 54 & 55 Vict. c. 74 (The Foreign Marriage Act, 1891); and a Consolidating Act, 55 & 56 Vict. c. 23 (The Foreign Marriage Act, 1892). See also 2 & 3 Geo. V., c. 15 (as to marriages in Japan); also 6 Edw. VII., c. 40.

[4] *Ante*, p. 186.

[5] See *Dicey*, Conflict of Laws (1896), c. 26, where the whole subject is discussed. See also *Hall*, Foreign Jurisdiction of the British Crown.

Doubts having arisen as to the extra-territorial operation of colonial Acts validating marriages contracted in the colonies respectively, an Imperial Act of 1865 [6] provides:

"Every law made or to be made by the legislature of any such possession as aforesaid for the purpose of establishing the validity of any marriage or marriages contracted in such possession shall have and be deemed to have had from the date of the making of such law the same force and effect for the purpose aforesaid within all parts of Her Majesty's dominions as such law may have had or may hereafter have within the possession for which the law was made:

Provided that nothing in this law contained shall give any effect or validity to any marriage unless at the time of such marriage both of the parties thereto were, according to the law of England, competent to contract the same."

Whether such a validating Act should in Canada be passed by the Parliament of Canada or by a provincial legislature may be a question of difficulty.[7]

Medical Practitioners.

Under the earlier British Medical Acts practitioners registered under those Acts were entitled to practice their profession in the colonies;[8] but since 1886 British registration while conferring the right to practice in the colonies [9] does so "subject to any local law." [10] "Local law" is defined as "an Act or ordinance passed by the legislature of any British possession;" and British possession as applied to

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[6] 28 & 29 Vict. c. 64 (Imp.).

[7] See *post*, p. 556, *et seq.*

[8] *Metherell* v. *Coll. of Phys.* (1892), 2 B. C. 189; *R.* v. *Coll. of Phys.* (1879), 44 U. C. Q. B. 564.

[9] See 49 & 50 Vict. c. 48 (Imp.).

[10] Section 6.

Canada means Canada as one whole.[1] Apparently, therefore, only an Act of the Parliament of Canada can make the 'local law' necessary to limit the full effect of registration under the British Act. The same provision appears in the Act as to dentists.[2] There are also provisions in the Act for the registration of colonial practitioners upon conditions designed to secure reciprocal advantages for British practitioners in the colonies.[3]

Official Secrets.

The Official Secrets Act, 1911,[3a] is designed to prevent the betrayal of government plans and purposes. It applies to all acts which offend against its provisions when committed in any part of His Majesty's dominions or by British officers or subjects elsewhere. Any competent British Court in the place where the offence is alleged to have been committed may hear and determine the charge; but out of the United Kingdom the Court must be one having jurisdiction "to try crimes which involve the greatest punishment allowed by law."

Pacific Cable.

The "Pacific Cable Act, 1901,"[3b] made provision for the construction and working of a submarine cable between Canada and the Australasian colonies (viâ Norfolk Island) at the joint expense of Great Britain and the colonies named. To that end the Pacific Cable Board was constituted, each of the contributing governments being represented on the Board. An amendment of 1911[3c] provides for branches to other points in the Pacific.

[1] Section 27.
[2] Section 26.
[3] Section 11, *et seq.*
[3a] 1 & 2 Geo. V., c. 28.
[3b] 1 Edw. VII., c. 31.
[3c] 1 & 2 Geo. V., c. 36; see also 2 Edw. VII., c. 26, which substitutes the Commonwealth of Australia for the former individual colonies of New South Wales, Victoria, and Queensland.

Privy Council Appeals.

There are a series of statutes dealing with the Judicial Committee of the Privy Council and its composition and the procedure on appeals from colonial Courts;[4] but it is deemed advisable to deal in one place with the Canadian judicial system of the administration of justice in and for Canada and its various provinces.[5] The question how far, if at all, a colonial legislature may take way the right of appeal to the Crown in Council (Imperial) has already been dealt with.[6]

Prize Courts Act, 1894.

Under this Act,[7] Prize Courts may be established in any British possession in time of peace by warrant, commission or instructions from the Crown or the Admiralty conditioned to take operative effect only on the breaking out of hostilities. Jurisdiction to act as a Prize Court may be conferred under this Act upon a Vice-Admiralty Court or a Colonial Court of Admiralty or a Vice-Admiralty Court may be established for that purpose. In Canada, the jurisdiction has been conferred on the Exchequer Court as a Colonial Court of Admiralty[8] and the proceedings to that end are published in the 6th volume of the Exchequer Court Reports, p. 468 *et seq.*

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[4] 3 & 4 Wm. IV. c. 41; 7 & 8 Vict. c. 69; 39 & 40 Vict. c. 59; 44 & 45 Vict. c. 3; 50 & 51 Vict. c. 70; 58 & 59 Vict. c. 44; 8 Edw. VII., c. 51; 3 & 4 Geo. V., c. 16.

[5] See *post.*

[6] *Ante*, p. 157, *et seq.*

[7] 57 & 58 Vict. c. 39 (Imp.).

[8] See *ante*, p. 239.

Probate. "Colonial Probates Act, 1892."

This is really a purely British Act[9] providing for the recognition in the United Kingdom of Probates and Letters of Administration granted by Colonial Courts, upon a reciprocal basis. The Canadian provinces are for the purposes of this statute to be treated as separate British possessions, contrary to the rule of interpretation generally applied to Imperial Acts since 1889.[10]

Seal Fisheries of the North Pacific.

The controversy between Great Britain and the United States as to Behring Sea and the seal fishing there and in the adjoining waters of the North Pacific resulted in the making of the Behring Sea Award of 15th August, 1893. To carry out the provisions of this Award, the Imperial Parliament passed the Behring Sea Award Act, 1894,[1] under which the Exchequer Court of Canada as a Colonial Court of Admiralty[2] has jurisdiction to punish those who, whether on British or United States ships, contravene the articles of the award as confirmed by the Act. In addition to this special Act, there have been several Acts passed by the Imperial Parliament, regulating the seal fisheries of the North Pacific;[3] but these apply only to British ships and their crews. The Act now in force is the Seal Fisheries (North Pacific) Act, 1895, as amended in 1912. It applies to that part of the Pacific Ocean north of the 30th parallel of north latitude, including the seas of

[9] 55 & 56 Vict. c. 6 (Br.).

[10] See *ante*, p. 238.

[1] 57 & 58 Vict. c. 2.

[2] See *ante*, p. 239.

[3] 54 & 55 Vict. c. 19; 55 & 56 Vict. c. 23; 58 & 59 Vict. c. 21; 2 & 3 Geo. V., c. 10.

Behring, Kamchatka, Okhotsk, and Japan; and is in addition to and not in derogation of the Behring Sea Award Act, 1894. This latter Act forbids altogether the killing of seals within 60 miles of the Pribiloff Islands, a well-known breeding haunt for seals, and establishes a close season from May 1st to July 31st in each year for Behring Sea and that part of the Pacific north of the 35th degree of north latitude and east of the Russian boundary line as agreed upon between Russia and the United States at the time of the Alaska purchase; and also makes regulations for the carrying on of the industry during the open season. Both Acts embody many provisions of the Imperial Merchant Shipping Acts of 1854 and 1894 and under both Acts, the Exchequer Court of Canada (in Admiralty) has complete jurisdiction to decree forfeiture or to fine for contravention of the Acts. Ships registered in Canada, it is hardly necessary to state, are British ships.[4] Further details as to these Acts must be sought for in the Acts themselves.[5]

"Colonial Solicitors' Act, 1900."

This, again, is a purely British Act[6] facilitating the admission of colonial solicitors to practice in the United Kingdom under certain conditions, looking

[4] See *ante*, pp. 215, 231.

[5] Reference may perhaps usefully be made to the following cases in the Exch. Ct. Reports: *R.* v. *Ship "Oscar & Hattie"* (1892), 3 E. C. R. 241; *R.* v. *Ship "Minnie"* (1894), 4 E. C. R. 151; *R.* v. *Ship "Ainoko"* (1894), 4 E. C. R. 195; *R.* v. *Ship "E. B. Marvin"* (1895), 4 E. C. R. 453; *R.* v. *Ship "Selby"* (1895), 5 E. C. R. 1; *R.* v. *Ship "Beatrice"* (1896), 5 E. C. R. 9, 160, 378; *R.* v. *Ship "Viva"* (1896), 5 E. C. R. 360; *R.* v. *Ship "Ainoko"* (1896), 5 E. C. R. 366; *R.* v. *Ship "Aurora"* (1896), 5 E. C. R. 372; *R.* v. *Ship "Otto"* (1898), 6 E. C. R. 188; *R.* v. *Ship "Carlotta G. Cox"* (1908), 11 E. C. R. 312.

[6] 63 & 64 Vict. c. 14 (Br.). It repeals earlier Acts on the subject.

to reciprocity amongst other things. For the purposes of this Act the Canadian provinces are to be treated as individual British possessions, contrary, as above intimated, to the general rule of interpretation to be applied to British statutes since 1889.

Colonial Stock Acts.

These Acts[7] are really purely British Acts, passed in order to facilitate dealings in the United Kingdom in stock "forming part of the public debt of any colony;" and they therefore call for little comment here. For the purpose of these Acts the Canadian provinces are colonies and their legislatures colonial legislatures; contrary to the general rule now applied in the interpretation of Imperial statutes under the Interpretation Act, 1889;[8] and contrary also to the rule of interpretation to be ordinarily applied in England to the word 'colony' in a will or other written document. The Act of 1900 for the first time made Colonial Stock to which these Acts apply a proper trustees' investment, but provincial stock was held to be an improper investment under a will of a person who died prior to 1900, and who by his will authorizes the trustees named therein to invest in the stock of "any British colony or dependency." These words were held not to cover the individual provinces of Canada.[9]

But, as already intimated, these Acts are not really Imperial Acts extending to Canada, so as, for instance, to authorize colonial trustees to invest in such securities unless duly authorized so to do by colonial law.

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[7] 40 & 41 Vict. c. 59; 55 & 56 Vict. c. 35; 63 & 64 Vict. c. 62: to be read together and cited as the "Colonial Stock Acts, 1877 to 1900."

[8] 52 & 53 Vict. c. 63 (Imp.), sec. 18 (3).

[9] *In re Maryon-Wilson Estate* (1912), 1 Ch. 55; 81 L. J. Ch. 73 (C.A.).

CHAPTER XIV.

English Law Introduction.

So far this book has dealt with Imperial Acts applying expressly or by necessary intendment to the colonies; and it has been shown that a statute of this class is in force in a colony *proprio vigore* as an enactment of the Supreme Legislature of the Empire; that it cannot be repealed or amended by colonial legislation, except under permissive Imperial enactment; and that any colonial Act in any way repugnant to it is to the extent of such repugnancy, but not otherwise, absolutely void and inoperative. In other words, such an Imperial Act is both a law in the colony and a limitation upon its legislative power. But there is another class of British statutes [1] which, like the unwritten law of England, may be part of the law of the colony. As part of the law of England they have been carried to the colony by its first settlers, or by the action of the home authorities or by colonial adoption have been established as the basic law of the colony. British statutes of this class are necessarily of date anterior to the introduction of English law into the colony. They are in force there only by colonial sufferance, for the legislature of the colony may repeal or amend them, so far as relates to their operation in the colony, either directly or by repugnant legislation. In other words, they may be a law in the colony but they are not a limitation upon the colony's legislative power. When passed, they had not the colonies in contemplation, but were intended to alter or amend the law of England. And the question is: to what extent is

[1] It will be convenient to call these statutes British, though the term is not always strictly accurate. See *ante*, p. 55, note.

the common and statute law of England in force as the basic law of the colony upon or after its acquisition?

"A question of this kind," said Chief Justice Robinson,[2] "arising in any British colony must depend upon the manner in which the law of England has become the law of that particular colony; whether it has been merely assumed to be in force upon common law principles, as in the case of new and uninhabited lands found and planted by British subjects; or whether it has been introduced by some positive enactment of the Mother Country, or of the colony, or (as may be done in the case of a conquered country) imposed by the mere Act or regulation of the King in the exercise of his royal prerogative."

Many of the British statutes in times past held to be in force here are not now operative in Canada, the subjects with which they deal having received attention at the hands of Canadian legislatures. It is only in the absence of Canadian legislation on the subject that any question can arise as to the effect here of such British Act.[3]

A brief review of the authorities is attempted in order to arrive at the principles upon which they rest and not in order to indicate what particular British Acts are to-day in force in the different Canadian provinces.[4]

English Cases:—

In 1889, the Privy Council had occasion to consider how far the rule of the common law of England against perpetuities had been introduced "by

[2] *Doe d. Anderson* v. *Todd* (1845), 2 U. C. Q. B. 82.

[3] *Falkland Islands Co.* v. *R.*, 2 Moo. P. C. (N.S.), 206; *Harris* v. *Davis*, L. R. 10 App. Cas. 259; 54 L. J. P. C. 15; etc., etc.

[4] In Appendix will be found a table of the British statutes as to which question has been raised in the Courts.

the silent operation of constitutional principles" into New South Wales.[5]

"The extent," said Lord Watson in delivering their Lordships' judgment, "to which English law is introduced into a British colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a colony acquired by conquest or cession, in which there is an established system of law, and that of a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The colony of New South Wales belongs to the latter class. In the case of such a colony, the Crown may by ordinance, and the Imperial Parliament or its own legislature when it comes to possess one may by statute, declare what parts of the common and statute law of England shall have effect within its limits. But when that is not done the law of England must, subject to well established exceptions, become from the outset the law of the colony[6] and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the colony the law of England must prevail until it is abrogated or modified either by ordinance or statute. The oft-quoted observations of Sir William Blackstone appear to their Lordships to have a direct bearing upon the present case. He says: 'It hath been held that if an uninhabited country be discovered and planted by English subjects all the English laws then in being, which are the birthright of every subject, are immediately there in force.'[7] But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The

[5] *Cooper* v. *Stuart* (1889), 58 L. J. P. C. 93.

[6] Begbie, C.J., with quaint humor, says (*Reynolds* v. *Vaughan*, 1 B. C. pt. 1, p. 3): "An Englishman going to found a colony may be supposed to know the common law by common sense, and to carry the statutes (in the form of Chitty) in his hands."

[7] 1 Salk. 411, 666.

artificial requirements and distinctions incidental to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalty), the mode of maintenance of the established church, the jurisdiction of spiritual Courts, and a multitude of other provisions, are neither necessary or convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must in case of dispute be decided in the first instance by their own provincial judicature subject to the decision and control of the King in Council; the whole of their Constitution being also liable to be remodelled and reformed by the general superintending power of the legislature in the Mother Country.'

"Blackstone, in that passage, was setting right an opinion attributed to Lord Holt, that *all* laws in force in England must apply to an infant colony of that kind. If the learned author had written at a later date he would probably have added that as the population, wealth, and commerce of the colony increase, many rules and principles of English law which were unsuitable to its infancy will gradually be attracted to it: and that the power of remodelling its laws belongs also to the colonial legislature." [8]

Applying these principles their Lordships held that the English rule against perpetuities could not be invoked in New South Wales to hamper the Crown in its dealings with the public lands of the colony; and a clause in a Crown grant reserving to the Crown the right to resume at any time possession of part of the land if found necessary for public purposes was held valid.

As the above extract indicates, the English authorities turn upon the question of reasonable applicability. In one of the earliest cases[9] Sir William Grant held that the Statute of Mortmain[10] (so

[8] See also the language of Lord Alverstone in *R.* v. *Jameson* (1896), 2 Q. B. 425; 65 L. J. M. C. 218.

[9] *Atty.-Gen.* v. *Stewart*, 2 Mer. 143.

[10] 9 Geo. II. c. 36 (Imp.).

called) was not part of the law of Grenada, being " a law of local policy adapted solely to the country in which it was made," and not a general regulation of property equally applicable to any country governed by English law. In a later case [1] the House of Lords approved of the principle thus laid down, and subsequent English authorities are but applications of it.[2] One notable case decided that the ecclesiastical law of England is not carried with them by emigrating colonists, and that, after the establishment of a constitutional government in a colony, the Crown cannot by patent create a bishopric with coercive jurisdiction. " The Church of England in places where there is no church established by law is in the same situation with any other religious body."[3] The extent to which English law, common and statutory, is to be applied in New South Wales was declared by Imperial statute,[4] but the construction put upon the Act has placed that colony in line with other settled colonies.[5] The Act further provided that the colonial assembly " as often as any doubt shall arise " might declare whether or not a particular law or statute should be deemed to extend to the colony, and might make such " limitations and modifications " of any such laws and statutes as might be deemed expedient. In the absence of such colonial legislation the Courts of the colony

[1] *Whicker* v. *Hume*, 7 H. L. Cas. 124; 28 L. J. Chy. 396.

[2] *Jex* v. *McKinney*, 14 App. Cas. 77; 58 L. J. P. C. 67; *Mayor of Canterbury* v. *Wyburn* (1895), A. C. 89; 64 L. J. P. C. 36; *Atty.-Gen.* (*N.S.W.*) v. *Love* (1898), A. C. 679; 67 L. J. P. C. 84; *Neo* v. *Neo*, L. R. 6 P. C. 382.

[3] *In re Bishop of Natal*, 3 Moo. P. C. (N.S.), 115. There is a series of cases relating to the position of the Anglican Church in South Africa: see *Merriman* v. *Williams* (1882), 7 App. Cas. 484; 51 L. J. P. C. 95. See also *Bishop of Columbia* v. *Cridge*, 1 B. C. (part 1), 25.

[4] 9 Geo. IV. c. 83 (Imp.).

[5] *Whicker* v. *Hume* and *Atty.-Gen* v. *Love*, both *ubi supra*.

were to decide as to the operation of any such laws or statutes within the colony. It was held by the Privy Council [6] that the colonial legislature had power under this Act to repeal, and by inconsistent legislation had repealed, a statute of James I. concerning costs in actions for slander. No direct power of repeal, it will be noted, was given by the Act; but whether the repeal is direct or by repugnant legislation is a mere question of words.

Canadian Cases:—

The Canadian cases upon this subject are numerous, and owing to some divergence of view, must be considered, so to speak, by provinces. And this broad distinction is to be noted: that in the Maritime Provinces—Nova Scotia, New Brunswick and Prince Edward Island—there is no statute, imperial or colonial, defining the extent to which English law was introduced into those provinces upon their acquisition; while in all the other Canadian provinces and territories there is express statutory provision upon the subject. In other words, in the Maritime Provinces the matter is at large, while elsewhere in Canada the question depends at the outset upon the words of the statutes respectively in force in the different provinces and the territories.

The Maritime Provinces have always been treated as colonies by settlement as distinguished from colonies obtained by conquest or cession, and the question of applicability has been to the front in all the cases. In Nova Scotia one decision [7] may be considered classic upon this question and subsequent decisions there have practically been but the application of the principles enunciated in it.

[6] *Harris* v. *Davis* (1885), 10 App. Cas. 259; 54 L. J. P. C. 15.

[7] *Uniacke* v. *Dickson*, James, 287. Haliburton, C.J., who then presided over the Court, had occupied a seat on the bench of Nova Scotia for over forty years.

Nova Scotia:—

Two extracts from the judgment of Haliburton, C.J., will indicate the considerations deemed essential in the Nova Scotia cases:

"Among the colonists themselves there has generally existed a strong disposition to draw a distinction between the common and the statute law. As a code, they have been disposed to adopt the whole of the former, with the exception of such parts only as were obviously inconsistent with their new situations; whilst, far from being inclined to adopt the whole body of the statute law, they thought that such parts of them only were in force among them as were obviously applicable to, and necessary for, them.

"As it respects the common law, any exclusion formed the exception; whereas, in the statute law, the reception formed the exception.

"Now, although this view of the subject leads us to nothing very precise, yet, if we adopt it, and I think it wise and safe to do so, we must hold it to be quite clear that an English statute is applicable and necessary for us before we decide that it is in force here."

* * * * * *

"In the early settlement of a colony, when the local legislature has just been called into existence and has its attention engrossed by the immediate wants of the infant community in their new situation, the Courts of judicature would naturally look for guidance, in deciding upon the claims of litigants, to the general laws of the Mother Country, and would exercise greater latitude in the adoption of them then they would be entitled to do as their local legislature in the gradual development of its powers assumed its proper position. Every year should render the Courts more cautious in the adoption of laws that had never been previously introduced into the colony, for prudent Judges would remember that it is the province of the Courts to declare what is the law, and of the legislature to decide what it shall be."

Acts in curtailment of prerogative have been favorably looked on by Nova Scotia Judges. Magna

Charta and the second and third charters of Henry III. were held [8] operative within the province to prevent the Crown from granting a general right of fishery. Again it was held [9] that where land had been granted with a condition that the grant should be void if the land were not settled upon within a certain time, no new grant could be made without a previous retaking of possession by the Crown; the provisions of certain statutes of Henry VIII. being held operative within the province to prevent such new grant from taking effect.

"The very grievances intended to be remedied and redressed by this statute are those under which the subjects of this province might well say they labored if it were held that land, granted with a condition that the grant should be void if the land were not settled on within a certain time, could be subsequently granted without inquest of office." [10]

The view expressed by Haliburton, C.J., [1] that after a legislature has been duly constituted in a colony, and has, so to speak, settled down to its work, Courts of law should be very cautious in giving effect to British Acts which had never been previously acted upon in the colony, has evidently had a most powerful effect in subsequent cases. For instance, the Court refused to visit upon the sheriff of Halifax penalties to which he would have been liable under English statutes, because the Nova Scotia legislature had "wisely legislated for the whole matter." [2]

[8] *Meisner* v. *Fanning*, 2 Thomp. 97. And see *Re B. C. Fisheries* (1913), 47 S. C. R. 493; (1914), A. C. 153, 83 L. J. P. C. 169.

[9] *Wheelock* v. *McKeown*, 1 Thomp. 41 (2nd ed.); and see also *Miller* v. *Lanty*, *ib.*, 161.

[10] Followed in *Scott* v. *Henderson*, 2 Thomp. 115; and *cf. Smyth* v. *McDonald*, 1 Old. 274; but see *Emerson* v. *Maddison* (1906), A. C. 569; 75 L. J. P. C. 109.

[1] In *Uniacke* v. *Dickson*; see the passage, *ante*, p. 277.

[2] *Jackson* v. *Campbell*, 1 Thomp. 18 (2nd ed.).

And, in like manner, the Imperial statutes giving aliens a right to a jury *de mediatate linguae* were held[3] not to be in force in Nova Scotia because:

"In the numerous Jury Acts, extending from 1759 . . . down to the Revised Statutes (2nd ser.), not the slightest allusion nor provision for this privilege of aliens . . . is to be found."

In another case the Supreme Court of Nova Scotia had to consider the question whether or not the British statute (12 Geo. II. c. 18) requiring notice to a convicting justice of a motion for a writ of *certiorari*, and limiting the time for moving for such writ to six months from conviction, was in force in the province. After quoting the caution of Haliburton, C.J., above referred to, the judgment proceeds:

"If this caution was necessary forty years ago, there is much more necessity for caution now in view of the fact that since then very many Acts have been passed regulating the practice and procedure of this Court, and the removal of causes from inferior Courts. . . . Now, our legislature has passed several statutes on the subject. . . . I cannot see that 13 Geo. II. c. 18, is obviously applicable and necessary to our condition in this province; and as our legislature has undertaken to legislate in the matter of *certiorari*, and has enacted many of the provisions of the English statutes on that subject, omitting those contained in the Act in question, I have been unable to come to the conclusion that that Act is at present in force here."[4]

A number of British Acts have been acted upon without question as introduced into Nova Scotia

[3] *Reg.* v. *Burdell*, 1 Old. 126; and see *Nolan* v. *McAdam* (1906), 39 N. S. 380.

[4] *Reg.* v. *Porter*, 20 N. S. R. Reference is made to the fact that in Upper Canada it had been always treated as in force there. It appears to have been acted on in Nova Scotia in earlier cases. See *Reg.* v. *McFadden*, 6 R. & G. 426, and *McDonald* v. *Ronan*, 7 R. & G. 25. As to New Brunswick, see *post*, pp. 282-3, note.

upon its settlement. The Statute of Uses was treated[5] as being in force within the province, while its companion—the Statute of Enrolment—would appear to have been thought[6] inapplicable by reason of the lack of facilities for enrolment. The British Acts of Hen. VIII. allowing partition between joint tenants and tenants in common and the Act of Queen Anne's reign giving an action of account to one tenant in common against another were held[7] to have been introduced into Nova Scotia as part of the English law. The provisions of Magna Charta, and of the Statute of Staples, which provided that "In case of war, merchant strangers shall have free liberty to depart the realm with their goods freely," were enforced[8] in favor of an American vessel, seized before the commencement of the American war of 1812. The Act of Eliz. respecting fraudulent conveyances seems to have been acted upon without question,[9] as also the Act of Henry VIII. against the buying of pretended titles.[10]

Upon a review of the Nova Scotia decisions, it appears that the admission of British statutes has been the exception; those which have been held to be in force being, in the main, statutes in amelioration of the rigors of the common law, in curtailment of prerogative, or in enlargement of the liberty of the subject. To a greater extent than has been the case in either New Brunswick or Ontario, the Judges

[5] *Shey* v. *Chisholm*, James, 52.

[6] *Berry* v. *Berry*, 4 R. & G. 66; see the contrary holding in New Brunswick, *Doe d. Hanington* v. *McFadden*, Berton, 153.

[7] *Doane* v. *McKenny*, *James*, 328; *Crane* v. *Blackadar* (1895), 40 N. S. 100.

[8] The Dart, *Stewart*.

[9] *Tarratt* v. *Sawyer*, 1 Thomp. 46 (2nd ed.); *Moore* v. *Moore*, 1 R. & G. 525; and *Graham* v. *Bell*, 5 R. & G. 90.

[10] *Wheelock* v. *Morrison*, 1 N. S. D. 337; *Scott* v. *Henderson*, 2 Thomp. 115.

of Nova Scotia have deemed it the office of legislation rather than of judicial decision to bring into operation within the province the provisions of British statutes not originally capable of being made operative, but which might be thought suitable to the changed circumstances of the colony.[10a] And in the same spirit it was laid down [1] that where an English Act is held to be in force the Courts "will not give it a further extension than it received in the land of its origin." The operation of an English statute might be confined within narrower bounds by the circumstances and situation of the colony; but it could never become a statute of greater effect or more enlarged construction. "This is the office of legislation alone."

New Brunswick:—

In New Brunswick an early case,[2] in which the Supreme Court of that province had to consider whether the Statute of Uses and its companion—the Statute of Enrolment—were or were not in force in the province, has had a very large controlling influence. Chipman, C.J., quotes with approval the language of Sir. W. Grant,[3] and takes as his guide the principle enunciated in that case. As to the Statute of Uses no doubt whatever was expressed; the fact that it had been generally, if not universally, considered to be in force in the old American colonies was treated as indicative of the general understanding that the statute was carried by emigrating colonists as part of the law of England relating to real property. As to the Statute of Enrolment more

[10a] On this point, see the judgment of Lord Watson in *Cooper* v. *Stuart*, quoted *ante*, p. 274.

[1] *Freeman* v. *Morton*, 2 Thomp. 352, *per* Bliss, J.

[2] *Doe dem. Hanington* v. *McFadden*, Berton, 153.

[3] *Atty.-Gen.* v. *Stewart*, 2 Mer. 143; see *ante*, p. 274.

hesitation seems to have been expressed; but all the Judges concurred in treating the two statutes as practically one. Although the Statute of Enrolment might be somewhat difficult of application in New Brunswick, it seems to have been considered that the machinery of the provincial Courts could be utilized in this respect. The extension to the province of statutes which are in terms confined to the Courts of the Mother Country is not by any means without precedent. Several of such statutes, regulative of the practice in "Her Majesty's Courts at Westminster," have always been treated as operative within the province in relation to the Superior Courts there.[4]

Although it is difficult to classify the New Brunswick authorities upon this question, in every case the Judges of the Courts there have exercised their best judgment as to the applicability of the British Statute to the circumstances of the colony. If any distinction in principle can be drawn between the decisions in New Brunswick and those in Nova Scotia, it would appear to be this: that British statutes have been denied operative force in Nova Scotia unless clearly applicable, while in New Brunswick the tendency, at least of earlier authorities, seems to have been not to reject them unless clearly inapplicable.[5] At the same time it must be confessed that this distinction cannot be clearly pointed out in every case.[6]

[4] Anne c. 16 (assignment of bail-bonds); 14 Geo. II. c. 17 (judgment of nonsuit); and see *Kelly* v. *Jones*, 2 Allen, 473 (43 Eliz. c. 6—certificate as to costs), and *Gilbert* v. *Sayre*, *ib.*, 512 (13 Car. II. c. 2—double costs on affirmance in error). See *Hesketh* v. *Ward*, 17 U. C. C. P. 667; also the cases noted *post*, p. 296, as to the jurisdiction of the Courts of British Columbia in divorce and matrimonial causes.

[5] Compare the "English Law" Acts of Manitoba and the N. W. T. with the British Columbia Act. See *post*, pp. 293, 296.

[6] For other New Brunswick cases, see *Ex parte Ritchie*, 2 Kerr., 75, and *Ex parte Bustin*, 2 Allen, 211; in which the Eng-

Quebec:—

Following upon the Treaty of Paris of 1763, by which Canada was ceded by France to Great Britain, the King's proclamation, issued in October of that year,[7] foreshadowed the establishment in the colonies acquired under the treaty of local assemblies " and in the meantime, and until such assemblies can be called as aforesaid all persons inhabiting in or resorting to our said colonies may confide in our Royal protection for the enjoyment of the benefit of the laws of our realm of England." This was construed as introducing English law into the province of Quebec,[8] but there was much controversy upon the point.

The Quebec Act, 1774, however, settled the question for the future in broad outlines by providing that the criminal law of England should continue in force, but that " in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada as the rule for the decision of the same." The result of this enactment has been, as put by the Privy Council, that " the law which governs civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces."[9] For this reason, the province of Quebec calls for little treatment

lish statutes as to *certiorari* were held not in force: *Wilson* v. *Jones*, 1 Allen, 658, in which I Rich. II. c. 12, giving a creditor an action of debt against a sheriff on an escape, was (following an early unreported decision), held not in force, although it was acted upon in Nova Scotia and the older American colonies; and see *James* v. *McLean*, 3 Allen, 164, and *Doe d. Allen* v. *Murray*, 2 Kerr., 359.

[7] See *ante*, p. 16, note.

[8] See the report of Hey, C.J., in Appendix to 1 L. C. Jurist; judgment of Lafontaine, C.J., in *Wilcox* v. *Wilcox*, 8 L. C. R. 34; argument of counsel in *Re Marriage Laws* (1912), 46 S. C. R., at p. 217; and judgment of Duff, J., *ib.*, p. 403.

[9] *Citizens* v. *Parsons*, 7 App. Cas. 96; 51 L. J. P. C. 11; conveniently cited as *Parsons' Case*.

upon the subject matter of this chapter. The position of the Roman Catholic Church in that province, in view of the concessions made to those of that faith by the Quebec Act, 1774, was to some extent defined by the Privy Council in *Guibord's Case;*[10] and the law of the province on the subject of marriage was the subject of recent consideration by the Supreme Court of Canada;[1] but extended treatment of these matters is beyond the scope of this work. It would seem reasonably clear that, upon the cession of Canada to England, any laws previously in force based upon principles fundamentally opposed to those underlying British laws would be abrogated;[1b] and that the Quebec Act, 1774, would not restore them.

Ontario:—

Ontario falls within the class of colonies into whose legal system English law has been introduced by the will of the colony itself, as expressed in legislative enactment.

In 1774, the Parliament of Great Britain, by giving to the inhabitants of Canada, then almost exclusively French, the law in accordance with which they had been accustomed to regulate their daily lives, secured their cordial adherence to British connection despite the enticing words of Washington and his French allies,[2] In like manner, in 1791, they established the new immigration in content in the upper province by giving them an assembly of their

[10] *Brown* v. *Les Curé &c., de Notre Dame de Montreal* (1875), L. R. 6 P. C. 206; 44 L. J. P. C. 1.

[1] *Re Marriage Laws* (1912), 46 S. C. R. 132; affirmed in the Privy Council on the question of jurisdiction as between the Parliament of Canada and the provincial legislatures (as to which, see *post*, p. 556, *et seq.*); but without discussion of other topics: (1912), A. C. 880; 81 L. J. P. C. 237.

[1b] See *ante*, p. 125.

[2] See Confed. Deb., p. 606, and the author's "History of Canada," p. 108.

own with the power to adopt such system of laws as they might deem best calculated to secure and advance their own material and religious welfare. In the very first Parliament of Upper Canada, by the first Act of its first session,[3] "that was done which no doubt was anticipated and intended as a consequence of erecting Upper Canada into a separate province.'" It was enacted that "from and after the passing of this Act, in all matters of controversy *relative to property and civil rights,* resort should be had to the laws of England as the rule for the decision of the same."

The Criminal law of England had been in force in the old province, and no legislation was deemed necessary by the legislature of Upper Canada beyond naming a day, in reference to which the English criminal law was to be considered fixed. This date was fixed by 40 Geo. III. c. 1 (U.C.), which enacted: "The criminal law of England, as it stood on the 17th day of September, 1792, shall be, and the same is hereby declared to be, the criminal law of this province," subject to any variations therein effected by ordinances of the old province of Quebec passed after the Quebec Act of 1774.

In the province of Ontario, therefore, the whole question turns upon the effect which should be given to these enactments. So far as concerns the law *relative to property and civil rights,* it will be found that, owing to the construction placed upon the English Law Act of 1792[5] by the Courts of Upper Canada, the same method of enquiry was often followed in that province (now Ontario) as in the Maritime Provinces; but a decision of the Court of

[3] 32 Geo. III. c. 1 (U.C.).

[4] *Per* Robinson, C.J., in *Doe d. Anderson* v. *Todd,* 2 U. C. Q. B. 82.

[5] 32 Geo. III. c. 1 (U.C.).

Appeal for Ontario in 1907 [5a] throws much doubt upon many of the earlier cases.

Throughout the law reports of Upper Canada (Ontario) numerous cases will be found in which laws passed by the Parliament of England, and in force there in 1792, were without question acted upon as being the law of Upper Canada. In the very first volume of reported cases, by Taylor, several of such instances appear,[6] and so on through the reports to the present time. For instance, no question seems to have ever been raised as to the Statute of Uses,[7] the Statute of Frauds,[8] the Acts of Elizabeth's time as to fraudulent and voluntary conveyances,[9] and a casual glance at our Digests will reveal many others as to which no doubt has ever found a reporter. As being in affirmance of the common law, or in amendment of same defect in that law working general detriment, their position as practically part and parcel of general English law was too fully recognized to be questioned. A statute of Elizabeth making void, in the interest of the guilds, articles of apprenticeship for a less term than seven years was the first statute upon which argument seems to have been had, and in three early cases[10] it received consideration. In two of these it was held not part of the law of Upper Canada. "That Act was obsolete in England even before the statute which repealed it. . . . We consider the statute as a local Act, which was probably adapted to the state of society in England three hundred

[5a] *Keewatin Power Co.* v. *Kenora*, 16 Ont. L. R. 184; see *post*, pp. 291-2.

[6] Taylor, 546.

[7] 27 Hen. VIII. c. 10.

[8] 29 Car. II. c. 3.

[9] 12 Eliz. c. 5; 27 Eliz. c. 4.

[10] *Fish* v. *Doyle* (1831), Drap. 328; *Dillingham* v. *Wilson* (1841), 6 U. C. Q. B. (O.S.), 85; *Shea* v. *Choat* (1845), 2 U. C. Q. B. 211.

years ago, but is not now, and never was, adapted to the population of a colony, and was never in force here.'"[1]

In the third case[2] it was broadly contended that the question of applicability was not open under the Upper Canadian statute; that all English statute law of 1792 had been introduced by it except the poor and bankrutcy laws.[3] The Court, however, held that a recognition must be accorded to the differences of environment, and that the Courts of Upper Canada should consider the question of the adaptability of any English Act "to the nature of our institutions." To some extent this view of the effect of 32 Geo. III. c. 1 has not met with entire approval by individual Judges in subsequent cases; but the decided tendency of the authorities was, until recently, to support the principle just laid down.

The English statute 9 Geo. II. c. 36—commonly classed as one of the Mortmain Acts—has been under review in a number of decided cases;[4] and in the argument of counsel and the opinions of the Judges will be found all the considerations which can be urged in support of the two different views.

In the result the statute was decided to be in force in Upper Canada, but only on the ground of

[1] *Per* Sherwood, J., in *Dillingham* v. *Wilson*. As will appear, *Keewatin Power Co.* v. *Kenora* (*ubi supra*), leaves this enquiry still open at least as to English statute law: *post*, p. 292.

[2] *Shea* v. *Choat*. The head-note is misleading. In speaking of 20 Geo. II. c. 19, Robinson, C.J., says: "My inclination at present is that that statute in its present scope and bearing is not applicable to this province"; but he decided that, even if in force, the pleading could not be supported, not showing a case within the statute.

[3] Expressly excepted by sec. 6.

[4] The latest is *Whitby* v. *Lipscombe*, 23 Grant 1, in which all the earlier cases are reviewed. See also *Smith* v. *Meth. Church*, 16 O. R. 199; *Butland* v. *Gillespie*, *ib.*, 486.

its implied *recognition by our colonial legislature;* the view of a decided majority being that it was not introduced by the sole force of 32 Geo. III. c. 1. The Courts of Upper Canada (Ontario) practically adopted the view of Robinson, C.J., that the terms of the Act of 1792 (U.C.), "do not place the introduction of the English law on a footing materially different from the footing on which the laws of England stand in those colonies in which they are merely assumed to be in force, on the principles of the common law, by reason of such colonies having been first inhabited and planted by British subjects."[5] This construction would place Ontario upon the same line in this matter as the Maritime Provinces and the more lately acquired provinces of Canada; but the latest pronouncement of the Court of Appeal for Ontario is distinctly opposed to this view.

In reference to Lord Hardwicke's Marriage Act[6] the same principles were invoked[7] as in reference to the Mortmain Acts. In each case the Court considered: 1st. Is the British statute one which can be considered as so applicable to the circumstances of this colony that the legislature must be taken to have intended to introduce it by the intrinsic effect of the Act of 1792? This question, in the case of the Mortmain Acts, does not seem to have been unanimously answered by Canadian Judges, but the

[5] *Doe d. Anderson* v. *Todd*, 2 U. C. Q. B. 82. And see *Maulson* v. *Commercial Bank*, *ib.*, 338, as to the English Bankruptcy Acts which were introduced into Upper Canada in somewhat similar language.

[6] 26 Geo. II. c. 33 (Imp.), Lord Lyndhurst's Act of 1835 has been held not to extend to Canada: *Hodgins* v. *McNeil*, 9 Grant, 309. See *ante*, p. 263.

[7] *Reg.* v. *Roblin*, 21 U. C. Q. B. 355; *Hodgins* v. *McNeil*, *ubi supra*; *O'Connor* v. *Kennedy*, 15 O. R. 22; *Lawless* v. *Chamberlain*, 18 O. R. 309; and see *Breakey* v. *Breakey*, 2 U. C. Q. B. 349; *Reg.* v. *Secker*, 14 U. C. Q. B. 604; and *Reg.* v. *Bell*, 15 U. C. Q. B. 287.

weight of authority would appear to be for a negative answer—in conformity with English decisions.[8] As to the Marriage Act of Lord Hardwicke there seems to have been no difference of opinion—all agreeing in the result arrived at in favour of an affirmative answer, except as to the 11th and 12th clauses.[9]

2nd. Has there been subsequent legislative recognition by the provincial Parliament of the binding force here of the Act in question? As to both Acts, the answer has been unanimously in the affirmative.[10] To these considerations may be added:

3rd. Have the decisions of provincial Courts proceeded so clearly upon one line, and for such a length of time, as to have established a rule of law in regard to dealings with property, or in regard to the *status* of particular classes of persons? In the later cases this consideration operated most powerfully. In 1876, Mr. Justice Burton used this language:[11] "Where solemn determinations which establish a period, a Court even of last resort should require very strong grounds for interfering with them;" and Mr. Justice Patterson, speaking of *Doe d. Anderson* v. *Todd*, said: "It has been acquiesced in too long and has for too long a period governed titles to land in this province to be now interfered with by any authority short of legislative enactment;" and in the opinion of Mr. Justice (afterwards Chief Justice) Moss the same rule of expediency is

[8] *Ante*, pp. 274-5.

[9] *Lawless* v. *Chamberlain, ubi supra; May* v. *May* (1910), 22 Ont. L. R. 559. These clauses render absolutely void a minor's marriage (by license) without consent of parent or guardian.

[10] *Whitby* v. *Lipscombe*, 23 Grant 1 (as to Mortmain Acts); cases *supra* (as to Marriage Act of Lord Hardwicke). Cf. *Seman Appu* v. *Queen's Adv.*, 9 App. Cas. 571; 53 L. J. P. C. 72.

[11] *Whitby* v. *Lipscombe, ubi supra.*

expressed in those polished periods by which his written opinions were always characterized.

An earlier case[2] brings into prominence another question proper for consideration in deciding whether or not a particular British Act is in force in Ontario: Is the Act one of general application in England, or is it local in the sense of being confined to some particular locality or local institution in England? And, as already intimated, this enquiry is still open. The Acts in question there made certain provisions in reference, amongst other matters, to escape warrants. Richards, C.J., decided that the earlier of these statutes was not part of our law, because "passed with reference to the peculiar position of the officers of the prisons" (the Marshalsea and the Fleet) "to which it referred, and the evils recited in the preamble, which state of things has not, and is not likely to exist in this country." The dissenting opinion of Mr. Justice Wilson (afterwards Chief Justice Sir Adam Wilson) is not a dissent in principle, but a joinder of issue on the facts. "Although it may have a limited application in England to the two special and peculiar prisons of the Courts, it is nevertheless a general law, and a beneficial one, and as there are no special prisons of the Courts here, but all the gaols of the province are equally the prisons of the Court, the statute, being such general law by the declaration of the statute itself, has an operation here upon all the prisons of the Courts."[3]

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[2] *Hesketh* v. *Ward* 17 U. C. C. P. 667. See *ante*, p. 282; *Le Syndicat Lyonnais* v. *McGrade* (1905), 36 S. C. R. 251.

[3] On this principle, many English statutes referring to, *e.g.* the Courts "at Westminister" have been held to be part of general English law, and as such in force here in relation to our Superior Courts. See 43 Eliz. c. 6, and 13 Car. II. c. 2, as to costs in certain cases, and note the New Brunswick decisions on this point, *ante*, p. 282.

In a series of cases it was held that the provisions of 14 Geo. III., cap. 78, relating to the liability of persons upon whose premises a fire accidentally starts, for damages resulting from its spreading to the premises of another, are part of our law, because they were part of the general law of England and were not of local application there in the sense before referred to.[4]

As to the criminal law: Under the Upper Canadian statute of 1800,[5] every Act of the British Parliament in force as part of the general criminal law of England on the 17th day of September, 1792, was introduced into Upper Canada. The enquiry proper in civil cases as to the applicability of a British Act to the circumstances of a colony was eliminated, and the only enquiry is—Is the Imperial statute local in the sense above indicated? If not, it is part of the law of Upper Canada. Owing, however, to the codification of the criminal law of Canada [6] further reference to this branch of the subject need not be made.[7]

In 1907, as already intimated, the whole question was reconsidered by the Court of Appeal for Ontario.[7a] Mr. Justice Anglin had held that the rule of English law governing non-tidal rivers, even when navigable in fact, was so far modified in its application to Canada that a public right of navigation *jure naturæ* existed over Canadian rivers navigable

[4] *Gaston* v. *Wald*, 19 U. C. Q. B. 586; *Stinson* v. *Pennock*, 14 Grant, 604; *Carr* v. *Fire Ass.*, 14 O. R. 487; *C. S. R.* v. *Phelps*, 14 S. C. R. 132; *Laidlaw* v. *Crow's Nest Ry.* (1909), 14 B. C. 169, 42 S. C. R. 169.

[5] 40 Geo. III. c. 1 (U.C.). See *ante*, p. 285.

[6] In 1892. The "criminal law" over which the Dominion Parliament has legislative power, does not, however, cover the whole field of penal legislation. See B. N. A. Act, s. 92, No. 15.

[7] In Appendix is a tabulated statement of English statutes as to which question has been raised in the Courts. Many of these are criminal statutes.

[7a] *Keewatin Power Co.* v. *Kenora*, 16 Ont. L. R. 184, reversing 13 Ont. L. R. 237.

in fact and particularly over those forming part of the international boundary line between Canada and the United States; and that, in regard to such rivers, the rule of English law that a grant of land upon the border of a stream presumably carried title to the middle line of the stream was not the rule of Canadian law, the presumption being, in his opinion, to the contrary.[7b] The Court of Appeal unanimously reversed this judgment, holding that as to the general principles of the English common law and as to English statute law of a general character no question of applicability in its wider sense could be raised; but in the judgment of Sir Charles Moss, C.J.O., it is intimated that the question is always open as to the purely local character of an English statute and, it is conceived, the same question might arise as to some features of English common law; for example, copyhold.[7c]

The position in Ontario may be shortly summarized. In any case, the question whether or not any particular British statute of date anterior to 1792 has the force of law in Ontario will depend, in the first place, upon the absence of colonial legislation—Canadian or Provincial, as the case may be—on the subject matter involved. If there is none such, then the following points must be considered: (1) Is the Act one of general English application? (2) If not, or if the matter is one of reasonable doubt, has there been a legislative recognition of the British Act as being in force here? (3) Have the decisions of the Courts proceeded so clearly upon one line as to have established a rule of property or *status* in the province?

[7b] The recent decision of the Privy Council in *Maclaren* v. *Atty.-Gen. (Quebec)*, 83 L. J. P. C. 201, (1914) A. C. affirms the view taken by the Court of Appeal of Ontario upon this last point.

[7c] The subject of navigation and shipping has already been dealt with to some extent in Chap. XII., *ante*, p. 211; and it will come up again in Part II. of this book.

As to the common law: Unless clearly dealing with a purely local institution, it was introduced in its entirety by the Upper Canadian Statute of 1792; and is still law unless altered or abrogated by Canadian enactment.

Other Provinces:—The statutes by which this question is governed in the provinces more lately acquired expressly make "applicability" the test of introduction.

North-West Territories: Alberta: Saskatchewan: After the admission of Rupert's Land and the north-western territory to the Canadian Union,[8] the Parliament of Canada continued all the then existing laws in those regions;[9] and so the matter stood until 1887. In that year it was provided that "the laws of England relating to civil and criminal matters as the same existed on the 15th day of July, 1870, shall be in force in the Territories in so far as the same are applicable to the Territories,"[10] subject, of course, to such alterations therein as had been affected by proper legislative authority. Down to 1887 the law in force was the law of England as it stood in 1670, the date of the Hudson's Bay Company's charter.[1]

Lord Hardwicke's Marriage Act was held not to be in force in the Territories *quoad* Indians.[2] In 1907 the British "Debtors' Act, 1869," was held to be in force in Alberta by a divided Court after a careful

[8] By Order in Council (Imp.), 23 June, 1870, passed under the authority of the B. N. A. Act, s. 146.

[9] 32 & 33 Vict. c. 3 (Can.).

[10] R. S. C. (1886), c. 50, s. 11; 49 Vict. c. 25 (Dom.).

[1] *Re Calder*, 2 Western Law Times, 1; *Sinclair* v. *Mulligan*, 5 Man. L. R. 17: but see *Connolly* v. *Woolrich*, 11 L. C. Jur. 197, and an article in 4 Can. Law Times, p. 1, *et seq.*, by Mr. C. C. McCaul. A large part of that region was undoubtedly first occupied by French Canadian voyageurs.

[2] *Reg.* v. *Nan-e-quis-a Ke*, 1 Terr. L. R. 211. See *ante*, p. 288, as to the Ontario decisions.

discussion of the principles to be kept in view on such an enquiry.[2a] The provisions of the British Act of 1838 respecting registration of notice of *lis pendens* are purely local and were not introduced into the North-West Territories by the Canadian Act above referred to.[2b] The "Infants Relief Act, 1874," is not in force in Alberta.[2c]

MANITOBA: "Until 1870," said Taylor, C.J., "the law of England at the date of the Hudson's Bay Company's charter, 1670, was the law in force here, and indeed, except as to matters which have been dealt with by the Dominion Parliament, *or which are within the jurisdiction of the provincial legislature and have been dealt with by it*, that is the law of this province at the present day."[3] The legislature of the province had dealt with this question in 1874[4] by providing that "The Court of Queen's Bench shall decide and determine all matters of controversy relative to property and civil rights according to the laws existing, or established and being in England, as such were, existed and stood on the 15th day of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province."

[2a] *Fraser* v. *Kirkpatrick*, 6 Terr. L. R. 403.

[2b] 2 & 3 Vict. c. 11 (Br.): *Syndicat Lyonnais* v. *McGrade* (1905), 36 S. C. R. 251.

[2c] *Brant* v. *Griffin*, 1 Alta. L. R. 510. The British Act is of later date than 1870, but the case is cited as drawing attention to the use in the N. W. T. Act of the word "applicable" in two different senses.

[3] *Sinclair* v. *Mulligan*, 5 Man. L. R. 17; 3 Man. L. R. 481.

[4] By 38 Vict. c. 12 (Man.). In 1871, a provincial Act (34 Vict. c. 2), established a Supreme Court in Manitoba, and provided that: "As far as possible consistently with the circumstances of the country the laws of evidence and the principles which govern the administration of justice in England shall obtain in the Supreme Court of Manitoba"; but it was doubtful if this was more than a law of procedure: See *Sinclair* v. *Mulligan*, *ubi supra*. Cf. the N. S. Wales cases referred to, *ante*, p. 275.

This statute has been uniformly treated as introducing into Manitoba the law of England as it stood at the date mentioned.

The limited operation of this Act is indicated by Taylor, C.J., in the passage of his judgment above italicized. From time to time the Parliament of Canada has passed statutes introducing certain portions of the statute law of the Dominion, passed prior to 1870, into Manitoba. Statutes since 1870 are of course in force there unless expressly excepted. But until 1888 no general provision was made as to those matters which are within the legislative competence of the Dominion Parliament, so that the law in Manitoba as to all such matters was the English law of 1670.[5]

"To remove doubts" a Dominion Act was passed in 1888[6] providing that "The Laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the 15th July, 1870, were from the said day and are in force in the province of Manitoba, in so far as the same are applicable to the said province, and in so far as the same have not been and are not hereafter repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the said province, or of the Parliament of Canada."

In the leading case[7] in Manitoba the Statute of Uses was held to be in force, the Statute of Enrolment was held inapplicable, and the Statute of Frauds not to be in force because of date subsequent to 1670. In the result a verbal bargain for the sale

[5] See *Canadian Bank of Commerce* v. *Adamson*, 1 Man. L. R. 3, as to bills of exchange.

[6] 51 Vict. c. 33 (Dom.).

[7] *Sinclair* v. *Mulligan*, *ubi supra*: followed in *Templeton* v. *Stewart*, 9 Man. L. R. 487.

of lands was enforced under the Statute of Uses. The English law of descent as it stood in 1670 was given effect to as late as 1890.[8] The introduction of the criminal law of England did not include the law as to maintenance and champerty; and a provincial Act allowing bargains of that character was held *intra vires*.[8a]

BRITISH COLUMBIA: In 1871, before its admission to the Canadian Union,[9] the legislature of the colony had enacted:[10]

"The civil and criminal laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable,[1] are and shall be in force in all parts of the colony of British Columbia."

This statute was held[2] to introduce the English "Matrimonial Causes Act, 1857," Chief Justice Begbie, however, dissenting from the judgment of the majority, the local circumstances of the colony precluding, in his opinion, its operation therein.[3] The jurisdiction of the British Columbia Supreme

[8] *Re Tait*, 9 Man. L. R. 617.

[8a] *Thomson* v. *Wishart* (1910), 19 Man. L. R. 340.

[9] Avoiding the Manitoba difficulty as indicated by Taylor, C.J., in *Sinclair* v. *Mulligan*, *supra*.

[10] No. 70 of 34 Vict. (1871). The proclamation (19th Nov., 1858), of Governor Douglas had so ordained as to the mainland colony; and the Act of 1871 was passed to extend its provision in this regard to the united colony.

[1] The use of the double negative would seem to place British Columbia in line with New Brunswick: see *ante*, p. 282.

[2] M. falsely called *S.* v. *S.*, 1 B. C. (pt. 1), 25: see also *Scott* v. *Scott*, 4 B. C. 316.

[3] Other B. C. cases are *Reg.* v. *Ah Pow*, 1 B. C. (pt. 1), 147; *In re Ward & Victoria*, *ib.*, 114; *Foley* v. *Webster*, 3 B C. 30. As to the operation of English ecclesiastical law in B. C., see *ante*, p. 275.

Court in Divorce and Matrimonial Causes has been finally affirmed by the Privy Council.[4]

The use of the double negative throws the burden on him who asserts that a given English law, statutory or other, of date prior to 1858, was not introduced into British Columbia.[4a]

The law of England as to the right of the public to fish in tidal waters is the law of the province.[5]

[4] *Watt* v. *Watt* (1908), A. C. 573; 77 L. J. P. C. 121; reversing 13 B. C. 281.

[4a] *Watt* v. *Watt*, 13 B. C. 281.

[5] *Re B. C. Fisheries* (1913), 47 S. C. R. 493; (1914), A. C. 153; 83 L. J. P. C. 169.

PART II.

SELF-GOVERNMENT

UNDER THE

BRITISH NORTH AMERICA ACT, 1867

AND ITS AMENDMENTS.

CHAPTER XV.

Outline Sketch (Part II.)

Part I. of this book has dealt with the limitations upon Canada's powers of self-government arising from her position as a British Colony. She is not one of the family of nations and her external relations with foreign powers are under the control of the British Government; to this extent, at least, that the Imperial stamp, in some form, is necessary to give legal efficacy. Again, Canada is only one of a sisterhood of self-governing dominions under the British Crown, and in matters which concern her relations with the parent state or with other parts of the Empire, she and they alike recognize the superintending authority of the Imperial Parliament; at least to the extent required for legal efficacy.[1] All, moreover, recognize that parliament as the supreme and ultimate power in legislation for and throughout the British Empire. How far that supreme power has been exercised in the past in relation to matters which ordinarily might be considered to pertain to internal self-government was one of the main themes of Part I. How far at any moment of time the British Parliament should treat such topics as of Imperial moment and legislate upon them as such rests in the wisdom of those who, throughout the Empire, are charged with control of its affairs. It is a purely domestic problem within the Empire. With one notable exception, some one hundred and forty years ago, mutual forbearance and goodwill have so far solved all difficulties; and time will in the end,

[1] Notable examples are the Fugitive Offenders' Acts (see *ante*, p. 198), and the Pacific Cable Acts (see *ante*, p. 266).

no doubt, evolve a more perfect system and, if necessary, remove the problem from the realm of constitutional usage to the realm of constitutional law.

Stress has been laid upon the fact that the British Parliament is the only constituent assembly, properly so-called, within the Empire. That free "mother of parliaments" is the sovereign constitution-maker for the outlying dominions under the British Crown; and like breeds like. Local self-government through representative assemblies has always been favoured of British policy, and within the last eighty years the tendency has become marked towards the establishment of the larger colonies upon a basis of complete self-government, subject only to the maintenance of Imperial or—which is the same thing—national unity in the face of the world. Their political standing within the Empire is recognized in the phrase "self-governing dominions" which has of late become common in Imperial statutes.[2] Their charters of government are not powers of attorney to manage affairs in the colonies as the agents or delegates of the people of the British Isles, but charters conferring powers of self-government as complete and ample within the colonial ambit and of the same nature as are those of the British Parliament. In form the Constitutions established have been in the main modelled upon that of the motherland; and for many years past, as will appear, the principle of responsible parliamentary government has been recognized as the working principle of government as well in the self-governing colonies as in the parent state.

The plenary nature of colonial legislative power has been already discussed, more particularly in

[2] See *post*, p. 352.

connection with the doctrine of exterritoriality;[3] so that in this Part, it will only be necessary to make clear that the principle applies equally to all Canadian assemblies, to the provincial legislatures as well as to the Parliament of Canada.

Furthermore, constituent power, that is to say, the power to alter the framework of government as prescribed in the Constitution conferred by the Imperial Parliament, has been to some extent conferred. This feature of the Canadian Constitution has been given an entire chapter in Part I. of this book. It appeared there rather than in this Part, because it touches more our position in the Imperial scheme than the relations between the Dominion of Canada and its various provinces. Further references to it in this Part will be somewhat casual.

The British North America Act.

The Dominion of Canada looks for its Constitution to the British North America Act, 1867.[4] Since the 1st day of July in that year, Canada's form of political organization has been, under that Act and its various amendments, (a) a general or Dominion government charged with matters of common interest to the whole country, and (b) local or provincial governments charged with the control of local matters in their respective sections.[5] The structure of these governments is provided for in the Act and the sphere of political activity assigned to the Dominion Government on the one hand and to provincial governments on the other is carefully mapped out.

[3] Chap. VII., *ante*, p. 93, *et seq.*

[4] 30 & 31 Vict. c. 3 (Imp.): in full in Appendix.

[5] General and local are the distinguishing words used in the Quebec Resolutions, upon which the Act was mainly based. See Appendix.

Originating in the will of the individual and, as between themselves, independent colonies concerned, the Act represents the first attempt to provide in a written organic instrument a federal form of government for one large area of the British Empire; and the experiment has been repeated in the case of the Australian Colonies.[6] The whole wide field of self-government in Canada has been divided and to each of the divisions, federal and provincial, full powers of government, legislative and executive, have been given. As described by that great expounder of the British North America Act, the late Lord Watson:[7]

"The object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers, executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property and revenues as were necessary for the due performance of its constitutional functions and that the remainder should be retained by the provinces for the purposes of the Provincial Government."

Outline of the Act:—At this stage, it may be well to exhibit shortly the general scheme of the Act. It opens with recitals which show, in the first place, that it was passed in order to carry into effect the expressed desire of Canada, Nova Scotia and New Brunswick "to be federally united into one

[6] See the *Commonwealth of Australia Constitution Act, 1900* (63 & 64 Vict., c. 12—Imp.)

[7] In the *Liquidator's Case* (1892), A. C. 437; 61 L. J. P. C. 75.

Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom;" and, secondly, that the eventual admission of other parts of British North America into the union was contemplated.

The Act is divided into eleven parts, with headings and sub-headings; and these (unlike the marginal notes) are to be read as an integral part of the statute, affording in many cases a master key to the proper interpretation of the clauses grouped under them.[8]

Part "*I.—Preliminary*" (secs. 1 and 2) provides for a short title to the statute, "The British North America Act, 1867;" and that the provisions of the Act relating to the Queen are to apply to her heirs and successors, Kings and Queens of the United Kingdom. It may be stated here that there are three other statutes similarly entitled: The British North America Act, 1871,[9] the British North America Act, 1886,[10] and the British North America Act, 1907.[1] By section 3 of the statute of 1886, the three Acts to that date are to be read together and may be cited as "The British North America Acts, 1867 to 1886." With them must also be read the

[8] See *Eastern, &c., Ry.* v. *Marriage* (1861), 9 H. L. Cas. 32; *Inglis* v. *Robertson* (1898), A. C. 616; 67 L. J. P. C. 108.

[9] 34 & 35 Vict., c. 28: "An Act respecting the establishment of provinces in the Dominion of Canada."

[10] 49 & 50 Vict., c. 35: "An Act respecting the representation in the Parliament of Canada of territories which for the time being form part of the Dominion of Canada, but are not included in any province."

[1] 7 Edw. VII., c. 11, respecting provincial subsidies only. There is another Imperial Act in amendment of the British North America Act, 1867. By the "Parliament of Canada Act, 1875" (38 & 39 Vict., c. 38), section 18, relating to the privileges of parliament, was amended: see *ante*, p. 44.

various Imperial Orders-in-Council admitting other parts of British North America to the Canadian Union; for, under section 146 of the Act of 1867, these Orders-in-Council have the force of Imperial Acts.

Part "*II.—Union*" (secs. 3-8) creates the Dominion of Canada covering the three former colonies of Canada, Nova Scotia and New Brunswick. Four provinces were to be established and to that end Canada as it stood under the Union Act, 1840, was to be taken as severed into Ontario [2] (old Upper Canada) and Quebec (old Lower Canada), while Nova Scotia and New Brunswick retained the same limits as at the passing of the Act. At that date, there were three other British colonies in North America, namely, Newfoundland, Prince Edward Island and British Columbia. The balance of British territory in North America was unorganized, except in so far as the government of the Hudson's Bay Company in Rupert's Land might be deemed an organized government. Part XI. of the Act makes provision for the admission of all these other parts to the Canadian Union. Newfoundland has so far declined all invitations to unite her fortunes with the Dominion, although she was one of the colonies represented at the Quebec Conference (1864), at which were adopted the resolutions upon which the scheme of Confederation is mainly based British Columbia and Prince Edward Island have since joined the union; and the remainder of British territory in North America has been annexed to Canada, and out of it have been carved the provinces of Manitoba, Saskatchewan and Alberta.

[2] See 52-53 Vict., c. 28 (Imp.), fixing the boundaries of Ontario in accordance with the award referred to in it. For the boundaries of the Dominion and of the individual provinces, see *Houston*, 'Const. Doc. of Canada,' p. 271.

There are now, therefore, nine provinces in Canada, exclusive of the Territories.

Part "*III.—Executive Power*" (secs. 9-16) has reference to the federal executive. As already pointed out,[3] there is no new creation of headship for the government of the Dominion. The executive government and authority of and over Canada is declared to continue and be vested in the Crown of the United Kingdom. It is administered locally by the Governor-General or other the chief executive officer or administrator for the time being carrying on the government of Canada, by whatever title he may be designated. He acts by and with the advice of the Privy Council for Canada; and so far as is necessary for the carrying on of the federal government all statutory powers, authorities, and functions previously possessed by the various governors of the pre-Confederation provinces are by the Act (sec. 12) vested in the Governor-General of Canada.

Part "*IV.—Legislative Power*" (secs. 17-57) has reference also to the Dominion Government only. Its title is not quite accurate. What is dealt with in this Part is the federal legislative machinery. Incidentally, some of its provisions confer legislative power of a constituent character,[4] but the main provisions of the Act as to the distribution of legislative power are contained in Part VI., sections 91 to 95.

The Parliament of Canada consists of the Crown, an Upper House, styled the Senate, and the House of Commons; and it must meet once at least in every year. The use of the term "Parliament" in reference to the Dominion Legislature only was formerly much relied on in argument to belittle the standing of provincial legislatures; but their

[3] Chap. III., *ante*, p. 25.
[4] See *ante*, p. 40.

co-ordinate rank with the Dominion Parliament, each being supreme within its sphere of legislative authority, is now finally established."[48] The name bestowed upon any of these bodies is immaterial. The question is: Have they legislative powers in the proper sense of that term? The Crown is possessed of a share in legislation throughout the Empire, and it would require very express language in any Constitutional Act to warrant an inference that sovereign powers of legislation "in which the British Sovereign was to have no share" have been bestowed upon any colonial legislature.

Part "*V.—Provincial Constitutions*" (secs. 58-90) consists of two main subdivisions, "*Executive power*" and "*Legislative power.*" This last expression, it should be again noted,[6] is inexact. What is dealt with in this Part is the legislative machinery for the provinces. Some of the sections do, it is true, impliedly confer powers of legislation, but these are all of a constituent character,[7] and do not touch the distribution of legislative power as between the Dominion and the provinces. That is provided for in Part VI. of the Act.

Executive Power:—In each province the Crown is represented by "an officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by instrument under the Great Seal of Canada." He acts by and with the advice of the Executive Council of the province, that is to say, of the provincial ministry. In the case of Nova Scotia and New Brunswick, the provision was simple; the constitution of the executive authority in those provinces was continued, subject only to the

[48] *Liquidator's Case* (1892), A. C. 437; 61 L. J. P. C. 75. See *post*, p. 350.

[6] See *ante*, p. 307.

[7] See Chap. V., *ante*, p. 40.

change in the method of appointment of the executive head of the province, and to those provisions of the British North America Act which limit the provincial sphere of legislative authority and, necessarily and co-relatively, the executive sphere as well. The same course was adopted in the Orders-in-Council admitting British Columbia and Prince Edward Island to the Canadian Union;[8] their executive government continued as before their admission, subject to the same qualifications as above mentioned. On the other hand, the division of (old) Canada into two provinces necessitated more detailed provision as to the constitution of the executive councils of those provinces. All statutory powers, authorities and functions which had previously been vested in the Governors or Lieutenant-Governors of (Old) Canada, Upper Canada, or Lower Canada, were by the Act (sec. 65) vested in the Lieutenant-Governors of the two new provinces, so far as the same might be capable of being exercised in relation to their government respectively. No such provision was necessary in the case of Nova Scotia or New Brunswick or, on their admission, in the case of British Columbia or Prince Edward Island. On the other hand, the corresponding section (12) vesting in the Governor-General all the statutory powers, etc., of the pre-Confederation governors, so far as the same might be capable of being exercised in relation to the government of Canada applies to all the provinces.[9]

Legislative Machinery:—For reasons already stated, new machinery had to be provided for Ontario and Quebec, while the constitution of the legislatures of Nova Scotia and New Brunswick

[8] The clauses are quoted in Chap. III., *ante*, and are also to be found in the appendix.

[9] See *ante*, p. 307.

was not interfered with, subject only to the change in the method of appointment of the Crown's representative. The range of legislative power possessed by the provincial assemblies prior to the passing of the Act was, of course, cut down, but that does not touch the constitutional arrangement of the legislative machinery. British Columbia and Prince Edward Island fall into the same category as Nova Scotia and New Brunswick;[10] while Manitoba, Saskatchewan and Alberta (like Ontario and Quebec) required new governmental machinery upon their establishment as provinces of Canada.

The only provision of this Part which applies to all the provinces originally joined by the Act, namely, section 90, also applies to all the present Canadian provinces; to those admitted by Imperial Orders-in-Council, as well as to those created by the Parliament of Canada under permissive Imperial Acts. This section will best explain itself:

The Four Provinces.

90. The following provisions of this Act respecting the Parliament of Canada, namely, the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of Acts, and the signification of pleasure on bills reserved, shall extend and apply to the legislatures of the several provinces as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the legislatures thereof, with the substitution of the Lieutenant-Governor of the province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, of one year for two years, and of the province for Canada.

Part "*VI.—Distribution of Legislative Powers*" (secs. 91-95) determines for all purposes of government the spheres of authority of the Dominion on

[10] The clauses are quoted in Chap. III., *ante*.

the one hand and the provinces on the other, subject only to what has been said in Part I. of this book as to Imperial limitations. The whole field of Canadian self-government is divided and, speaking generally, matters of common interest to the whole of Canada are allotted to the control of the Parliament of Canada, while matters of more immediate local or provincial concern are left with the legislative assemblies of the various provinces. To draw the line between these two fields, as that line is fixed by the Act and by authoritative judicial decisions, is the main purpose of this Part of this book. As already noticed,[1] there are other sections of the Act which confer legislative power both upon the Parliament of Canada and upon the provincial legislatures; but these are in the nature of constituent powers and do not vitally affect the question as to the division of the field. This Part VI. is the really important matter.

Part "*VII.—Judicature*" (secs. 96-101) is really in the nature of a modification of the provisions made by sections 91 and 92 for the administration of justice in Canada. The topic will be fully dealt with hereafter. Here it will suffice to say that in the main justice is administered through the medium of provincial Courts, both of civil and criminal jurisdiction, constituted under provincial legislation. Criminal law and procedure in criminal cases is determined by federal law; and this Part VII. provides for the appointment of certain of the judges of the provincial Courts by the Dominion Ministry, for their payment out of the federal exchequer, and (sec. 101) for the establishment "notwithstanding anything in the Act" of a general Court of Appeal for Canada and of additional Courts for the better administration of federal law.

[1] See *ante*, p. 40.

The Supreme Court of Canada, and the Exchequer Court of Canada have been established under the powers conferred by this Part.

Part "*VIII.—Revenue, Debts, Assets, Taxation*" (secs. 102-126) deals with the division of Crown property as it existed in the various provinces immediately prior to the passing of the Act; with the sources of Crown revenue; and with the financial arrangements then deemed expedient as between the Dominion and the provinces, as well as between the two new provinces formed out of (Old) Canada. So far as tangible assets were concerned, certain enumerated classes of Crown property were to become the property of Canada, all others remaining the property of the provinces in which, respectively, they were situate. The line of division may be said to follow, roughly, the general line of division of the field for purposes of legislation and, necessarily and co-relatively, of executive government as well. Crown lands and the revenues thence arising were by the Act specifically allotted to the provincial governments, an arrangement which has not been followed in the case of the prairie provinces, Manitoba, Saskatchewan and Alberta.

Part "*IX.—Miscellaneous Provisions*" prescribes the form of the Oath of Allegiance to be taken by members, both federal and provincial, and the Declaration of Qualification to be made by senators of Canada and legislative councillors in Quebec. The only other provisions which need here be mentioned are those contained in sections 132 and 133. Section 132, which conveys to the Parliament and Government of Canada all powers necessary or proper for performing treaty obligations, has already been discussed.[2]

[2] See *ante* p. 134.

Section 133 provides for the use of the French language in the debates and records of the Dominion Parliament and of the Quebec Legislature; and for the publication of their statutes in both languages.

Part "*X.—Intercolonial Railway*" (sec. 145) calls for no comment.

Part "*XI.—Admission of other Colonies*" has already been referred to.[3] Under it, Imperial Orders-in-Council have been passed for the admission of British Columbia and Prince Edward Island to the Canadian Union as provinces thereof, and also for the admission of "Rupert's Land and the North-western Territory." The position of this later territory, both before and after the creation therein of the provinces of Manitoba, Saskatchewan and Alberta, will call for more extended treatment in a later chapter.[4]

Spirit of the Act: Responsible Parliamentary Government.—The British North America Act professedly intended to give to Canada a constitution similar in principle to that of the United Kingdom.[5] The one great legal principle which dominates British government is the supremacy of parliament. Side by side with it are what Dr. Dicey calls the "conventions of the Constitution," those unwritten constitutional usages which time has established to give more complete and easy operation to the legal principle; to ensure, in other words, that executive government in all its departments shall be carried on with full and easily-enforced responsibility to parliament and, through parliament, to the electors. While this book is not designed to treat of constitutional procedure and practice resting

[3] See *ante*, p. 306.
[4] Chapter XLIV., *post*.
[5] See preamble to the Act.

upon the unwritten "conventions of the Constitution," it would be incomplete if no attempt were made to show that responsible parliamentary government obtains in Canada, both in the federal and in the provincial spheres of government. This will necessitate some historical references to the constitutional position of the British Colonies in North America prior to Confederation. These will be found in Chapter XVI.

To further emphasize the fact that we have a constitution like that of the Motherland, and not, as some have contended, similar in principle to that of the United States, a brief comparison of the two is attempted in Chapter XVII.

Spheres of Authority.—Turning, then, to the more immediate purpose of this Part, the respective spheres of government occupied by the Dominion, on the one hand, and the provinces, on the other, the legal principle of the supremacy of parliament requires that attention should first be given to the division of the field for legislative purposes. Legislative jurisdiction and executive power go hand in hand. To fix the line which divides the field of colonial authority for legislative purposes between the Dominion Parliament and the provincial legislatures is to fix at the same time the same line of division for purposes of executive government. Those sections, therefore, of the British North America Act[6] which define the law-making spheres, federal and provincial, are the pivotal clauses upon which the scheme of Confederation turns.

Next will follow a brief examination of the machinery provided in and by the Act for the executive government of Canada and its provinces. The

[6] Particularly sections 91 to 95, both inclusive; but there are other sections also to be considered and, as will appear, other Imperial Acts.

division made by the Act of the Crown's assets throughout Canada will be discussed most conveniently in dealing with the legislative power of the Dominion and the provinces respectively over Crown property.[6a]

[6a] See Chap. XXIX., *post*.

CHAPTER XVI.

Pre-Confederation Constitutions.

Had the British North America Act created a governmental organism new in all its parts, justification might be lacking for historical retrospect. Many parts, however, of the machinery of government existing in the provinces prior to 1867 were retained under the federating Act. Indeed, in two of them, Nova Scotia and New Brunswick, the governmental machinery was left almost intact, and the same is true of British Columbia and Prince Edward Island upon their admission to the Union New machinery was obviously required for the new political creations, the federal government and the governments of Ontario and Quebec; and the same remark applies to the provinces since carved out of the North-West Territories, namely, Manitoba, Alberta and Saskatchewan. The earlier provincial constitutions which in the main features of their organization are thus continued merit careful study, and it is proposed to trace shortly the constitutional history of those provinces, but so far only as is necessary to a proper appreciation of the principles which underlie the working of the Canadian Constitution, federal and provincial, to-day.

To *Nova Scotia* belongs the distinction of being the oldest of the British Colonies in North America which now form part of the Dominion of Canada. The preamble to one of the earliest Acts of the Nova Scotia Assembly (1759)[1] declares that "this province of Nova Scotia or Acadie and the property thereof did always of right belong to the Crown of England, both by priority of discovery and ancient

[1] 33 Geo. II., c. 3 (Nova Scotia).

possession." The correctness of this declaration, France would probably not admit; but the contest would be of antiquarian interest merely, for by the Treaty of Utrecht in 1713, "Nova Scotia or Acadie, with its ancient boundaries," was ceded by France to Great Britain in the most ample terms of renunciation. Nova Scotia, as thus ceded, included the present province of that name (excluding Cape Breton), as well as what is now New Brunswick and part of Maine. For many years after its acquisition Nova Scotia was practically under the military rule of a Governor and council, whose authority was defined in the Governor's Commission. In 1749, a colonization scheme was set on foot and, anticipating an influx of settlers into the colony, the commission of Governor Cornwallis authorized the summoning of "general assemblys of the freeholders and planters within your government according to the usage of the rest of Our colonies and plantations in America." After much delay and the exhibition of much unwillingness on the part of the Governor and his council to act upon this direction, a scheme of representation was settled and the first parliament of Nova Scotia met at Halifax on the 2nd of October, 1758.

In 1763, the remaining portions of what are now known as the Maritime Provinces, namely, Cape Breton and Prince Edward Island, were ceded by France to Great Britain by the Treaty of Paris; and, by the proclamation which followed, were annexed to "our Government of Nova Scotia."[2]

Six years later, *Prince Edward Island* was made a separate province under a Governor, whose

[2] Of Cape Breton's constitutional vicissitudes it is unnecessary to make mention. They are set out in 5 Moo. P. C. 259 (*In re the Island of Cape Breton*). Finally in 1820 it was re-annexed to Nova Scotia, of which province it has ever since formed, and now forms, part.

commission, also, authorized the calling together of "general assemblys of the freeholders and planters within your government." The first parliament of Prince Edward Island met in 1773.

In 1784, *New Brunswick* was also created a separate province; and the commission of its first Governor authorized in somewhat similar phrase the summoning of a general assembly which shortly thereafter met.

So far as the Maritime Provinces by the Atlantic seaboard are concerned, their provincial legislatures of to-day are the lineal descendants of those early "general assemblys."[3]

Quebec, then embracing, roughly speaking, territory now occupied by the present provinces of Ontario and Quebec, was ceded by France to Great Britain by the same Treaty of Paris (1763), which secured to her Prince Edward Island and Cape Breton. By the proclamation which followed, Quebec was erected into a separate province; and, both by the proclamation itself[4] and by the commission to Governor James Murray, the institution of a representative assembly was contemplated. For reasons upon which it is unnecessary to enlarge here, no such assembly was summoned. Not until after the passage of the Constitutional Act, 1791,[5] dividing Quebec into the two provinces of Lower and Upper Canada and providing for a separate legislature for each, did such assemblies meet. The first parliament of Upper Canada met at Niagara on the 17th of September, 1792; that of Lower Canada at Quebec a few months later. By the

[3] The documents relating to the early constitutions of the Maritime Provinces are set out in Return No. 70, Can. Sess. Papers, 1883.

[4] See *ante*, p. 17.

[5] 31 Geo. III., c. 31 (Imp.)

Union Act, 1840,[6] the two provinces were re-united under the name of Canada in a legislative union, the severance of which was effected only by the British North America Act, 1867. Under this Act, the Canada of the Union Act was divided into the present provinces of Ontario and Quebec, corresponding to the earlier provinces of Upper and Lower Canada respectively.

British Columbia, as it existed at the date of the adoption by the Parliament of Canada of the Resolutions for its admission to the Dominion, had not a representative assembly and did not, therefore, enjoy responsible parliamentary government. Its introduction into the colony was then contemplated [7] and, in fact, was actually accomplished before the date (20th July, 1871) upon which the union took effect. By an Imperial Order-in-Council of 9th August, 1870, the Legislature of British Columbia was so altered as to make it a "representative legislature" within the meaning of the Colonial Laws Validity Act, 1865.[8] Theretofore it had consisted of a Governor and Legislative Council only, the latter containing both Crown-appointed and elective members. The appointed members, however, constituted a majority; and, in consequence, a strong agitation had arisen in the colony in favour of responsible government, under a wholly elective assembly. The Imperial Order-in-Council of August, 1870, above mentioned, was avowedly passed in order to bring this about. Under the Order-in-Council, the elective members were constituted a majority (9 to 6) of the Legislature, which, therefore, became clothed with power under the Colonial

[6] 3 & 4 Vict., c. 35 (Imp.)

[7] See Item No. 14 of the Terms of Union, as set out in the Order in Council, admitting British Columbia to the Union. In Appendix.

[8] See the Act in Appendix. See also *ante*, p. 38.

Laws Validity Act, 1865, to alter its own Constitution. This it promptly did; the Legislative Council was abolished and in its stead a legislative assembly of wholly elective members was established.[9] The provincial legislature of to-day in British Columbia is in its essential features but the continuation of the legislature so established. This short statement of the position of British Columbia will suffice to explain why no further reference to that province need be made in this chapter.

In making a survey of the forms of government established in the various provinces in order to learn their actual working, it will be convenient to confine attention, in the first place, to the constitutions established by royal prerogative[10] in the Maritime Provinces and to treat later of the statutory constitutions of the Upper Provinces. The survey, it should again be premised, is taken in order to show that, prior to Confederation, the Imperial Government had in a tangible way—evidenced partly by despatches, partly by instructions, partly by statutory enactments, partly, perhaps, by long disuse of power along certain lines—put upon record its recognition of the necessary connection which must exist between the legislative and executive departments of government, as well in the case of a colony as in the case of the United Kingdom.

As a preliminary to this survey reference must be made to what was, in the latter part of the eighteenth and the earlier decades of the nineteenth century, the accepted view of the British constitution. It was then chiefly commended because of the complete separation, as was supposed, of the legislative and executive departments. Legislative

[9] British Columbia Statutes, No. 147 of 34 Vict.

[10] See *ante*, p. 11, as to the position of the Crown in Council (Imp.) in this connection.

supremacy resided in the parliament, executive supremacy in the Crown. Opportunity for interference by parliament to control and regulate executive action was largely the result of the financial necessities of the executive head of the nation; but, to the extent to which the royal revenues rendered the Crown independent of parliament, the government of the nation was frequently carried on without the aid of that body. How the change was gradually brought about, until now the supremacy of parliament over the executive is a clearly established principle of the British constitution, is beyond the scope of this work to trace. Shortly stated, it was effected by the judicious use of the Commons' control over the purse strings, as a means to secure the consent of the Crown to the relinquishment to parliament of the most important of those common law powers of the executive known as "the prerogatives of the Crown." But in the latter part of the eighteenth century, the government of Great Britain was, to an extent very much larger than at present, carried on by the exercise of these prerogatives. It was more largely an executive government, and of no department was this more true than of the colonial, "the Board of Trade and Plantation." The very facts above alluded to—that for very many years after the settlement of Nova Scotia (practically until the British North America Act) no legislative interference by the Imperial parliament in the government of the Maritime Provinces took place; that provinces were enlarged, divided, joined, all without Act of parliament; and that, without Act of parliament, representative assemblies were established therein—make manifest the extent to which the government of the early provinces was in the nature of executive government,

by prerogative. And yet not entirely so, for in a celebrated case,[1] involving a consideration of the proclamation of 1763, Lord Mansfield held that, although on the acquisition of new territory by conquest or cession the Crown without parliament may make laws for the government of the conquered or ceded territory, nevertheless, on the grant to the inhabitants of the right to make laws through a representative assembly, the prerogative right of the Crown to legislate for the internal government of the colony is forever gone. Thereafter the Crown stands in the same relation to the representative assembly of the colony as in England to the Imperial parliament; and any withdrawal of the colony's right to make laws can only be effected by the Imperial parliament.[2]

So far, however, as related to the executive functions of government, the theory of executive independence which obtained in England was carried to its practical result in the work of government in the colonies. Theoretically and, indeed, legally, the Crown, by virtue of its position as a constituent branch of parliament, could prevent encroachment by the legislature upon its prerogatives (in other words, upon the executive department of government), but in England the financial necessities of the executive gradually led, as before observed, to the surrender to parliament, or at least to parliamentary control, of the entire executive government of the nation. The Crown occupied in the colonies the same position as a constituent branch of the legislature; but the financial necessities of the

[1] *Campbell* v. *Hall*, Cowp. 204; relating to Grenada. See *ante*, p. 17.

[2] See *Re Lord Bishop of Natal*, 3 Moo. P. C. (N.S.) 148. The position of the Crown in Council (Imp.) in relation to colonial government has already been largely discussed. See Chap. VIII., *ante*, p. 116 *et seq.*

executive government were, in those early colonial days, so largely met by the revenues arising from the sale of Crown lands, from fines, tolls, and other royalties of various sorts, and, for the balance, provided for in the Imperial budget, that the executive of a colony was to a large degree independent of the colonial assembly.

That the early "assemblys" of the provinces were intended to be confined to purely legislative work, and that, in the doing of it, they were not to interfere in the executive government of the colony, is apparent when one comes to study somewhat more closely the commissions of the early governors, the constitutional charters of those provinces.

There is no essential difference in the terms of these commissions. The first commission conveying authority to summon an assembly in the provinces now forming part of the Dominion was that to Governor Cornwallis of Nova Scotia.[3] "For the better administration of justice, and the management of the public affairs of our said province," the Governor was authorized to appoint "such fitting and discreet persons as you shall either find there, *or carry along with you,* not exceeding the number of twelve, to be of our council in our said province. As also to nominate and appoint, by warrant under your hand and seal, all such other officers and ministers as you shall judge proper and necessary for our service and the good of the people whom we shall settle in our said province until our further will and pleasure shall be known." Subsequent appointments to fill vacancies in the council were to be made by the authorities in *England.* With the advice and consent of this council, the governor was empowered to establish Courts of Justice and to appoint all the

[3] *Houston,* Const. Documents, p. 9.

necessary ministerial and judicial officers in connection therewith. The public revenue was to be disbursed by the Governor's warrant, issued by and with the advice of the council, with this limitation, however, that it was to be disposed of by the governor "for the support of the government, and not otherwise." It is hardly to be wondered at, having in view the mode of appointment, and of filling vacancies in this council, that the executive government of those days came to be designated by the familiar phrase, "the family compact."

Turning now to the part played in government by the assemblies: the commission to Governor Cornwallis commanded him to govern the colony according to his commission, the instructions therewith, or to be thereafter given, "and according to such reasonable laws and statutes as hereafter shall be made or agreed upon by you, with the advice and consent of our council and the assembly of our said province." The legislative power was in terms ample: "To make, constitute, and ordain laws . . . for the publick peace, welfare, and good government of our said province . . . and for the benefit of us, our heirs, and successors; which said laws are not to be repugnant, but, as near as may be, agreeable to the laws and statutes of this our Kingdom of Great Britain." All such laws, however, were subject to disallowance by the Imperial authorities, with no limitation as to the time within which such disallowance might take place.

The position of the Crown as a constituent branch of the assembly was recognized in a clause noteworthy for the frank and undisguised fashion in which it discloses the reason:

"And to the end that nothing may be passed or done by our said council or assembly to the prejudice of us, our heirs, and successors, we will and ordain that you, the said

Edward Cornwallis, shall have and enjoy a negative voice in the making and passing of all laws, statutes, and ordinances, as aforesaid."

The importance of the concession to the early provinces of the right to frame the laws by which, in local matters, they were to be governed, must not be under-rated. If it cannot be considered as in any fair sense a concession of the right of self-government, it must at least be admitted that it fell short only because of the theory which then obtained that the two departments of government should be kept strictly distinct and because of the inability of the colonial legislatures to withhold supplies until grievances in the executive department were remedied.

The form of government introduced into Quebec by Imperial statutes must now be examined. For eleven years after the Treaty of Paris, the commission to Governor Murray and his successors (read with the proclamation of 1763) was the charter of government; but, as already noticed, no assembly ever met in that province, and any legislation which was considered necessary was passed by the Governor and his council. Owing to the discontent of the inhabitants, then largely French, at the introduction (which was claimed to have taken place) of English civil law, and owing perhaps to a doubt of the legality of the ordinances of the Governor and his council, "*The Quebec Act, 1774,*"[1] was passed by the Imperial parliament. This statute revoked the right to a representative assembly and lodged both departments of government, legislative and executive, in the hands of the governor and his council; with this provision, however, that the members of the council were to be appointed from the

[1] 14 Geo. III., c. 83.

inhabitants of the province. A perusal of the Act discloses much milder checks on the legislative power than in the case of the earlier commissions; —no doubt because of the union of the legislative and executive powers of government in the same hands.

By the 13th section, the Governor and his council were expressly prohibited from laying taxes or duties within the province, with the exception of local assessments for municipal purposes. By an Act of the same session (c. 88), provision was made for raising a revenue by means of duties on rum, spirits, and molasses, to be disbursed by Imperial officers. It will be referred to again.

By "*The Constitutional Act, 1791*"—the King having signified "his Royal intention to divide his province of Quebec into two separate provinces"—provision was made for the establishment in each of a legislative council and assembly. Beyond giving the assembly so created the right to legislate as to time, place, and manner of holding elections to the assembly, the Act gave the legislature no larger measure of control over the executive than had been conferred on the assemblies in the Maritime Provinces.

The consent of the Crown by its representative in the colony to any Act of the colonial legislature curtailing the power of the Crown in the exercise of any prerogative right is as effective to that end as is an Act of the Imperial parliament in similar case;[5] but, by reason of the refusal to concede to the colonies the control of the revenues raised therein, the colonial assemblies were unable to force consent to Acts in curtailment of prerogative. Not being able to starve the executive, they were unable

[5] *Exchange Bank* v. *Reg.*, 11 App. Cas. 157; 55 L. J. P. C. 5.

to hold the officers of that department to responsibility for the due performance of their duties; and whether they had or had not the confidence of the representative branch of the legislature was practically a matter of indifference to these executive officers. The importance, therefore, of this question of revenue and its expenditure—the power to make provision for a revenue and to appropriate it when raised—becomes more and more apparent.

The treatment accorded by Great Britain to her colonies in the matter of taxation was entirely regulated by the view taken in England of the necessities of British trade and commerce. At first, the expense of governing the colonies was borne entirely by the home government, but as early as 1672,[6] the Imperial treasury levied tribute upon the colonies by the imposition, by Imperial Act, of export duties on certain articles shipped from the colonies for consumption elsewhere than in England; the proceeds of which duties were, of course, a set-off to the expense of government in those colonies. During the century which followed, Imperial Acts were from time to time passed providing for the collection of both export and import duties, but always as part and parcel of the regulation of trade and commerce. In 1763, permanent provision was made with regard to these colonial duties and it was provided that the net proceeds thereof should be reserved for the disposition of the Imperial parliament "towards defraying the necessary expenses of defending, protecting, and securing the British colonies in America."

This, then, was the position of affairs at the time when regular forms of civil government began to be established in Nova Scotia, Prince Edward

[6] 25 Car. II., c. 7.

Island, New Brunswick, and Quebec. The abandonment by the Imperial parliament of the principle that these duties should only be imposed when necessary for the due regulation of Imperial trade and commerce, and the extension of the Imperial power of taxation to matters of excise—to laying tribute, in other words, on the internal trade of a colony—and the consequent loss of the southern half of this continent, is a familiar story. During the progress of the struggle, but too late to win back the revolting colonies, the Imperial parliament passed the celebrated Renunciation Act of 1778,[7] by which it was declared and enacted that:

"The King and Parliament of Great Britain will not impose any duty, tax, or assessment whatever, payable in any of his Majesty's colonies, provinces, and plantations in North America or the West Indies; except only such duties as it may be expedient to impose for the regulation of commerce; the net produce of such duties to be always paid and applied to and for the use of the colony, province, or plantation in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective general courts or general assemblies of such colony, province, or plantation, are ordinarily paid and applied."

This principle was followed until the free trade campaign in England led to the abandonment of the system of taxing trade for the benefit of trade, and, with it, the regulation of colonial tariffs by British legislation.

During this period, however, the practical result of the colonial system was this: With the exception of such sums as the colonial assemblies were minded to raise (usually by the imposition of customs duties) for public improvement and to

[7] 18 Geo. III., c. 12. This Act is, of course, powerless to bind the Imperial parliament; but it is a most emphatic expression of a 'conventional" rule to be thereafter followed.

promote settlement, the revenues which came to the hands of the executive were, (1) the proceeds of customs, excise, and license duties, levied under Imperial Acts, and (2) the hereditary, territorial, and casual revenues of the Crown, consisting of the proceeds of the sale or lease of the " waste " lands in the colonies, fines, tolls, etc. The colonial legislatures could, of course, and did insist on retaining power of appropriation over the revenues arising under colonial Acts, and, so far as these revenues were concerned, could withhold supplies. But their action in such case made no difference to the executive, however it might do harm to the colony; the cost of the administration of justice and of civil government (including the salaries of the entire executive staff, administrative and judicial) was paid out of the other two sources of revenue, and over these the colonial assemblies had for many years no power of appropriation. To secure control of the executive—to make them *feel* responsibility—it was indispensably necessary to get control of these revenues and their appropriation; and the history of the growth of the principle of " Responsible government " is the history of the gradual acquisition by the colonial legislatures of the right to appropriate revenue from whatever source within the colony arising. The " tenure-of-office " question practically depended upon this question of control over the purse strings.

In all the provinces, the real issue was somewhat obscured by reason of the fact that under the then arrangement the legislative council, or second chamber, acted as a shield to the governor and his executive council, and was interposed to bear the brunt of all attacks upon executive methods. In the earlier stages of colonial history, the executive council was a branch of the legislature, and it always continued

potentially so, because its members formed the influential portion of the Crown-appointed legislative council. This position of affairs, however, gave the disputes between the assembly and the executive the appearance of being disputes between the two branches of the legislature; and it is not surprising, therefore, to find that the efforts of Howe, Wilmot, Papineau, and Baldwin were directly and ostensibly bent to secure reform in the constitution of the legislative council.[8] The real issue, however, was the question of executive responsibility, and that question largely depended upon the more sordid one as to control of expenditure. Perhaps there was a lack, too, of proper appreciation of the way in which the principle of responsible government was working its way into the fibre of the British constitution —through the medium of cabinet government—and this may have tended to the adoption of the less direct route to the establishment of responsible government here. It needed men like Lord Durham and Charles Buller, who were able to see through the intricacies of governmental machinery and discern the true principle of the British system, to point out how that same principle could be made effective in colonial government.

The first concession gained was of the power to appropriate the proceeds of Imperial tariffs in force in the colonies. As far back as the Constitutional Act, 1791, this power of appropriation was expressly given to the legislatures of Upper and Lower Canada over the proceeds of all customs duties levied as part of the commercial policy of the Empire. But the only Imperial tariff Act then in force in Canada, was the Act of 1774,[9] a *revenue* Act;

[8] *Sir John Bourinot*, "Responsible Government in Canada"—a paper read before the National Club, Toronto, during the winter of 1890-91, and published as "Maple Leaves," p. 43.

[9] See *ante*, p. 326.

and because that Act was thought not to come within the terms of the Constitutional Act, 1791, express legislation was necessary to give the colonial legislature control over the revenue arising under it. This was not obtained until 1831.[10]

For many years, however, in all the provinces, the "hereditary, territorial, and casual revenues" were amply sufficient to pay the salaries of all the executive staff, and these salaries the legislature had power neither to fix nor withhold. Secure in the enjoyment of the emoluments of office, the executive were able to thwart the wishes of the popular branch of the legislature and to ignore its claim to control and regulate their mode of conducting public business.

The history of the struggles, which in the Upper Provinces culminated at one time in open rebellion, and in all resulted in the firm establishment of responsible government, is beyond the scope of this work; but it is curious to note that the contemporary statutory record[1] appears in Acts relating to colonial control of colonial finances—the "tenure of office" question appearing only in despatches, instructions, etc. Not to dwell at undue length upon this point: first to New Brunswick and afterward to Canada (1847) and Nova Scotia (1849) full control over the revenues from all sources was conceded;

[10] 1 & 2 Wm. IV., c. 23. See *Houston* "Const. Doc." p. 106; *Andrew* v. *White*, 18 U. C. Q. B. 170.

[1] 1 & 2 Wm. IV. c. 23 (Imp.); 8 Wm. IV. c. 1 (N.B.); 3 & 4 Vic. c. 35 (Imp.); 6 & 7 Vic. c. 29 (Imp.); 6 Vic. c. 31 (Can.); 9 & 10 Vic. c. 94 (Imp.); 9 Vic. c. 114 (Can.); 10 & 11 Vic. c. 71 (Imp.); 12 & 13 Vic. c. (N.S.); 12 & 13 Vic. c. 29 (Imp.); 15 & 16 Vic. c. 39 (Imp.) 17 & 18 Vic. c. 118 (Imp.). For historical statements on this subject see *Mercer* v. *Atty.-Gen'l. of Ontario.*, 5 S. C. R. at p. 700, *et seq.*, *per* Gwynne, J.: *Ontario Mining Co.* v. *Seybold*, 31 O. R. 386, *per* Boyd, C.; *Algoma Central Ry. Co.* v. *Reg.*, 7 Exch. C. R. 239, *per* Burbidge, J.; *Todd* "Parl. Gov't in Brit. Col." pp. 25-6, 169, *et seq.* As to the disposal of Crown lands, see also *Cunard* v. *Reg.*, 42 S. C. R. 88.

and, having that full control, the Legislative Assemblies slowly but surely overcame the stubborn resistance or active opposition of the governors of the early 'forties, and the principle of executive responsibility was firmly and permanently established in all the pre-Confederation provinces.

The nature of the constitutions existing in the provinces immediately prior to the coming into force of the British North America Act may now, perhaps, be defined with some approach to accuracy. What Lieut.-Gov. Archibald has said,[2] in reference to the Constitution of Nova Scotia is equally applicable to the other maritime provinces: "No formal charter or constitution ever was conferred, either on the province of Nova Scotia or upon Cape Breton while that island was a separate province. The constitution of Nova Scotia has always been considered as derived from the terms of the Royal commissions to the Governors and Lieutenant-Governors, and from the 'instructions' which accompanied the same, moulded from time to time by despatches from Secretaries of State, conveying the will of the Sovereign, and by Acts of the local legislature, assented to by the Crown; the whole to some extent interpreted by uniform usage and custom in the colony."

In (old) Canada, the form of government was prescribed by the Act of Union.[3] But as to all the provinces, it can be truly said that their constitutions were modelled on the pattern of the parent state. In outward form, there is a close resemblance between the British constitution and the constitution of those provinces—the same single executive, the same legislative machinery (even to a second chamber), with about the same apparent connection

[2] Can. Sess. Papers, 1883, No. 70.
[3] 3 & 4 Vic. c. 35 (Imp.)

between the two departments of government. And upon inquiry further, it is found that just as in the case of the Imperial parliament, so here in the case of the pre-Confederation provinces, one will look in vain for any statute laying down the rules which should govern in the matter of the formation, the continuance in office, or the retirement of the Cabinet. Constitutional usage had in the parent land gradually culminated in the full recognition of the principle of executive responsibility to parliament, and this principle was by the simple method of instructions to the Governors introduced as the working principle of the provincial constitutions.[4]

Of the causes which led to the adoption by the provinces of the Quebec Resolutions, upon which the British North America Act is founded, it is for the historian to treat. In agreeing to the establishment of a " general " government, charged with matters of common concern, the provinces resolved that such general government should be modelled, as were their own governments, on that of the United Kingdom, and that its executive authority should be administered according to the well-understood principles of the British constitution. Nowhere in the British North America Act is to be found any section laying down that the ministry, either federal or provincial, shall hold office only so long as it can command the confidence of the legislature. Such is, of course, the unwritten but undoubted constitutional rule, and no significance can be attached to its absence from the British North America Act. " It is evidently impossible to reduce into the form of a positive enactment a constitutional principle of this nature."[5] It may, therefore, be unhesitatingly

[4] Extracts from the despatches from the Col. Secy. to Lord Sydenham are given in the author's " Hist. of Canada," at p. 248.

[5] Lord Russell's famous despatch of Sept., 1839, introducing " Responsible Government " into Upper Canada: Can. Sess. Jour., 1841, pp. 390-6, App. BB.

affirmed of both the Dominion and the provincial governments:

"That great body of unwritten conventions, usages, and understandings, which have in the course of time grown up in the practical working of the English constitution, form as important a part of the political system of Canada as the fundamental law itself which governs the federation."[6]

[6] *Bourinot* "Maple Leaves," p. 37; see note *ante*, p. 330.

CHAPTER XVII.

"A Constitution Similar in Principle to that of the United Kingdom."

The preamble to the British North America Act recites that the provinces of Canada, Nova Scotia and New Brunswick, had expressed their desire[1] for a federal union into one Dominion "*with a constitution similar in principle to that of the United Kingdom,*" and one would naturally expect that the design so clearly announced would be effectually carried out in the enacting clauses of the Act. There have not been wanting, however, those who have contended that the performance has fallen far short of the promise; that the Act is in its preamble a notable instance of "official mendacity:"[2] and that its effect has been to establish in Canada a system of government presenting features analogous rather to those of the United States than to those of the United Kingdom. This view of the Canadian Constitution is quite erroneous and wanting in a proper regard for the underlying principle in conformity to which the pre-Confederation provinces had been governed and the Dominion and its federated provinces have since been governed—the principle of executive responsibility to the people through parliament, which is the chief distinguishing feature of the British form of government, the Empire over, as contrasted with that of the United States. Because the union of the provinces is federal, indicating, *ex necessitate*,[3] some sort of a

[1] In the Quebec Resolutions; see Appendix.

[2] *Dicey* (Prof. A. V.)—"The Law of Constitution," 3rd ed., p. 155. Modified in later editions to "diplomatic inaccuracy." See the criticism of this passage by Burton, J.A., in the *Pardoning Power Case*, 19 O. A. R. at p. 39.

[3] *Per* Ritchie, C.J.—*Valin* v. *Langlois*, 3 S. C. R. 1, at p. 10.

division of the field of governmental action and an allotment of some part of that field to a central government, the conclusion is rashly reached that these matters of outward and superficial resemblance between the Canadian system of government and that of the neighbouring Republic are sufficient to stamp them as essentially alike. A closer examination of the Act itself, coupled with some slight knowedge of the pre-existing provincial constitutions and their practical working, would have sufficed to show that, in essentials, the constitution of Canada is not like the constitution of the United States, but is in very truth "similar in principle to that of the United Kingdom."

To arrive at an intelligent conclusion upon this much-discussed question—to which form of government, the British or the American, does our government in principle conform?—one must necessarily first formulate in his own mind some definite notion of the difference in principle between these two systems. It may, perhaps, turn out that a candid comparison will disclose that the difference between them should hardly be characterized as a difference *in principle*—that in each the same motive power is applied to the same end, with some difference only in the mode of application.

The British Empire and the American Union consist, each of a central or national government, internationally recognized, side by side with subordinate local governments. In the case of the United States, the central or Federal government has always received treatment as a tangible national government over one compact territory; but the British constitution has, as a rule, been looked at as the constitution of Great Britain rather than as an Imperial constitution. The reason is partly geographical, partly historical. The Imperial con-

stitution, as it to-day exists, is the result of the gradual application to the government of an expanding empire of those principles of local self-government which were adopted, at the start, as the basis of the federal union of the American colonies. Thirteen colonies, mutually independent, having joined to destroy the common tie of subjection to the British Crown, but desiring still to perpetuate their union of race and common interest, faced the task of forming a central or union government in such fashion as to reconcile national unity with those ideas of the right of self-government which had been the cause of their separation from the Empire. Schooled by the failure of the "Articles of Confederation" to work this result, they formulated the "Constitution of the United States," under which they have lived and thrived for so many years.[4] That which by revolution and a formal written convention they accomplished has been brought to pass throughout the British Empire by peaceful evolution and unwritten conventions. The true federal idea is clearly manifest, to reconcile national unity with the right of local self-government; the very same idea that is stamped on the written constitution of the United States. The difference of position historically is quite sufficient to account for the difference of position legally. Given the independent self-governing communities which made up the American Commonwealth, the national government was super-imposed to secure unity, but upon conditions preservative of local autonomy.

[4] "I think and believe that it is one of the most skilful works which human intelligence ever created; is one of the most perfect organizations that ever governed a free people. To say that it has some defects is but to say that it is not the work of Omniscience but of human intellects."—*Sir John A. Macdonald*, Confed. Debates, 32.

With us, on the other hand, the central government stands historically first, but the various communities which grew out of it have now as full a measure of local self-government as is enjoyed by the individual States which together form the neighbouring Republic. The sum total of conceded power at any given period will be found to be commensurate with the opinion prevalent at such period as to the proper line of division between Imperial and local concerns.

Under both the British and the United States systems the Courts charged with the enforcement of law must decline to recognize the validity of any act, legislative or executive, done by any person or body of persons, beyond the limits to which they are legally subject. The enforcement by the Courts, colonial and British, of the legal limitations upon colonial legislative power is matter of legal notoriety, and there is a no less rigorous enforcement of the legal limits set to interference, otherwise than by Imperial legislation, with colonial rights of self-government.[5]

The difference in principle between the British and the American systems of government is not in respect of the federal idea—that is common to both; nor in respect of the rule of law, the enforcement by the Courts of the law of the constitution—that, too, is common ground. But in the *machinery* of government a difference runs through the national and local governments alike of these two systems. The difference in principle is in the connection between the law-making and the law-executing departments of government. In both the British and the American systems, the body which makes the law must necessarily be supreme over the body

[5] *Campbell* v. *Hall*, Cowp. 209; and see *Lenoir* v. *Ritchie*, 3 S. C. R. 575, 1 Cart. 488.

which simply carries out the law when made. In the British system not only is this supremacy recognized, but, by a certain arrangement of the machinery of government, the will of the law-making body is made to sympathetically affect and control the will of the executive in the administration of public affairs; and the administrative knowledge of the executive is utilized to the full in the work of legislation. The same supremacy of the legislature necessarily exists in the United States system; the executive department of the Federal government, or of any one of the State governments, must administer public affairs according to law. But in their system there seems apparent a determined effort to prevent co-operation and sympathy.

What then is this arrangement of machinery in the British system? Of late years it has been found necessary to revise somewhat our ideas concerning the British constitution. The older authorities dwell upon the division of power between the legislative and executive departments of government, and the subdivision, in turn, of the legislative department into King, Lords, and Commons; and they[6] dilate with quiet enthusiasm upon the "checks and balances" provided in and by such a division and subdivision of power. Gradually, however, this "literary theory," safe-guarding the ark of the constitution with its supposed division of sovereignty into departments, came to be recognized as an incomplete and, in truth, wholly erroneous explanation of the working of the constitution. Of comparatively recent writers, the late Walter Bagehot, in his most valuable essays, attacks with vigor this "literary theory" with its supposed checks and balances, and arrives at this conclusion:

[6] *E.g. Chitty*, "On the Prerogatives of the Crown," at p. 2.

Blackburn, the whole question is discussed and more extended treatment of it is not called for here.

It would seem clear that the soil beneath the waters of such arms of the sea on the Canadian coast would be part of the Crown lands of the province into which they penetrate, except in the case of public harbours,[1a] though it may be presumptuous to express too decided an opinion upon the point. The proprietary interest of the Crown in the soil below low water mark along other parts of the coast is of a very doubtful character, apart from express legislative declaration;[2] and, as already pointed out, the Territorial Waters Jurisdiction Act, 1878, is silent as to proprietary interest. There is merely an assertion of jurisdiction, both past and present, for purposes of defence and security.[3]

(2) *Inland Waters*:

The waters of the Great Lakes which lie along the boundary between Canada and the United States are usually spoken of as inland waters and the Canadian "realm" extends to the international line, with as full territorial sovereignty as over waters strictly inland.[4] By treaty conventions with the United States the free navigation of these boundary waters is open to the ships of both countries.

Criminal jurisdiction has been asserted and provided for by Canadian statutes from early times

[1a] B. N. A. Act, sec. 108, schedule 3.

[2] This question is much discussed in *R.* v. *Keyn*, *ubi supra*, and proprietary interest in the Crown denied. See also judgment of Duff, J., in *Re British Columbia Fisheries* (1913), 47 S. C. R., at p. 502.

[3] On this question of title, see also *Coulson and Forbes*, Law of Waters, 8, *et seq.*

[4] *The Grace* (1894), 4 Exch. Ct. R. 283; *Dunbar Dredging Co.* v. *The "Milwaukee"* (1907), 11 Exch. Ct. R. 179. As to the Bay of Chaleurs: see *Mowat* v. *McPhee* (1880), 5 S. C. R. 66.

and the boundary lines of townships extend to the international line.[5] It has also been held that the Great Lakes are " high seas " within the jurisdiction of the Admiral,[6] so that the Imperial statutes of 1849 and 1878 would convey jurisdiction to Canadian Courts over offences committed on those waters, even if the exercise of criminal jurisdiction had not been fully provided for by Canadian legislation.

The same territorial sovereignty with proprietary ownership of the underlying soil exists, it would seem, in regard to the waters of the Gulf of Georgia lying behind Vancouver Island and to the north and west of the international boundary line and as far out as the seaward entrance to the Straits of Juan de Fuca. These are Canadian territorial waters apart altogether from the Territorial Waters Jurisdiction Act, 1878; for they are not " open " sea and it is only as to a three-mile belt of open sea that the Act of 1878 was necessary. These waters are " within the realm " and the underlying soil is part of the province of British Columbia and held by the Crown, it seems clear, in right of that province; just as the soil beneath the waters of strictly inland lakes is so held.[7]

[5] See 11 Exch. Ct. R., at p. 181-2.

[6] *R.* v. *Sharpe*, 5 Ont. Pract. R. 135: see *ante*, p. 238.

[7] As to public rights of fishing and of navigation in strictly inland waters: see *Re B. C. Fisheries* (1912), 47 S. C. R. 493.

CHAPTER XIII.

Miscellaneous Imperial Statutes.

Bankruptcy Acts.

The extent to which the British Acts are of colonial application has been considered by the Privy Council and the House of Lords. The Act of 1869 was held to vest in the assignee in bankruptcy real estate of the bankrupt situate in a colony.[1] The words of the particular sections were "lands and every description of property whether real or personal" and "all such property as may belong to or be vested in the bankrupt." There being thus no "express words," the question was whether there was the "necessary intendment" required by the Colonial Laws Validity Act.[2] It was held that "if a consideration of the scope and object of a statute leads to the conclusion that the legislature intended to affect a colony, and the words used are calculated to have that effect they should be so construed." The scope and object of the statute was determined, not only on the language of the Act itself, but on their Lordships' view of the policy of the whole series[3] of Bankruptcy Acts as being in *pari materia*, and it was held that "there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony."

[1] *Callender* v. *Col. Sec'y Lagos* (1891), A. C. 460; 60 L. J. P. C. 33. A Scotch bankruptcy under the Act of 1856 (19 & 20 Vict. c. 79), would seem to have the same effect: see sec. 102.

[2] 28 & 29 Vict. c. 63 (Imp.); see Appendix.

[3] The Act of 1849 had been held not to extend to New Zealand; *Bunny* v. *Hart*, 11 Moo. P. C. 189.

The natural result would follow that the discharge of a bankrupt under the Imperial Act may be pleaded as a defence to an action in a colonial Court.[4]

On the other hand, it has recently been held by the House of Lords[5] that a foreigner cannot be adjudicated a bankrupt under the Imperial Act for an act of bankruptcy committed abroad. In that case certain United States merchants carried on business, through a manager, in England. Being in financial difficulties they executed in the United States a deed of assignment for the benefit of creditors. This would have been an act of bankruptcy under the Imperial statute had the assignment been executed in England; but its execution abroad was held not to bring them within the Act. A resident of a colony is a "foreigner" within the meaning of this decision.[6]

Buying and Selling Offices.

The statute of Edward VI[7] against trafficking in public offices was expressly extended to the colonies by an Act of Geo. III.[8]

[4] *Ellis* v. *McHenry*, L. R. 6 C. P. 228; 40 L. J. P. C. 109. See also *Nicholson* v. *Baird*, N. B. Eq. Cas. (Trueman), 195; *Fraser* v. *Morrow*, 2 Thomp. (N.S.), 232; *Hall* v. *Goodall*, 2 Murd. Epit. (N.S.), 149; ——— v. *Irving*, 1 P. E. I. Rep. 38.

[5] *Cooke* v. *Chas. A. Vogeler Co.* (1901), A. C. 102; 70 L. J. K. B. 181. See *ante*, p. 84. See, however, 3 & 4 Geo. V., c. 34, sec. 8 (Br.), which extends the meaning of the word 'debtor,' as used in the Acts of 1883 and 1890, to persons carrying on business in England by an agent or manager, etc.

[6] See *Colquhoun* v. *Brooks* (1888), L. R. 21 Q. B. D. 65; 57 L. J. Q. B. 70, 439.

[7] 5 & 6 Ed. VI. c. 16.

[8] 49 Geo. III. c. 126, sec. 1. See *R.* v. *Mercer*, 17 U. C. Q. B. 602; *R.* v. *Moodie*, 20 U. C. Q. B. 389.

Companies' Acts.

Neither the Joint Stock Companies' Arrangement Act, 1870, nor the other Companies' Acts with which it must be read and construed, extend to the colonies or are intended to bind the colonial Courts; and proceedings in an English Court under those Acts cannot be pleaded in a colony as a defence to an action by a colonial creditor.[9]

"It is impossible to contend that the Companies' Acts as a whole extend to the colonies, or are intended to bind the colonial Courts. The colonies possess and have exercised the power of legislating on these subjects for themselves, and there is every reason why legislation of the United Kingdom should not unnecessarily be held to extend to the colonies, and thereby overrule, qualify, or add to their own legislation on the same subject. It is quite true that the provisions of the Arrangement Act are expressed to extend to all creditors, and so they do to foreign as well as to colonial creditors, but only when their rights are in question in the Courts of the United Kingdom. . . . Nor do their Lordships think that any assistance is to be derived from what has been held with regard to the application of the Bankruptcy Act to the colonies. It has been decided that by the express words[10] of the Bankruptcy Acts all the property, real and personal, of an English bankrupt in the colonies as well as in the United Kingdom is vested in his assignees or trustees. Their title must therefore receive recognition in the colonial Courts, from which it has been considered to follow that the bankrupt, being denuded of his property by the English law, is also entitled to plead the discharge given him by the same law. But how does this assist the appellants? We have to deal with the winding-up of a company, not with bankruptcy, and there is a material distinction between the effect of bankruptcy and that of winding-up. In the former case the whole property of the bankrupt is taken out of him, whilst

[9] *New Zealand Loan Co.* v. *Morrison* (1898), A. C. 349; 67 L. J. P. C. 10.

[10] But see *ante*, p. 248.

in the latter case the property remains vested in title and in fact in the company, subject only to its being administered for the purpose of the winding-up under the direction of the English Courts."

And the respondent held her judgment, obtained in the Victorian Courts, for moneys deposited with the appellants in Victoria before the making of the English winding-up order.

If a winding-up of a company incorporated under the Imperial Acts is desired in and for a colony, it must be decreed by the colonial Court under colonial legislation.[1]

"The Companies Seals Act, 1864,"[2] is not, strictly speaking, an Imperial statute. It applies only to companies incorporated under the British Act of 1862 and empowers them to adopt and use a special seal for transactions outside of the United Kingdom. The reverse method appears in an Imperial Act of 1908[2a] which empowers companies incorporated in British Possessions to hold land on complying with certain provisions of the (Imperial) Companies Act.

Copyright.

To what extent the Imperial Copyright Act of 1842[3] was operative in Canada was considered by the House of Lords in 1868.[4] The precise case, as stated by the Lord Chancellor (Lord Cairns), was whether an alien friend publishing a work in England during the time of his or her temporary sojourn in a British colony was entitled to the protection

[1] *Allen* v. *Hanson* (1890), 18 S. C. R. 667; 4 Cart. 470.

[2] 27 & 28 Vict. c. 19 (Br.). See also the Companies Act, 1862, sec. 55, as to appointing agents abroad.

[2a] 8 Edw. VII., c. 12.

[3] 5 & 6 Vict. c. 45 (Imp.).

[4] *Routledge* v. *Low*, L. R. 3 E. & I. App. 113; 37 L. J. Chy. 454.

given by the Act. The facts were that an American authoress had crossed into Canada and her book was published in London during her few days' stay in Montreal. Three questions were considered: First, where must the publication take place? Secondly, what is the area over which the protection of the Act extends? Thirdly, who is entitled to that protection? Although the Act expressly provides[5] that it shall extend to "every part of the British Dominions," it was held to protect those works only which were published in the United Kingdom for reasons thus summed up by Lord Westbury: "This results from various provisions and conditions contained in the Act which could not possibly be complied with if the first publication was to take place in distant parts of the British Empire." As to the area over which the protection afforded by the Act was to extend, the language of the statute[6] was express that the copyright when created should extend to every part of the British Dominions. The third question as to what authors could procure the protection of the Act has already been fully discussed.[7]

Upon the question of chief importance from a Canadian standpoint, the operation of the Act in a colony having copyright legislation of its own, the language of Lord Cranworth and of Lord Chelmsford may be quoted:

"The decision of your Lordships' House in *Jeffreys* v. *Boosey*[8] rested on the ground that the statute of Anne, then alone in question, must be taken to have had reference exclusively to the subjects of this country, including in that description foreigners resident within it, and not to have contemplated the case of aliens living abroad beyond the auth-

[5] Section 29.
[6] Sections 15 and 29.
[7] See *ante* p. 72, *et seq.*
[8] (1855), 4 H. L. Cas. 815; 24 L. J. Ex. 81.

ority of the British legislature. The British Parliament in the time of Queen Anne must be taken *prima facie* to have legislated only for Great Britain, just as the present Parliament must be taken to legislate only for the United Kingdom.[9] But though the Parliament of the United Kingdom must *prima facie* be taken to legislate only for the United Kingdom and not for the colonial Dominions of the Crown, it is certainly within the power of Parliament to make law for every part of Her Majesty's Dominions, and this is done in express terms by the 29th section of the Act, now in question. Its provisions appear to me to show clearly that the privileges of authorship, which the Act was intended to confer or regulate in respect to works first published in the United Kingdom, were meant to extend to all subjects of Her Majesty in whatever part of her dominions they might be resident, including under the term 'subjects' foreigners resident there and so owing to her a temporary allegiance. That Her Majesty's colonial subjects are by the statute deprived of rights they would otherwise have enjoyed is plain, for the 15th section prohibits them from printing or publishing in the colony, whatever may be their own colonial laws, any work in which there is a copyright in the United Kingdom. It is reasonable to infer that the persons thus restrained were intended to have the same privileges as to works they might publish in the United Kingdom as authors actually resident therein."—*Per* Lord Cranworth.

"Our attention was called to a local law of Canada with regard to copyright; but it was not contended that it would prevent a native of Canada from acquiring an English copyright which would extend to Canada as well as to all other parts of the British Dominions, although the requisitions of the Canadian law had not been complied with. It is unnecessary to decide what would be the extent and effect of a copyright in [10] those colonies and possessions of the Crown which have local laws upon the subject. But even if the Imperial statute applies at all to such a case, I do not see how such a copyright can extend beyond the local limits of the law which creates it."—*Per* Lord Chelmsford.

[9] See *ante*, p. 69.

[10] "In" clearly means "under the laws of."

The question was afterwards litigated in Canadian Courts,[1] and the view of Lord Cranworth adopted, that the prohibition against printing or publishing in a colony a work protected by British copyright applies even to a colony having its own Copyright Act. But it should be noted that as late as 1905 the Supreme Court of Canada[2] expressly reserved the right to reconsider this decision, saying that it was still open to discussion whether the Parliament of Canada might not be able to override Imperial legislation on the subject of 'copyright' passed prior to 1867.[2a]

The question is not now likely to arise—at least, as to copyright[2b]—as the recent consolidating British "Copyright Act, 1911,"[3] contains these careful provisions as to the application of the Act to the self-governing dominions:

APPLICATION TO BRITISH POSSESSIONS.

25. (1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

(2) If the Secretary of State certifies by notice published in the London Gazette that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects

[1] *Smiles* v. *Belford*, 1 Ont. App. R. 436.

[2] *Imp. Book Co.* v. *Black*, 35 S. C. R. 488; affirming 8 Ont. L. R. 9. The Privy Council refused leave to appeal.

[2a] See *ante*, p. 63.

[2b] But see *ante*, p. 63.

[3] 1 & 2 Geo. V., c. 46 (Imp.).

resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this act extends, enjoy within the dominion rights substantially identical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

26. (1) The Legislature of any self-governing dominion may, at any time, repeal all or any of the enactments relating to copyright passed by Parliament (including this Act) so far as they are operative within that dominion: Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that, on this Act or any part thereof being so repealed by the Legislature of a self-governing dominion, that dominion shall cease to be a dominion to which this Act extends.

(2) In any self-governing dominion to which this Act does not extend, the enactments repealed by this Act shall, so far as they are operative in that dominion, continue in force until repealed by the Legislature of that dominion.

(3) Where His Majesty in Council is satisfied that the law of a self-governing dominion to which this Act does not extend provides adequate protection within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere than in that dominion, His Majesty in Council may, for the purpose of giving reciprocal protection, direct that this Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein, shall, within the parts of His Majesty's dominions to which this Act extends, apply to works the authors whereof were, at the time of the making of the work, resident within the first-mentioned dominion, and to works first published in that dominion; but, save as

provided by such an Order, works the authors whereof were resident in a dominion to which this Act does not extend shall not, whether they are British subjects or not, be entitled to any protection under this Act except such protection as is by this Act conferred on works first published within the parts of His Majesty's dominions to which this Act extends:—

Provided that no such Order shall confer any rights within a self-governing dominion, but the Governor in Council of any self-governing dominion, to which this Act extends, may, by Order, confer within that dominion the like rights as His Majesty in Council is, under the foregoing provisions of this sub-section, authorised to confer within other parts of His Majesty's dominions.

For the purposes of this sub-section, the expression "a dominion to which this Act extends" includes a dominion which is for the purpose of this Act to be treated as if it were a dominion to which this Act extends.

27. The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but, except so far as such modifications and addition relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

28. His Majesty may by Order in Council, extend this Act to any territories under his protection and to Cyprus, and, on the making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty's dominions to which this Act extends. . . .

Part II.—International Copyright.

30. (1) An Order in Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends except self-governing dominions and any other possessions specified in the Order with respect to which it appears to His Majesty expedient that the Order should not apply.

(2) The Governor in Council of any self-governing dominion to which this Act extends may, as respects that dominion make the like orders as under this Part of this Act His Majesty in Council is authorised to make with respect to His Majesty's dominions other than self-governing dominions, and the provisions of this Part of this Act shall, with the necessary modifications, apply accordingly.

(3) Where it appears to His Majesty expedient to except from the provisions of any order any part of his dominions not being a self-governing dominion, it shall be lawful for His Majesty by the same or any other Order in Council to declare that such order and this Part of this Act shall not, and the same shall not, apply to such part, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order.

35. (1) "Self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

The Copyright (Works of Art) Act, 1862,[4] does not extend to the colonies.[5]

"*Colonial Boundaries Act, 1895.*"

Under this Act[6] power is given to the Crown in Council (Imperial) to alter the boundaries of British colonies; but not without the consent of the colony in the case of the self-governing colonies set out in the schedule, Canada being one of those named.[7]

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[4] 25 & 26 Vict. c. 68 (Br.).

[5] *Graves* v. *Gorrie*, 72 L. J. P. C. 95.

[6] 58 & 59 Vict. c. 34.

[7] See *post*, Chap. XVI., as to the alteration of boundaries by mere prerogative in the early days of colonial history.

Demise of the Crown.

By the "Demise of the Crown Act, 1901,"[7a] it is provided:

"1. The holding of any office under the Crown whether within or without His Majesty's dominions shall not be affected, nor shall any fresh appointment thereon be rendered necessary, by the demise of the Crown."

Evidence: British, Foreign, and Colonial Law.

It may happen that in a case before a Canadian Court, the law to be applied is the law written or unwritten, of a foreign country, of some other British colony, or of the United Kingdom. Where the law which governs is to be found in an Imperial enactment extending to Canada, judicial notice must be taken of such enactment; but in the case of statutory law of local application merely in the United Kingdom that law, as in the case of foreign or other colonial law, must be proved as fact. Apart from Canadian legislation, both federal and provincial, as to the mode of proof—a topic not within our range here—there are several Imperial enactments upon the subject which are or have been in force in Canada.

A statute of George II.[8] provided an easy method of proof by affidavit of debts sued for by British merchants in the colonies and plantations in America;[9] but this was repealed by the Statute Law Revision Act, 1887 (Imp.).

Colonial enactments providing for admission of the unsworn testimony of the heathen aborigines

[7a] 1 Edw. VII., c. 5.
[8] 5 Geo. II. c. 7 (Imp.).
[9] See *Gordon* v. *Fuller*, referred to *ante*, p. 61.

were considered of doubtful validity as being "repugnant to the law of England,"[10] and an Imperial statute was passed in 1843 to quiet such doubts.[1]

By an Imperial Act of 1851, every document admissible in England without proof of the seal, or stamp, or signature authenticating it, or of the judicial or official character of the person appearing to have signed it, is to be admitted in evidence in the same way in colonial Courts.[2] The provision in the Canada Evidence Act as to giving notice of intention to use certified copies of such documents was held by the Supreme Court of the North-West Territories not repugnant to this Imperial Act.[3]

The Documentary Evidence Act, 1868,[4] providing for proof of Orders in Council and departmental regulations, applies to all British colonies, but "subject to any law that may be from time to time made by the legislature of any British colony or possession." One method of proof open in a colonial Court is by production of a copy purporting to have been printed under the authority of the colonial legislature. The practice of printing such orders and regulations with the Dominion Statutes facilitates this method of proof.

Under the Colonial Laws Validity Act, 1865,[5] a simple method of proof of a colonial statute is provided, viz., a copy of the Act certified by the proper officer of the legislature enacting it; and this provision applies, it would seem, to proceedings in the Courts not only of the United Kingdom but of all

[10] See *ante*, p. 57.

[1] 6 & 7 Vict. c. 22.

[2] 14 & 15 Vict. c. 99, s. 11 (Imp.). The provisions of sec. 12 as to proof of registry of a British ship, are now to be found in the Merchant Shipping Act, 1894.

[3] *Stevens* v. *Olson* (1904), 6 Terr. L. R. 106 (Full Ct.).

[4] 31 & 32 Vict. c. 37.

[5] 28 & 29 Vict. c. 63 (Imp.), sec. 6. See Appendix.

other British colonies. An Act of 1907 [5a] provides for proof in the United Kingdom of colonial statutes by production of a copy purporting to be signed by the King's Printer in the colony. The Act is not to be taken as affecting the operation of the Colonial Laws Validity Act, 1865.

Colonial law, statutory and common, is entitled in cases where it applies to at least as full recognition as is accorded in British Courts to foreign law on principles of international comity.[6] In Admiralty Courts, which are really Imperial tribunals, colonial enactments are of binding authority in all cases to which they apply and judicial recognition would be accorded them;[7] just as judicial recognition is taken by the Privy Council on colonial appeals.[8]

In 1859 an Imperial Act was passed "to afford better facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof." [9] It provides for the transmission of a settled case for the opinion of a Superior Court of the colony the law of which is in question and for the hearing of the parties by counsel in such Court. Upon receipt of such opinion the Court which asked for it is to apply it to the case before them. In the event of an appeal to the Privy Council the Board are not bound by the opinion so obtained and may either adopt it or reject it "as the same shall appear to them to be well founded or not in law." In other words, the Privy Council as the ultimate Imperial Court of Appeal for the Empire must decide for itself what the law is in any and all parts of the

[5a] 7 Edw. VII., c. 16.

[6] *Phillips* v. *Eyre*, L. R. 4 Q. B., at p. 241; *R.* v. *Brierly*, 14 Ont. R., at p. 534.

[7] *Redpath* v. *Allen*, L. R. 4 P. C. 511; 42 L. J. Adm., 8.

[8] *Cameron* v. *Kyte*, 3 Knapp P. C., at p. 345.

[9] 22 & 23 Vict. c. 63 (Imp.). See Appendix.

Empire, taking judicial notice of that law both statutory and unwritten.

In 1861, the principle of the statute just referred to was applied for the better ascertainment of foreign law "when pleaded in Courts within Her Majesty's dominions."[10] The procedure is along the same lines as that of the earlier Act; but there is a clause providing for reciprocal action by British Courts at the request of a foreign Court. The statute, however, only applies to those foreign countries with which a convention has been entered into to that end by the British Government.

"An Act to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals"[1] was passed by the Imperial Parliament in 1856. Under it an order may be made for the examination of a witness or witnesses whose evidence may be desired by a foreign tribunal before some person to be named in the order; and any such order may be enforced as if made in a cause depending in the Court which made it. The statute, it will be noticed, does not apply to criminal cases. "Every Supreme Court in any of Her Majesty's colonies or possessions abroad" has authority under this Act.[2]

In 1859, a somewhat similar Act was passed to facilitate the taking of evidence in one part of the Empire for use before a tribunal in some other part.[3]

The Parliament of Canada has enacted legislation along similar lines[4] and its power in that regard

[10] 24 Vict. c. 11 (Imp.). See Appendix.

[1] 19 & 20 Vict. c. 113 (Imp.). See Appendix.

[2] See *Eccles* v. *Louisville, &c., Ry. Co.* (1912), 1 K. B. 135; 81 L. J. K. B. 445, where the principles upon which British Courts should act under this statute are discussed.

[3] 22 Vict. c. 20 (Imp.). See Appendix.

[4] See R. S. C. (1906), c. 145.

has been upheld in Ontario.[5] The view was expressed that provincial legislatures could not enact such laws as being of extra-provincial pertinence; but in a recent case in Manitoba this view was not adopted, and an Act of the legislature of that province providing for the taking of evidence there for use in another province was upheld as within provincial competence.[6] In neither of these cases was the Imperial Act discussed, though it would appear sufficient to uphold the proceedings in each of them.

Floating Derelicts.

The Derelict Vessels (Report) Act, 1896, requires the master or person in command of any British ship who shall become aware of the existence on the high seas of any floating derelict vessel to notify Lloyd's agent at the next port of call or, if there be no agent at such port, to send a report to the Secretary of Lloyd's, London; under penalty not exceeding five pounds.

Geneva or Red Cross.

The Geneva Convention Act, 1911,[7a] prohibits the use of the Red or Geneva Cross for trade or other commercial purposes, under penalty. It extends to "His Majesty's possessions outside the United Kingdom, subject to such necessary adaptations as may be made by order-in-council."

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[5] *Re Wetherell & Jones*, 4 Ont. R. 713.

[6] *Re Alberta & Great Waterways Ry. Co.* (1910), 20 Man. L. R. 697; agreeing with the view expressed in the 2nd ed. of this book, p. 182. See also *Ex p. Smith*, L. C. Jur. 140; 2 Cart. 330.

[7] 59-60 Vict. c. 12 (Imp.).

[7a] 1 & 2 Geo. V., c. 20.

Marriage. "*The Foreign Marriage Act*, 1892."

For obvious reasons, the Royal Marriage Act of George III.[8] applies to all marriages wheresoever solemnized;[9] while the Act forbidding marriage with a deceased wife's sister [10] was confined in its operation to persons domiciled in the United Kingdom and was held not to apply to a foreign or colonial marriage of persons not domiciled in England.[1] In an early Canadian case it was expressly held not to be in force in Canada as "the colonies are not mentioned in the Act nor included by any necessary or even strong intendment."[2] An Act of 1906[2a] passed for removing doubts makes such colonial marriages valid in the United Kingdom where both parties were domiciled in the colony. And in 1907,[2b] the "Deceased Wife's Sister Act" makes valid all such marriages "heretofore or hereafter contracted . . . within the realm or without."

Beginning in 1823, there are a series of British statutes passed with the view of validating marriages of British subjects solemnized abroad by consular and naval and military officers or army chaplains according to English forms and not in conformity with the *lex loci celebrationis*, which in international law as adopted by the municipal law of England is the law upon which, speaking generally, the validity of a marriage depends.[3] Extended treatment of this topic is not to be expected here; but it

[8] 12 Geo. III. c. 11 (Imp.).

[9] *Sussex Peerage Case* (1844), 11 Ch. & F. 146.

[10] 5 & 6 Wm. IV. c. 54 (Br.), commonly called Lord Lyndhurst's Act.

[1] *Brook* v. *Brook*, 9 H. L. Cas. 193.

[2] *Hodgins* v. *McNeil*, 9 Grant 305 (U.C.).

[2a] 6 Edw. VII., c. 30.

[2b] 7 Edw. VII., c. 47 (Imp.).

[3] 4 Geo. IV. c. 91; 12 & 13 Vict. c. 68. (The Consular Marriage Act, 1849); 31 & 32 Vict. c. 61 (The Consular Marriage Act,

may be remarked that the question as to the operation of these statutes in the colonies and as to British subjects there presents at least three aspects: *First*, to what extent are such marriages to be held valid in colonial Courts? *Second*, to what extent did those Acts, and does now the Act of 1892, cover marriages celebrated in a colony? and *Third*, what is the position of a colonially naturalized British subject in reference to taking the benefit of the Act? This last question has already been dealt with.[4] The second question seems to present no difficulty as the only marriages which under the Act could take place in a colony would be marriages on board ship in a colonial port or marriages within the lines of the army, and these are expressly dealt with by the Act itself, which is in this respect clearly an Imperial enactment. As to the first question, the proper answer would seem to be that such marriages would be held valid everywhere within British dominions, at least. They are based on a fiction of extended territoriality; and are considered as really made in British territory.[5] The Acts prior to 1890 provide that such marriages are to be "valid in law as if the same had been solemnized within (His) Majesty's dominions with a due observance of all forms required by law." In the Acts of 1890, 1891, and 1892 the expression is "within the United Kingdom." Reading all the Acts as *in pari materiâ*, however, and in the light of the fictional idea underlying them all, the intent would seem to be of Imperial scope.

1868); 53 & 54 Vict. c. 47 (The Marriage Act, 1890); 54 & 55 Vict. c. 74 (The Foreign Marriage Act, 1891); and a Consolidating Act, 55 & 56 Vict. c. 23 (The Foreign Marriage Act, 1892). See also 2 & 3 Geo. V., c. 15 (as to marriages in Japan); also 6 Edw. VII., c. 40.

[4] *Ante*, p. 186.

[5] See *Dicey*, Conflict of Laws (1896), c. 26, where the whole subject is discussed. See also *Hall*, Foreign Jurisdiction of the British Crown.

Doubts having arisen as to the extra-territorial operation of colonial Acts validating marriages contracted in the colonies respectively, an Imperial Act of 1865 [6] provides:

"Every law made or to be made by the legislature of any such possession as aforesaid for the purpose of establishing the validity of any marriage or marriages contracted in such possession shall have and be deemed to have had from the date of the making of such law the same force and effect for the purpose aforesaid within all parts of Her Majesty's dominions as such law may have had or may hereafter have within the possession for which the law was made:

Provided that nothing in this law contained shall give any effect or validity to any marriage unless at the time of such marriage both of the parties thereto were, according to the law of England, competent to contract the same."

Whether such a validating Act should in Canada be passed by the Parliament of Canada or by a provincial legislature may be a question of difficulty.[7]

Medical Practitioners.

Under the earlier British Medical Acts practitioners registered under those Acts were entitled to practice their profession in the colonies;[8] but since 1886 British registration while conferring the right to practice in the colonies [9] does so "subject to any local law." [10] "Local law" is defined as "an Act or ordinance passed by the legislature of any British possession;" and British possession as applied to

[6] 28 & 29 Vict. c. 64 (Imp.).

[7] See *post*, p. 556, *et seq.*

[8] *Metherell* v. *Coll. of Phys.* (1892), 2 B. C. 189; *R.* v. *Coll. of Phys.* (1879), 44 U. C. Q. B. 564.

[9] See 49 & 50 Vict. c. 48 (Imp.).

[10] Section 6.

Canada means Canada as one whole.[1] Apparently, therefore, only an Act of the Parliament of Canada can make the ' local law ' necessary to limit the full effect of registration under the British Act. The same provision appears in the Act as to dentists.[2] There are also provisions in the Act for the registration of colonial practitioners upon conditions designed to secure reciprocal advantages for British practitioners in the colonies.[3]

Official Secrets.

The Official Secrets Act, 1911,[3a] is designed to prevent the betrayal of government plans and purposes. It applies to all acts which offend against its provisions when committed in any part of His Majesty's dominions or by British officers or subjects elsewhere. Any competent British Court in the place where the offence is alleged to have been committed may hear and determine the charge; but out of the United Kingdom the Court must be one having jurisdiction " to try crimes which involve the greatest punishment allowed by law."

Pacific Cable.

The " Pacific Cable Act, 1901,"[3b] made provision for the construction and working of a submarine cable between Canada and the Australasian colonies (viâ Norfolk Island) at the joint expense of Great Britain and the colonies named. To that end the Pacific Cable Board was constituted, each of the contributing governments being represented on the Board. An amendment of 1911[3c] provides for branches to other points in the Pacific.

[1] Section 27.
[2] Section 26.
[3] Section 11, *et seq.*
[3a] 1 & 2 Geo. V., c. 28.
[3b] 1 Edw. VII., c. 31.
[3c] 1 & 2 Geo. V., c. 36; see also 2 Edw. VII., c. 26, which substitutes the Commonwealth of Australia for the former individual colonies of New South Wales, Victoria, and Queensland.

Privy Council Appeals.

There are a series of statutes dealing with the Judicial Committee of the Privy Council and its composition and the procedure on appeals from colonial Courts;[4] but it is deemed advisable to deal in one place with the Canadian judicial system of the administration of justice in and for Canada and its various provinces.[5] The question how far, if at all, a colonial legislature may take way the right of appeal to the Crown in Council (Imperial) has already been dealt with.[6]

Prize Courts Act, 1894.

Under this Act,[7] Prize Courts may be established in any British possession in time of peace by warrant, commission or instructions from the Crown or the Admiralty conditioned to take operative effect only on the breaking out of hostilities. Jurisdiction to act as a Prize Court may be conferred under this Act upon a Vice-Admiralty Court or a Colonial Court of Admiralty or a Vice-Admiralty Court may be established for that purpose. In Canada, the jurisdiction has been conferred on the Exchequer Court as a Colonial Court of Admiralty[8] and the proceedings to that end are published in the 6th volume of the Exchequer Court Reports, p. 468 *et seq.*

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[4] 3 & 4 Wm. IV. c. 41; 7 & 8 Vict. c. 69; 39 & 40 Vict. c. 59; 44 & 45 Vict. c. 3; 50 & 51 Vict. c. 70; 58 & 59 Vict. c. 44; 8 Edw. VII., c. 51; 3 & 4 Geo. V., c. 16.

[5] See *post.*

[6] *Ante*, p. 157, *et seq.*

[7] 57 & 58 Vict. c. 39 (Imp.).

[8] See *ante*, p. 239.

Probate. "Colonial Probates Act, 1892."

This is really a purely British Act[9] providing for the recognition in the United Kingdom of Probates and Letters of Administration granted by Colonial Courts, upon a reciprocal basis. The Canadian provinces are for the purposes of this statute to be treated as separate British possessions, contrary to the rule of interpretation generally applied to Imperial Acts since 1889.[10]

Seal Fisheries of the North Pacific.

The controversy between Great Britain and the United States as to Behring Sea and the seal fishing there and in the adjoining waters of the North Pacific resulted in the making of the Behring Sea Award of 15th August, 1893. To carry out the provisions of this Award, the Imperial Parliament passed the Behring Sea Award Act, 1894,[1] under which the Exchequer Court of Canada as a Colonial Court of Admiralty[2] has jurisdiction to punish those who, whether on British or United States ships, contravene the articles of the award as confirmed by the Act. In addition to this special Act, there have been several Acts passed by the Imperial Parliament, regulating the seal fisheries of the North Pacific;[3] but these apply only to British ships and their crews. The Act now in force is the Seal Fisheries (North Pacific) Act, 1895, as amended in 1912. It applies to that part of the Pacific Ocean north of the 30th parallel of north latitude, including the seas of

[9] 55 & 56 Vict. c. 6 (Br.).

[10] See *ante*, p. 238.

[1] 57 & 58 Vict. c. 2.

[2] See *ante*, p. 239.

[3] 54 & 55 Vict. c. 19; 55 & 56 Vict. c. 23; 58 & 59 Vict. c. 21; 2 & 3 Geo. V., c. 10.

Behring, Kamchatka, Okhotsk, and Japan; and is in addition to and not in derogation of the Behring Sea Award Act, 1894. This latter Act forbids altogether the killing of seals within 60 miles of the Pribiloff Islands, a well-known breeding haunt for seals, and establishes a close season from May 1st to July 31st in each year for Behring Sea and that part of the Pacific north of the 35th degree of north latitude and east of the Russian boundary line as agreed upon between Russia and the United States at the time of the Alaska purchase; and also makes regulations for the carrying on of the industry during the open season. Both Acts embody many provisions of the Imperial Merchant Shipping Acts of 1854 and 1894 and under both Acts, the Exchequer Court of Canada (in Admiralty) has complete jurisdiction to decree forfeiture or to fine for contravention of the Acts. Ships registered in Canada, it is hardly necessary to state, are British ships.[4] Further details as to these Acts must be sought for in the Acts themselves.[5]

"Colonial Solicitors' Act, 1900."

This, again, is a purely British Act[6] facilitating the admission of colonial solicitors to practice in the United Kingdom under certain conditions, looking

[4] See *ante*, pp. 215, 231.

[5] Reference may perhaps usefully be made to the following cases in the Exch. Ct. Reports: *R.* v. *Ship "Oscar & Hattie"* (1892), 3 E. C. R. 241; *R.* v. *Ship "Minnie"* (1894), 4 E. C. R. 151; *R.* v. *Ship "Ainoko"* (1894), 4 E. C. R. 195; *R.* v. *Ship "E. B. Marvin"* (1895), 4 E. C. R. 453; *R.* v. *Ship "Selby"* (1895), 5 E. C. R. 1; *R.* v. *Ship "Beatrice"* (1896), 5 E. C. R. 9, 160, 378; *R.* v. *Ship "Viva"* (1896), 5 E. C. R. 360; *R.* v. *Ship "Ainoko"* (1896), 5 E. C. R. 366; *R.* v. *Ship "Aurora"* (1896), 5 E. C. R. 372; *R.* v. *Ship "Otto"* (1898), 6 E. C. R. 188; *R.* v. *Ship "Carlotta G. Cox"* (1908), 11 E. C. R. 312.

[6] 63 & 64 Vict. c. 14 (Br.). It repeals earlier Acts on the subject.

to reciprocity amongst other things. For the purposes of this Act the Canadian provinces are to be treated as individual British possessions, contrary, as above intimated, to the general rule of interpretation to be applied to British statutes since 1889.

Colonial Stock Acts.

These Acts[7] are really purely British Acts, passed in order to facilitate dealings in the United Kingdom in stock "forming part of the public debt of any colony;" and they therefore call for little comment here. For the purpose of these Acts the Canadian provinces are colonies and their legislatures colonial legislatures; contrary to the general rule now applied in the interpretation of Imperial statutes under the Interpretation Act, 1889;[8] and contrary also to the rule of interpretation to be ordinarily applied in England to the word 'colony' in a will or other written document. The Act of 1900 for the first time made Colonial Stock to which these Acts apply a proper trustees' investment, but provincial stock was held to be an improper investment under a will of a person who died prior to 1900, and who by his will authorizes the trustees named therein to invest in the stock of "any British colony or dependency." These words were held not to cover the individual provinces of Canada.[9]

But, as already intimated, these Acts are not really Imperial Acts extending to Canada, so as, for instance, to authorize colonial trustees to invest in such securities unless duly authorized so to do by colonial law.

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[7] 40 & 41 Vict. c. 59; 55 & 56 Vict. c. 35; 63 & 64 Vict. c. 62; to be read together and cited as the "Colonial Stock Acts, 1877 to 1900."

[8] 52 & 53 Vict. c. 63 (Imp.), sec. 18 (3).

[9] *In re Maryon-Wilson Estate* (1912), 1 Ch. 55; 81 L. J. Ch. 73 (C.A.).

CHAPTER XIV.

English Law Introduction.

So far this book has dealt with Imperial Acts applying expressly or by necessary intendment to the colonies; and it has been shown that a statute of this class is in force in a colony *proprio vigore* as an enactment of the Supreme Legislature of the Empire; that it cannot be repealed or amended by colonial legislation, except under permissive Imperial enactment; and that any colonial Act in any way repugnant to it is to the extent of such repugnancy, but not otherwise, absolutely void and inoperative. In other words, such an Imperial Act is both a law in the colony and a limitation upon its legislative power. But there is another class of British statutes [1] which, like the unwritten law of England, may be part of the law of the colony. As part of the law of England they have been carried to the colony by its first settlers, or by the action of the home authorities or by colonial adoption have been established as the basic law of the colony. British statutes of this class are necessarily of date anterior to the introduction of English law into the colony. They are in force there only by colonial sufferance, for the legislature of the colony may repeal or amend them, so far as relates to their operation in the colony, either directly or by repugnant legislation. In other words, they may be a law in the colony but they are not a limitation upon the colony's legislative power. When passed, they had not the colonies in contemplation, but were intended to alter or amend the law of England. And the question is: to what extent is

[1] It will be convenient to call these statutes British, though the term is not always strictly accurate. See *ante*, p. 55, note.

the common and statute law of England in force as the basic law of the colony upon or after its acquisition?

"A question of this kind," said Chief Justice Robinson,[2] "arising in any British colony must depend upon the manner in which the law of England has become the law of that particular colony; whether it has been merely assumed to be in force upon common law principles, as in the case of new and uninhabited lands found and planted by British subjects; or whether it has been introduced by some positive enactment of the Mother Country, or of the colony, or (as may be done in the case of a conquered country) imposed by the mere Act or regulation of the King in the exercise of his royal prerogative."

Many of the British statutes in times past held to be in force here are not now operative in Canada, the subjects with which they deal having received attention at the hands of Canadian legislatures. It is only in the absence of Canadian legislation on the subject that any question can arise as to the effect here of such British Act.[3]

A brief review of the authorities is attempted in order to arrive at the principles upon which they rest and not in order to indicate what particular British Acts are to-day in force in the different Canadian provinces.[4]

English Cases:—

In 1889, the Privy Council had occasion to consider how far the rule of the common law of England against perpetuities had been introduced "by

[2] *Doe d. Anderson* v. *Todd* (1845), 2 U. C. Q. B. 82.

[3] *Falkland Islands Co.* v. *R.*, 2 Moo. P. C. (N.S.), 206; *Harris* v. *Davis*, L. R. 10 App. Cas. 259; 54 L. J. P. C. 15; etc., etc.

[4] In Appendix will be found a table of the British statutes as to which question has been raised in the Courts.

the silent operation of constitutional principles" into New South Wales.[5]

"The extent," said Lord Watson in delivering their Lordships' judgment, "to which English law is introduced into a British colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a colony acquired by conquest or cession, in which there is an established system of law, and that of a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The colony of New South Wales belongs to the latter class. In the case of such a colony, the Crown may by ordinance, and the Imperial Parliament or its own legislature when it comes to possess one may by statute, declare what parts of the common and statute law of England shall have effect within its limits. But when that is not done the law of England must, subject to well established exceptions, become from the outset the law of the colony[6] and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the colony the law of England must prevail until it is abrogated or modified either by ordinance or statute. The oft-quoted observations of Sir William Blackstone appear to their Lordships to have a direct bearing upon the present case. He says: 'It hath been held that if an uninhabited country be discovered and planted by English subjects all the English laws then in being, which are the birthright of every subject, are immediately there in force.[7] But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The

[5] *Cooper* v. *Stuart* (1889), 58 L. J. P. C. 93.

[6] Begbie, C.J., with quaint humor, says (*Reynolds* v. *Vaughan*, 1 B. C. pt. 1, p. 3): "An Englishman going to found a colony may be supposed to know the common law by common sense, and to carry the statutes (in the form of Chitty) in his hands."

[7] 1 Salk. 411, 666.

artificial requirements and distinctions incidental to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalty), the mode of maintenance of the established church, the jurisdiction of spiritual Courts, and a multitude of other provisions, are neither necessary or convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must in case of dispute be decided in the first instance by their own provincial judicature subject to the decision and control of the King in Council; the whole of their Constitution being also liable to be remodelled and reformed by the general superintending power of the legislature in the Mother Country.'

"Blackstone, in that passage, was setting right an opinion attributed to Lord Holt, that *all* laws in force in England must apply to an infant colony of that kind. If the learned author had written at a later date he would probably have added that as the population, wealth, and commerce of the colony increase, many rules and principles of English law which were unsuitable to its infancy will gradually be attracted to it: and that the power of remodelling its laws belongs also to the colonial legislature."[8]

Applying these principles their Lordships held that the English rule against perpetuities could not be invoked in New South Wales to hamper the Crown in its dealings with the public lands of the colony; and a clause in a Crown grant reserving to the Crown the right to resume at any time possession of part of the land if found necessary for public purposes was held valid.

As the above extract indicates, the English authorities turn upon the question of reasonable applicability. In one of the earliest cases[9] Sir William Grant held that the Statute of Mortmain[10] (so

[8] See also the language of Lord Alverstone in *R.* v. *Jameson* (1896), 2 Q. B. 425; 65 L. J. M. C. 218.

[9] *Atty.-Gen.* v. *Stewart*, 2 Mer. 143.

[10] 9 Geo. II. c. 36 (Imp.).

called) was not part of the law of Grenada, being "a law of local policy adapted solely to the country in which it was made," and not a general regulation of property equally applicable to any country governed by English law. In a later case [1] the House of Lords approved of the principle thus laid down, and subsequent English authorities are but applications of it.[2] One notable case decided that the ecclesiastical law of England is not carried with them by emigrating colonists, and that, after the establishment of a constitutional government in a colony, the Crown cannot by patent create a bishopric with coercive jurisdiction. "The Church of England in places where there is no church established by law is in the same situation with any other religious body."[3] The extent to which English law, common and statutory, is to be applied in New South Wales was declared by Imperial statute,[4] but the construction put upon the Act has placed that colony in line with other settled colonies.[5] The Act further provided that the colonial assembly "as often as any doubt shall arise" might declare whether or not a particular law or statute should be deemed to extend to the colony, and might make such "limitations and modifications" of any such laws and statutes as might be deemed expedient. In the absence of such colonial legislation the Courts of the colony

[1] *Whicker* v. *Hume*, 7 H. L. Cas. 124; 28 L. J. Chy. 396.

[2] *Jex* v. *McKinney*, 14 App. Cas. 77; 58 L. J. P. C. 67; *Mayor of Canterbury* v. *Wyburn* (1895), A. C. 89; 64 L. J. P. C. 36; *Atty.-Gen. (N.S.W.)* v. *Love* (1898), A. C. 679; 67 L. J. P. C. 84; *Neo* v. *Neo*, L. R. 6 P. C. 382.

[3] *In re Bishop of Natal*, 3 Moo. P. C. (N.S.), 115. There is a series of cases relating to the position of the Anglican Church in South Africa: see *Merriman* v. *Williams* (1882), 7 App. Cas. 484; 51 L. J. P. C. 95. See also *Bishop of Columbia* v. *Cridge*, 1 B. C. (part 1), 25.

[4] 9 Geo. IV. c. 83 (Imp.).

[5] *Whicker* v. *Hume* and *Atty.-Gen* v. *Love*, both *ubi supra*.

were to decide as to the operation of any such laws or statutes within the colony. It was held by the Privy Council [6] that the colonial legislature had power under this Act to repeal, and by inconsistent legislation had repealed, a statute of James I. concerning costs in actions for slander. No direct power of repeal, it will be noted, was given by the Act; but whether the repeal is direct or by repugnant legislation is a mere question of words.

Canadian Cases:—

The Canadian cases upon this subject are numerous, and owing to some divergence of view, must be considered, so to speak, by provinces. And this broad distinction is to be noted: that in the Maritime Provinces—Nova Scotia, New Brunswick and Prince Edward Island—there is no statute, imperial or colonial, defining the extent to which English law was introduced into those provinces upon their acquisition; while in all the other Canadian provinces and territories there is express statutory provision upon the subject. In other words, in the Maritime Provinces the matter is at large, while elsewhere in Canada the question depends at the outset upon the words of the statutes respectively in force in the different provinces and the territories.

The Maritime Provinces have always been treated as colonies by settlement as distinguished from colonies obtained by conquest or cession, and the question of applicability has been to the front in all the cases. In Nova Scotia one decision [7] may be considered classic upon this question and subsequent decisions there have practically been but the application of the principles enunciated in it.

[6] *Harris* v. *Davis* (1885), 10 App. Cas. 259; 54 L. J. P. C. 15.

[7] *Uniacke* v. *Dickson*, James, 287. Haliburton, C.J., who then presided over the Court, had occupied a seat on the bench of Nova Scotia for over forty years.

Nova Scotia:—

Two extracts from the judgment of Haliburton, C.J., will indicate the considerations deemed essential in the Nova Scotia cases:

"Among the colonists themselves there has generally existed a strong disposition to draw a distinction between the common and the statute law. As a code, they have been disposed to adopt the whole of the former, with the exception of such parts only as were obviously inconsistent with their new situations; whilst, far from being inclined to adopt the whole body of the statute law, they thought that such parts of them only were in force among them as were obviously applicable to, and necessary for, them.

"As it respects the common law, any exclusion formed the exception; whereas, in the statute law, the reception formed the exception.

"Now, although this view of the subject leads us to nothing very precise, yet, if we adopt it, and I think it wise and safe to do so, we must hold it to be quite clear that an English statute is applicable and necessary for us before we decide that it is in force here."

* * * * * *

"In the early settlement of a colony, when the local legislature has just been called into existence and has its attention engrossed by the immediate wants of the infant community in their new situation, the Courts of judicature would naturally look for guidance, in deciding upon the claims of litigants, to the general laws of the Mother Country, and would exercise greater latitude in the adoption of them then they would be entitled to do as their local legislature in the gradual development of its powers assumed its proper position. Every year should render the Courts more cautious in the adoption of laws that had never been previously introduced into the colony, for prudent Judges would remember that it is the province of the Courts to declare what is the law, and of the legislature to decide what it shall be."

Acts in curtailment of prerogative have been favorably looked on by Nova Scotia Judges. Magna

Charta and the second and third charters of Henry III. were held [8] operative within the province to prevent the Crown from granting a general right of fishery. Again it was held [9] that where land had been granted with a condition that the grant should be void if the land were not settled upon within a certain time, no new grant could be made without a previous retaking of possession by the Crown; the provisions of certain statutes of Henry VIII. being held operative within the province to prevent such new grant from taking effect.

"The very grievances intended to be remedied and redressed by this statute are those under which the subjects of this province might well say they labored if it were held that land, granted with a condition that the grant should be void if the land were not settled on within a certain time, could be subsequently granted without inquest of office." [10]

The view expressed by Haliburton, C.J., [1] that after a legislature has been duly constituted in a colony, and has, so to speak, settled down to its work, Courts of law should be very cautious in giving effect to British Acts which had never been previously acted upon in the colony, has evidently had a most powerful effect in subsequent cases. For instance, the Court refused to visit upon the sheriff of Halifax penalties to which he would have been liable under English statutes, because the Nova Scotia legislature had "wisely legislated for the whole matter." [2]

[8] *Meisner* v. *Fanning*, 2 Thomp. 97. And see *Re B. C. Fisheries* (1913), 47 S. C. R. 493; (1914), A. C. 153, 83 L. J. P. C. 169.

[9] *Wheelock* v. *McKeown*, 1 Thomp. 41 (2nd ed.); and see also *Miller* v. *Lanty*, *ib.*, 161.

[10] Followed in *Scott* v. *Henderson*, 2 Thomp. 115; and *cf. Smyth* v. *McDonald*, 1 Old. 274; but see *Emerson* v. *Maddison* (1906), A. C. 569; 75 L. J. P. C. 109.

[1] In *Uniacke* v. *Dickson*; see the passage, *ante*, p. 277.

[2] *Jackson* v. *Campbell*, 1 Thomp. 18 (2nd ed.).

And, in like manner, the Imperial statutes giving aliens a right to a jury *de mediatate linguae* were held [3] not to be in force in Nova Scotia because:

"In the numerous Jury Acts, extending from 1759 . . . down to the Revised Statutes (2nd ser.), not the slightest allusion nor provision for this privilege of aliens . . . is to be found."

In another case the Supreme Court of Nova Scotia had to consider the question whether or not the British statute (12 Geo. II. c. 18) requiring notice to a convicting justice of a motion for a writ of *certiorari*, and limiting the time for moving for such writ to six months from conviction, was in force in the province. After quoting the caution of Haliburton, C.J., above referred to, the judgment proceeds:

"If this caution was necessary forty years ago, there is much more necessity for caution now in view of the fact that since then very many Acts have been passed regulating the practice and procedure of this Court, and the removal of causes from inferior Courts. . . . Now, our legislature has passed several statutes on the subject. . . . I cannot see that 13 Geo. II. c. 18, is obviously applicable and necessary to our condition in this province; and as our legislature has undertaken to legislate in the matter of *certiorari*, and has enacted many of the provisions of the English statutes on that subject, omitting those contained in the Act in question, I have been unable to come to the conclusion that that Act is at present in force here."[4]

A number of British Acts have been acted upon without question as introduced into Nova Scotia

[3] *Reg.* v. *Burdell*, 1 Old. 126; and see *Nolan* v. *McAdam* (1906), 39 N. S. 380.

[4] *Reg.* v. *Porter*, 20 N. S. R. Reference is made to the fact that in Upper Canada it had been always treated as in force there. It appears to have been acted on in Nova Scotia in earlier cases. See *Reg.* v. *McFadden*, 6 R. & G. 426, and *McDonald* v. *Ronan*, 7 R. & G. 25. As to New Brunswick, see *post*, pp. 282-3, note.

upon its settlement. The Statute of Uses was treated[5] as being in force within the province, while its companion—the Statute of Enrolment—would appear to have been thought[6] inapplicable by reason of the lack of facilities for enrolment. The British Acts of Hen. VIII. allowing partition between joint tenants and tenants in common and the Act of Queen Anne's reign giving an action of account to one tenant in common against another were held[7] to have been introduced into Nova Scotia as part of the English law. The provisions of Magna Charta, and of the Statute of Staples, which provided that "In case of war, merchant strangers shall have free liberty to depart the realm with their goods freely," were enforced[8] in favor of an American vessel, seized before the commencement of the American war of 1812. The Act of Eliz. respecting fraudulent conveyances seems to have been acted upon without question,[9] as also the Act of Henry VIII. against the buying of pretended titles.[10]

Upon a review of the Nova Scotia decisions, it appears that the admission of British statutes has been the exception; those which have been held to be in force being, in the main, statutes in amelioration of the rigors of the common law, in curtailment of prerogative, or in enlargement of the liberty of the subject. To a greater extent than has been the case in either New Brunswick or Ontario, the Judges

[5] *Shey* v. *Chisholm*, James, 52.

[6] *Berry* v. *Berry*, 4 R. & G. 66; see the contrary holding in New Brunswick, *Doe d. Hanington* v. *McFadden*, Berton, 153.

[7] *Doane* v. *McKenny*, *James*, 328; *Crane* v. *Blackadar* (1895), 40 N. S. 100.

[8] The Dart, *Stewart*.

[9] *Tarratt* v. *Sawyer*, 1 Thomp. 46 (2nd ed.); *Moore* v. *Moore*, 1 R. & G. 525; and *Graham* v. *Bell*, 5 R. & G. 90.

[10] *Wheelock* v. *Morrison*, 1 N. S. D. 337; *Scott* v. *Henderson*, 2 Thomp. 115.

of Nova Scotia have deemed it the office of legislation rather than of judicial decision to bring into operation within the province the provisions of British statutes not originally capable of being made operative, but which might be thought suitable to the changed circumstances of the colony.[10a] And in the same spirit it was laid down [1] that where an English Act is held to be in force the Courts "will not give it a further extension than it received in the land of its origin." The operation of an English statute might be confined within narrower bounds by the circumstances and situation of the colony; but it could never become a statute of greater effect or more enlarged construction. "This is the office of legislation alone."

New Brunswick:—

In New Brunswick an early case,[2] in which the Supreme Court of that province had to consider whether the Statute of Uses and its companion—the Statute of Enrolment—were or were not in force in the province, has had a very large controlling influence. Chipman, C.J., quotes with approval the language of Sir. W. Grant,[3] and takes as his guide the principle enunciated in that case. As to the Statute of Uses no doubt whatever was expressed; the fact that it had been generally, if not universally, considered to be in force in the old American colonies was treated as indicative of the general understanding that the statute was carried by emigrating colonists as part of the law of England relating to real property. As to the Statute of Enrolment more

[10a] On this point, see the judgment of Lord Watson in *Cooper* v. *Stuart*, quoted *ante*, p. 274.

[1] *Freeman* v. *Morton*, 2 Thomp. 352, *per* Bliss, J.

[2] *Doe dem. Hanington* v. *McFadden*, Berton, 153.

[3] *Atty.-Gen.* v. *Stewart*, 2 Mer. 143; see *ante*, p. 274.

hesitation seems to have been expressed; but all the Judges concurred in treating the two statutes as practically one. Although the Statute of Enrolment might be somewhat difficult of application in New Brunswick, it seems to have been considered that the machinery of the provincial Courts could be utilized in this respect. The extension to the province of statutes which are in terms confined to the Courts of the Mother Country is not by any means without precedent. Several of such statutes, regulative of the practice in "Her Majesty's Courts at Westminster," have always been treated as operative within the province in relation to the Superior Courts there.[4]

Although it is difficult to classify the New Brunswick authorities upon this question, in every case the Judges of the Courts there have exercised their best judgment as to the applicability of the British Statute to the circumstances of the colony. If any distinction in principle can be drawn between the decisions in New Brunswick and those in Nova Scotia, it would appear to be this: that British statutes have been denied operative force in Nova Scotia unless clearly applicable, while in New Brunswick the tendency, at least of earlier authorities, seems to have been not to reject them unless clearly inapplicable.[5] At the same time it must be confessed that this distinction cannot be clearly pointed out in every case.[6]

[4] Anne c. 16 (assignment of bail-bonds); 14 Geo. II. c. 17 (judgment of nonsuit); and see *Kelly* v. *Jones*, 2 Allen, 473 (43 Eliz. c. 6—certificate as to costs), and *Gilbert* v. *Sayre*, *ib.*, 512 (13 Car. II. c. 2—double costs on affirmance in error). See *Hesketh* v. *Ward*, 17 U. C. C. P. 667; also the cases noted *post*, p. 296, as to the jurisdiction of the Courts of British Columbia in divorce and matrimonial causes.

[5] Compare the "English Law" Acts of Manitoba and the N. W. T. with the British Columbia Act. See *post*, pp. 293, 296.

[6] For other New Brunswick cases, see *Ex parte Ritchie*, 2 Kerr., 75, and *Ex parte Bustin*, 2 Allen, 211; in which the Eng-

Quebec:—

Following upon the Treaty of Paris of 1763, by which Canada was ceded by France to Great Britain, the King's proclamation, issued in October of that year,[7] foreshadowed the establishment in the colonies acquired under the treaty of local assemblies "and in the meantime, and until such assemblies can be called as aforesaid all persons inhabiting in or resorting to our said colonies may confide in our Royal protection for the enjoyment of the benefit of the laws of our realm of England." This was construed as introducing English law into the province of Quebec,[8] but there was much controversy upon the point.

The Quebec Act, 1774, however, settled the question for the future in broad outlines by providing that the criminal law of England should continue in force, but that "in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada as the rule for the decision of the same." The result of this enactment has been, as put by the Privy Council, that "the law which governs civil rights in Quebec is in the main the French law as it existed at the time of the cession of Canada, and not the English law which prevails in the other provinces."[9] For this reason, the province of Quebec calls for little treatment

lish statutes as to *certiorari* were held not in force: *Wilson* v. *Jones*, 1 Allen, 658, in which I Rich. II. c. 12, giving a creditor an action of debt against a sheriff on an escape, was (following an early unreported decision), held not in force, although it was acted upon in Nova Scotia and the older American colonies; and see *James* v. *McLean*, 3 Allen, 164, and *Doe d. Allen* v. *Murray*, 2 Kerr., 359.

[7] See *ante*, p. 16, note.

[8] See the report of Hey, C.J., in Appendix to 1 L. C. Jurist; judgment of Lafontaine, C.J., in *Wilcox* v. *Wilcox*, 8 L. C. R. 34; argument of counsel in *Re Marriage Laws* (1912), 46 S. C. R., at p. 217; and judgment of Duff, J., *ib.*, p. 403.

[9] *Citizens* v. *Parsons*, 7 App. Cas. 96; 51 L. J. P. C. 11; conveniently cited as *Parsons' Case*.

upon the subject matter of this chapter. The position of the Roman Catholic Church in that province, in view of the concessions made to those of that faith by the Quebec Act, 1774, was to some extent defined by the Privy Council in *Guibord's Case*;[10] and the law of the province on the subject of marriage was the subject of recent consideration by the Supreme Court of Canada;[1] but extended treatment of these matters is beyond the scope of this work. It would seem reasonably clear that, upon the cession of Canada to England, any laws previously in force based upon principles fundamentally opposed to those underlying British laws would be abrogated;[1b] and that the Quebec Act, 1774, would not restore them.

Ontario:—

Ontario falls within the class of colonies into whose legal system English law has been introduced by the will of the colony itself, as expressed in legislative enactment.

In 1774, the Parliament of Great Britain, by giving to the inhabitants of Canada, then almost exclusively French, the law in accordance with which they had been accustomed to regulate their daily lives, secured their cordial adherence to British connection despite the enticing words of Washington and his French allies,[2] In like manner, in 1791, they established the new immigration in content in the upper province by giving them an assembly of their

[10] *Brown* v. *Les Curé &c., de Notre Dame de Montreal* (1875), L. R. 6 P. C. 206; 44 L. J. P. C. 1.

[1] *Re Marriage Laws* (1912), 46 S. C. R. 132; affirmed in the Privy Council on the question of jurisdiction as between the Parliament of Canada and the provincial legislatures (as to which, see *post*, p. 556, *et seq.*); but without discussion of other topics: (1912), A. C. 880; 81 L. J. P. C. 237.

[1b] See *ante*, p. 125.

[2] See Confed. Deb., p. 606, and the author's "History of Canada," p. 108.

own with the power to adopt such system of laws as they might deem best calculated to secure and advance their own material and religious welfare. In the very first Parliament of Upper Canada, by the first Act of its first session,[3] "that was done which no doubt was anticipated and intended as a consequence of erecting Upper Canada into a separate province."[4] It was enacted that "from and after the passing of this Act, in all matters of controversy *relative to property and civil rights*, resort should be had to the laws of England as the rule for the decision of the same."

The Criminal law of England had been in force in the old province, and no legislation was deemed necessary by the legislature of Upper Canada beyond naming a day, in reference to which the English criminal law was to be considered fixed. This date was fixed by 40 Geo. III. c. 1 (U.C.), which enacted: "The criminal law of England, as it stood on the 17th day of September, 1792, shall be, and the same is hereby declared to be, the criminal law of this province," subject to any variations therein effected by ordinances of the old province of Quebec passed after the Quebec Act of 1774.

In the province of Ontario, therefore, the whole question turns upon the effect which should be given to these enactments. So far as concerns the law *relative to property and civil rights*, it will be found that, owing to the construction placed upon the English Law Act of 1792[5] by the Courts of Upper Canada, the same method of enquiry was often followed in that province (now Ontario) as in the Maritime Provinces; but a decision of the Court of

[3] 32 Geo. III. c. 1 (U.C.).

[4] *Per* Robinson, C.J., in *Doe d. Anderson* v. *Todd*, 2 U. C. Q. B. 82.

[5] 32 Geo. III. c. 1 (U.C.).

Appeal for Ontario in 1907 [5a] throws much doubt upon many of the earlier cases.

Throughout the law reports of Upper Canada (Ontario) numerous cases will be found in which laws passed by the Parliament of England, and in force there in 1792, were without question acted upon as being the law of Upper Canada. In the very first volume of reported cases, by Taylor, several of such instances appear,[6] and so on through the reports to the present time. For instance, no question seems to have ever been raised as to the Statute of Uses,[7] the Statute of Frauds,[8] the Acts of Elizabeth's time as to fraudulent and voluntary conveyances,[9] and a casual glance at our Digests will reveal many others as to which no doubt has ever found a reporter. As being in affirmance of the common law, or in amendment of same defect in that law working general detriment, their position as practically part and parcel of general English law was too fully recognized to be questioned. A statute of Elizabeth making void, in the interest of the guilds, articles of apprenticeship for a less term than seven years was the first statute upon which argument seems to have been had, and in three early cases[10] it received consideration. In two of these it was held not part of the law of Upper Canada. "That Act was obsolete in England even before the statute which repealed it. . . . We consider the statute as a local Act, which was probably adapted to the state of society in England three hundred

[5a] *Keewatin Power Co.* v. *Kenora*, 16 Ont. L. R. 184; see *post*, pp. 291-2.

[6] Taylor, 546.

[7] 27 Hen. VIII. c. 10.

[8] 29 Car. II. c. 3.

[9] 12 Eliz. c. 5; 27 Eliz. c. 4.

[10] *Fish* v. *Doyle* (1831), Drap. 328; *Dillingham* v. *Wilson* (1841), 6 U. C. Q. B. (O.S.), 85; *Shea* v. *Choat* (1845), 2 U. C. Q. B. 211.

years ago, but is not now, and never was, adapted to the population of a colony, and was never in force here.''[1]

In the third case[2] it was broadly contended that the question of applicability was not open under the Upper Canadian statute; that all English statute law of 1792 had been introduced by it except the poor and bankrutcy laws.[3] The Court, however, held that a recognition must be accorded to the differences of environment, and that the Courts of Upper Canada should consider the question of the adaptability of any English Act "to the nature of our institutions.'' To some extent this view of the effect of 32 Geo. III. c. 1 has not met with entire approval by individual Judges in subsequent cases; but the decided tendency of the authorities was, until recently, to support the principle just laid down.

The English statute 9 Geo. II. c. 36—commonly classed as one of the Mortmain Acts—has been under review in a number of decided cases;[4] and in the argument of counsel and the opinions of the Judges will be found all the considerations which can be urged in support of the two different views.

In the result the statute was decided to be in force in Upper Canada, but only on the ground of

[1] *Per* Sherwood, J., in *Dillingham* v. *Wilson*. As will appear, *Keewatin Power Co.* v. *Kenora* (*ubi supra*), leaves this enquiry still open at least as to English statute law: *post*, p. 292.

[2] *Shea* v. *Choat*. The head-note is misleading. In speaking of 20 Geo. II. c. 19, Robinson, C.J., says: "My inclination at present is that that statute in its present scope and bearing is not applicable to this province"; but he decided that, even if in force, the pleading could not be supported, not showing a case within the statute.

[3] Expressly excepted by sec. 6.

[4] The latest is *Whitby* v. *Lipscombe*, 23 Grant 1, in which all the earlier cases are reviewed. See also *Smith* v. *Meth. Church*, 16 O. R. 199; *Butland* v. *Gillespie*, *ib.*, 486.

its implied *recognition by our colonial legislature;* the view of a decided majority being that it was not introduced by the sole force of 32 Geo. III. c. 1. The Courts of Upper Canada (Ontario) practically adopted the view of Robinson, C.J., that the terms of the Act of 1792 (U.C.), "do not place the introduction of the English law on a footing materially different from the footing on which the laws of England stand in those colonies in which they are merely assumed to be in force, on the principles of the common law, by reason of such colonies having been first inhabited and planted by British subjects."[5] This construction would place Ontario upon the same line in this matter as the Maritime Provinces and the more lately acquired provinces of Canada; but the latest pronouncement of the Court of Appeal for Ontario is distinctly opposed to this view.

In reference to Lord Hardwicke's Marriage Act[6] the same principles were invoked[7] as in reference to the Mortmain Acts. In each case the Court considered: 1st. Is the British statute one which can be considered as so applicable to the circumstances of this colony that the legislature must be taken to have intended to introduce it by the intrinsic effect of the Act of 1792? This question, in the case of the Mortmain Acts, does not seem to have been unanimously answered by Canadian Judges, but the

[5] *Doe d. Anderson* v. *Todd*, 2 U. C. Q. B. 82. And see *Maulson* v. *Commercial Bank*, *ib.*, 338, as to the English Bankruptcy Acts which were introduced into Upper Canada in somewhat similar language.

[6] 26 Geo. II. c. 33 (Imp.), Lord Lyndhurst's Act of 1835 has been held not to extend to Canada: *Hodgins* v. *McNeil*, 9 Grant, 309. See *ante*, p. 263.

[7] *Reg.* v. *Roblin*, 21 U. C. Q. B. 355; *Hodgins* v. *McNeil*, *ubi supra*; *O'Connor* v. *Kennedy*, 15 O. R. 22; *Lawless* v. *Chamberlain*, 18 O. R. 309; and see *Breakey* v. *Breakey*, 2 U. C. Q. B. 349; *Reg.* v. *Secker*, 14 U. C. Q. B. 604; and *Reg.* v. *Bell*, 15 U. C. Q. B. 287.

weight of authority would appear to be for a negative answer—in conformity with English decisions.[8] As to the Marriage Act of Lord Hardwicke there seems to have been no difference of opinion—all agreeing in the result arrived at in favour of an affirmative answer, except as to the 11th and 12th clauses.[9]

2nd. Has there been subsequent legislative recognition by the provincial Parliament of the binding force here of the Act in question? As to both Acts, the answer has been unanimously in the affirmative.[10] To these considerations may be added:

3rd. Have the decisions of provincial Courts proceeded so clearly upon one line, and for such a length of time, as to have established a rule of law in regard to dealings with property, or in regard to the *status* of particular classes of persons? In the later cases this consideration operated most powerfully. In 1876, Mr. Justice Burton used this language:[1] "Where solemn determinations which establish a period, a Court even of last resort should require very strong grounds for interfering with them;" and Mr. Justice Patterson, speaking of *Doe d. Anderson* v. *Todd*, said: "It has been acquiesced in too long and has for too long a period governed titles to land in this province to be now interfered with by any authority short of legislative enactment;" and in the opinion of Mr. Justice (afterwards Chief Justice) Moss the same rule of expediency is

[8] *Ante*, pp. 274-5.

[9] *Lawless* v. *Chamberlain, ubi supra; May* v. *May* (1910), 22 Ont. L. R. 559. These clauses render absolutely void a minor's marriage (by license) without consent of parent or guardian.

[10] *Whitby* v. *Lipscombe*, 23 Grant 1 (as to Mortmain Acts); cases *supra* (as to Marriage Act of Lord Hardwicke). Cf. *Seman Appu* v. *Queen's Adv.*, 9 App. Cas. 571; 53 L. J. P. C. 72.

[1] *Whitby* v. *Lipscombe, ubi supra.*

expressed in those polished periods by which his written opinions were always characterized.

An earlier case[2] brings into prominence another question proper for consideration in deciding whether or not a particular British Act is in force in Ontario: Is the Act one of general application in England, or is it local in the sense of being confined to some particular locality or local institution in England? And, as already intimated, this enquiry is still open. The Acts in question there made certain provisions in reference, amongst other matters, to escape warrants. Richards, C.J., decided that the earlier of these statutes was not part of our law, because "passed with reference to the peculiar position of the officers of the prisons" (the Marshalsea and the Fleet) "to which it referred, and the evils recited in the preamble, which state of things has not, and is not likely to exist in this country." The dissenting opinion of Mr. Justice Wilson (afterwards Chief Justice Sir Adam Wilson) is not a dissent in principle, but a joinder of issue on the facts. "Although it may have a limited application in England to the two special and peculiar prisons of the Courts, it is nevertheless a general law, and a beneficial one, and as there are no special prisons of the Courts here, but all the gaols of the province are equally the prisons of the Court, the statute, being such general law by the declaration of the statute itself, has an operation here upon all the prisons of the Courts."[3]

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[2] *Hesketh* v. *Ward* 17 U. C. C. P. 667. See *ante*, p. 282; *Le Syndicat Lyonnais* v. *McGrade* (1905), 36 S. C. R. 251.

[3] On this principle, many English statutes referring to, *e.g.* the Courts "at Westminister" have been held to be part of general English law, and as such in force here in relation to our Superior Courts. See 43 Eliz. c. 6, and 13 Car. II. c. 2, as to costs in certain cases, and note the New Brunswick decisions on this point, *ante*, p. 282.

In a series of cases it was held that the provisions of 14 Geo. III., cap. 78, relating to the liability of persons upon whose premises a fire accidentally starts, for damages resulting from its spreading to the premises of another, are part of our law, because they were part of the general law of England and were not of local application there in the sense before referred to.[4]

As to the criminal law: Under the Upper Canadian statute of 1800,[5] every Act of the British Parliament in force as part of the general criminal law of England on the 17th day of September, 1792, was introduced into Upper Canada. The enquiry proper in civil cases as to the applicability of a British Act to the circumstances of a colony was eliminated, and the only enquiry is—Is the Imperial statute local in the sense above indicated? If not, it is part of the law of Upper Canada. Owing, however, to the codification of the criminal law of Canada [6] further reference to this branch of the subject need not be made.[7]

In 1907, as already intimated, the whole question was reconsidered by the Court of Appeal for Ontario.[7a] Mr. Justice Anglin had held that the rule of English law governing non-tidal rivers, even when navigable in fact, was so far modified in its application to Canada that a public right of navigation *jure naturæ* existed over Canadian rivers navigable

[4] *Gaston* v. *Wald*, 19 U. C. Q. B. 586; *Stinson* v. *Pennock*, 14 Grant. 604; *Carr* v. *Fire Ass.*, 14 O. R. 487; *C. S. R.* v. *Phelps*, 14 S. C. R. 132; *Laidlaw* v. *Crow's Nest Ry.* (1909), 14 B. C. 169, 42 S. C. R. 169.

[5] 40 Geo. III. c. 1 (U.C.). See *ante*, p. 285.

[6] In 1892. The "criminal law" over which the Dominion Parliament has legislative power, does not, however, cover the whole field of penal legislation. See B. N. A. Act, s. 92, No. 15.

[7] In Appendix is a tabulated statement of English statutes as to which question has been raised in the Courts. Many of these are criminal statutes.

[7a] *Keewatin Power Co.* v. *Kenora*, 16 Ont. L. R. 184, reversing 13 Ont. L. R. 237.

in fact and particularly over those forming part of the international boundary line between Canada and the United States; and that, in regard to such rivers, the rule of English law that a grant of land upon the border of a stream presumably carried title to the middle line of the stream was not the rule of Canadian law, the presumption being, in his opinion, to the contrary.[7b] The Court of Appeal unanimously reversed this judgment, holding that as to the general principles of the English common law and as to English statute law of a general character no question of applicability in its wider sense could be raised; but in the judgment of Sir Charles Moss, C.J.O., it is intimated that the question is always open as to the purely local character of an English statute and, it is conceived, the same question might arise as to some features of English common law; for example, copyhold.[7c]

The position in Ontario may be shortly summarized. In any case, the question whether or not any particular British statute of date anterior to 1792 has the force of law in Ontario will depend, in the first place, upon the absence of colonial legislation—Canadian or Provincial, as the case may be—on the subject matter involved. If there is none such, then the following points must be considered: (1) Is the Act one of general English application? (2) If not, or if the matter is one of reasonable doubt, has there been a legislative recognition of the British Act as being in force here? (3) Have the decisions of the Courts proceeded so clearly upon one line as to have established a rule of property or *status* in the province?

[7b] The recent decision of the Privy Council in *Maclaren* v. *Atty.-Gen.* (*Quebec*), 83 L. J. P. C. 201, (1914) A. C. affirms the view taken by the Court of Appeal of Ontario upon this last point.

[7c] The subject of navigation and shipping has already been dealt with to some extent in Chap. XII., *ante*, p. 211; and it will come up again in Part II. of this book.

As to the common law: Unless clearly dealing with a purely local institution, it was introduced in its entirety by the Upper Canadian Statute of 1792; and is still law unless altered or abrogated by Canadian enactment.

Other Provinces:—The statutes by which this question is governed in the provinces more lately acquired expressly make "applicability" the test of introduction.

North-West Territories: Alberta: Saskatchewan: After the admission of Rupert's Land and the north-western territory to the Canadian Union,[8] the Parliament of Canada continued all the then existing laws in those regions;[9] and so the matter stood until 1887. In that year it was provided that "the laws of England relating to civil and criminal matters as the same existed on the 15th day of July, 1870, shall be in force in the Territories in so far as the same are applicable to the Territories,"[10] subject, of course, to such alterations therein as had been affected by proper legislative authority. Down to 1887 the law in force was the law of England as it stood in 1670, the date of the Hudson's Bay Company's charter.[1]

Lord Hardwicke's Marriage Act was held not to be in force in the Territories *quoad* Indians.[2] In 1907 the British "Debtors' Act, 1869," was held to be in force in Alberta by a divided Court after a careful

[8] By Order in Council (Imp.), 23 June, 1870, passed under the authority of the B. N. A. Act, s. 146.

[9] 32 & 33 Vict. c. 3 (Can.).

[10] R. S. C. (1886), c. 50, s. 11; 49 Vict. c. 25 (Dom.).

[1] *Re Calder*, 2 Western Law Times, 1; *Sinclair* v. *Mulligan*, 5 Man. L. R. 17: but see *Connolly* v. *Woolrich*, 11 L. C. Jur. 197, and an article in 4 Can. Law Times, p. 1, *et seq.*, by Mr. C. C. McCaul. A large part of that region was undoubtedly first occupied by French Canadian voyageurs.

[2] *Reg.* v. *Nan-e-quis-a Ke*, 1 Terr. L. R. 211. See *ante*, p. 288, as to the Ontario decisions.

discussion of the principles to be kept in view on such an enquiry.[2a] The provisions of the British Act of 1838 respecting registration of notice of *lis pendens* are purely local and were not introduced into the North-West Territories by the Canadian Act above referred to.[2b] The "Infants Relief Act, 1874," is not in force in Alberta.[2c]

MANITOBA: "Until 1870," said Taylor, C.J., "the law of England at the date of the Hudson's Bay Company's charter, 1670, was the law in force here, and indeed, except as to matters which have been dealt with by the Dominion Parliament, *or which are within the jurisdiction of the provincial legislature and have been dealt with by it*, that is the law of this province at the present day."[3] The legislature of the province had dealt with this question in 1874[4] by providing that "The Court of Queen's Bench shall decide and determine all matters of controversy relative to property and civil rights according to the laws existing, or established and being in England, as such were, existed and stood on the 15th day of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province."

[2a] *Fraser* v. *Kirkpatrick*, 6 Terr. L. R. 403.

[2b] 2 & 3 Vict. c. 11 (Br.): *Syndicat Lyonnais* v. *McGrade* (1905), 36 S. C. R. 251.

[2c] *Brant* v. *Griffin*, 1 Alta. L. R. 510. The British Act is of later date than 1870, but the case is cited as drawing attention to the use in the N. W. T. Act of the word "applicable" in two different senses.

[3] *Sinclair* v. *Mulligan*, 5 Man. L. R. 17; 3 Man. L. R. 481.

[4] By 38 Vict. c. 12 (Man.). In 1871, a provincial Act (34 Vict. c. 2), established a Supreme Court in Manitoba, and provided that: "As far as possible consistently with the circumstances of the country the laws of evidence and the principles which govern the administration of justice in England shall obtain in the Supreme Court of Manitoba"; but it was doubtful if this was more than a law of procedure: See *Sinclair* v. *Mulligan*, *ubi supra*. Cf. the N. S. Wales cases referred to, *ante*, p. 275.

This statute has been uniformly treated as introducing into Manitoba the law of England as it stood at the date mentioned.

The limited operation of this Act is indicated by Taylor, C.J., in the passage of his judgment above italicized. From time to time the Parliament of Canada has passed statutes introducing certain portions of the statute law of the Dominion, passed prior to 1870, into Manitoba. Statutes since 1870 are of course in force there unless expressly excepted. But until 1888 no general provision was made as to those matters which are within the legislative competence of the Dominion Parliament, so that the law in Manitoba as to all such matters was the English law of 1670.[5]

"To remove doubts" a Dominion Act was passed in 1888[6] providing that "The Laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the 15th July, 1870, were from the said day and are in force in the province of Manitoba, in so far as the same are applicable to the said province, and in so far as the same have not been and are not hereafter repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the said province, or of the Parliament of Canada."

In the leading case[7] in Manitoba the Statute of Uses was held to be in force, the Statute of Enrolment was held inapplicable, and the Statute of Frauds not to be in force because of date subsequent to 1670. In the result a verbal bargain for the sale

[5] See *Canadian Bank of Commerce* v. *Adamson*, 1 Man. L. R. 3, as to bills of exchange.

[6] 51 Vict. c. 33 (Dom.).

[7] *Sinclair* v. *Mulligan*, *ubi supra*: followed in *Templeton* v. *Stewart*, 9 Man. L. R. 487.

of lands was enforced under the Statute of Uses. The English law of descent as it stood in 1670 was given effect to as late as 1890.[8] The introduction of the criminal law of England did not include the law as to maintenance and champerty; and a provincial Act allowing bargains of that character was held *intra vires*.[8a]

British Columbia: In 1871, before its admission to the Canadian Union,[9] the legislature of the colony had enacted:[10]

"The civil and criminal laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable,[1] are and shall be in force in all parts of the colony of British Columbia."

This statute was held[2] to introduce the English "Matrimonial Causes Act, 1857," Chief Justice Begbie, however, dissenting from the judgment of the majority, the local circumstances of the colony precluding, in his opinion, its operation therein.[3] The jurisdiction of the British Columbia Supreme

[8] *Re Tait*, 9 Man. L. R. 617.

[8a] *Thomson* v. *Wishart* (1910), 19 Man. L. R. 340.

[9] Avoiding the Manitoba difficulty as indicated by Taylor, C.J., in *Sinclair* v. *Mulligan*, *supra*.

[10] No. 70 of 34 Vict. (1871). The proclamation (19th Nov., 1858), of Governor Douglas had so ordained as to the mainland colony; and the Act of 1871 was passed to extend its provision in this regard to the united colony.

[1] The use of the double negative would seem to place British Columbia in line with New Brunswick: see *ante*, p. 282.

[2] M. falsely called *S.* v. *S.*, 1 B. C. (pt. 1), 25: see also *Scott* v. *Scott*, 4 B. C. 316.

[3] Other B. C. cases are *Reg.* v. *Ah Pow*, 1 B. C. (pt. 1), 147; *In re Ward & Victoria*, *ib.*, 114; *Foley* v. *Webster*, 3 B C. 30. As to the operation of English ecclesiastical law in B. C., see *ante*, p. 275.

Court in Divorce and Matrimonial Causes has been finally affirmed by the Privy Council.[4]

The use of the double negative throws the burden on him who asserts that a given English law, statutory or other, of date prior to 1858, was not introduced into British Columbia.[4a]

The law of England as to the right of the public to fish in tidal waters is the law of the province.[5]

[4] *Watt* v. *Watt* (1908), A. C. 573; 77 L. J. P. C. 121; reversing 13 B. C. 281.

[4a] *Watt* v. *Watt*, 13 B. C. 281.

[5] *Re B. C. Fisheries* (1913), 47 S. C. R. 493; (1914), A. C. 153; 83 L. J. P. C. 169.

PART II.

SELF-GOVERNMENT

UNDER THE

BRITISH NORTH AMERICA ACT, 1867

AND ITS AMENDMENTS.

CHAPTER XV.

Outline Sketch (Part II.)

Part I. of this book has dealt with the limitations upon Canada's powers of self-government arising from her position as a British Colony. She is not one of the family of nations and her external relations with foreign powers are under the control of the British Government; to this extent, at least, that the Imperial stamp, in some form, is necessary to give legal efficacy. Again, Canada is only one of a sisterhood of self-governing dominions under the British Crown, and in matters which concern her relations with the parent state or with other parts of the Empire, she and they alike recognize the superintending authority of the Imperial Parliament; at least to the extent required for legal efficacy.[1] All, moreover, recognize that parliament as the supreme and ultimate power in legislation for and throughout the British Empire. How far that supreme power has been exercised in the past in relation to matters which ordinarily might be considered to pertain to internal self-government was one of the main themes of Part I. How far at any moment of time the British Parliament should treat such topics as of Imperial moment and legislate upon them as such rests in the wisdom of those who, throughout the Empire, are charged with control of its affairs. It is a purely domestic problem within the Empire. With one notable exception, some one hundred and forty years ago, mutual forbearance and goodwill have so far solved all difficulties; and time will in the end,

[1] Notable examples are the Fugitive Offenders' Acts (see *ante*, p. 198), and the Pacific Cable Acts (see *ante*, p. 266).

no doubt, evolve a more perfect system and, if necessary, remove the problem from the realm of constitutional usage to the realm of constitutional law.

Stress has been laid upon the fact that the British Parliament is the only constituent assembly, properly so-called, within the Empire. That free "mother of parliaments" is the sovereign constitution-maker for the outlying dominions under the British Crown; and like breeds like. Local self-government through representative assemblies has always been favoured of British policy, and within the last eighty years the tendency has become marked towards the establishment of the larger colonies upon a basis of complete self-government, subject only to the maintenance of Imperial or—which is the same thing—national unity in the face of the world. Their political standing within the Empire is recognized in the phrase "self-governing dominions" which has of late become common in Imperial statutes.[2] Their charters of government are not powers of attorney to manage affairs in the colonies as the agents or delegates of the people of the British Isles, but charters conferring powers of self-government as complete and ample within the colonial ambit and of the same nature as are those of the British Parliament. In form the Constitutions established have been in the main modelled upon that of the motherland; and for many years past, as will appear, the principle of responsible parliamentary government has been recognized as the working principle of government as well in the self-governing colonies as in the parent state.

The plenary nature of colonial legislative power has been already discussed, more particularly in

[2] See *post*, p. 352.

connection with the doctrine of exterritoriality;[3] so that in this Part, it will only be necessary to make clear that the principle applies equally to all Canadian assemblies, to the provincial legislatures as well as to the Parliament of Canada.

Furthermore, constituent power, that is to say, the power to alter the framework of government as prescribed in the Constitution conferred by the Imperial Parliament, has been to some extent conferred. This feature of the Canadian Constitution has been given an entire chapter in Part I. of this book. It appeared there rather than in this Part, because it touches more our position in the Imperial scheme than the relations between the Dominion of Canada and its various provinces. Further references to it in this Part will be somewhat casual.

The British North America Act.

The Dominion of Canada looks for its Constitution to the British North America Act, 1867.[4] Since the 1st day of July in that year, Canada's form of political organization has been, under that Act and its various amendments, (a) a general or Dominion government charged with matters of common interest to the whole country, and (b) local or provincial governments charged with the control of local matters in their respective sections.[5] The structure of these governments is provided for in the Act and the sphere of political activity assigned to the Dominion Government on the one hand and to provincial governments on the other is carefully mapped out.

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[3] Chap. VII., *ante*, p. 93, *et seq.*

[4] 30 & 31 Vict. c. 3 (Imp.): in full in Appendix.

[5] General and local are the distinguishing words used in the Quebec Resolutions, upon which the Act was mainly based. See Appendix.

Originating in the will of the individual and, as between themselves, independent colonies concerned, the Act represents the first attempt to provide in a written organic instrument a federal form of government for one large area of the British Empire; and the experiment has been repeated in the case of the Australian Colonies.[6] The whole wide field of self-government in Canada has been divided and to each of the divisions, federal and provincial, full powers of government, legislative and executive, have been given. As described by that great expounder of the British North America Act, the late Lord Watson:[7]

"The object of the Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers, executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property and revenues as were necessary for the due performance of its constitutional functions and that the remainder should be retained by the provinces for the purposes of the Provincial Government."

Outline of the Act:—At this stage, it may be well to exhibit shortly the general scheme of the Act. It opens with recitals which show, in the first place, that it was passed in order to carry into effect the expressed desire of Canada, Nova Scotia and New Brunswick "to be federally united into one

[6] See the *Commonwealth of Australia Constitution Act, 1900* (63 & 64 Vict., c. 12—Imp.)

[7] In the *Liquidator's Case* (1892), A. C. 437; 61 L. J. P. C. 75.

Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom;" and, secondly, that the eventual admission of other parts of British North America into the union was contemplated.

The Act is divided into eleven parts, with headings and sub-headings; and these (unlike the marginal notes) are to be read as an integral part of the statute, affording in many cases a master key to the proper interpretation of the clauses grouped under them.[8]

Part "*I.—Preliminary*" (secs. 1 and 2) provides for a short title to the statute, "The British North America Act, 1867;" and that the provisions of the Act relating to the Queen are to apply to her heirs and successors, Kings and Queens of the United Kingdom. It may be stated here that there are three other statutes similarly entitled: The British North America Act, 1871,[9] the British North America Act, 1886,[10] and the British North America Act, 1907.[1] By section 3 of the statute of 1886, the three Acts to that date are to be read together and may be cited as "The British North America Acts, 1867 to 1886." With them must also be read the

[8] See *Eastern, &c., Ry.* v. *Marriage* (1861), 9 H. L. Cas. 32; *Inglis* v. *Robertson* (1898), A. C. 616; 67 L. J. P. C. 108.

[9] 34 & 35 Vict., c. 28: "An Act respecting the establishment of provinces in the Dominion of Canada."

[10] 49 & 50 Vict., c. 35: "An Act respecting the representation in the Parliament of Canada of territories which for the time being form part of the Dominion of Canada, but are not included in any province."

[1] 7 Edw. VII., c. 11, respecting provincial subsidies only. There is another Imperial Act in amendment of the British North America Act, 1867. By the "Parliament of Canada Act, 1875" (38 & 39 Vict., c. 38), section 18, relating to the privileges of parliament, was amended: see *ante*, p. 44.

various Imperial Orders-in-Council admitting other parts of British North America to the Canadian Union; for, under section 146 of the Act of 1867, these Orders-in-Council have the force of Imperial Acts.

Part "*II.—Union*" (secs. 3-8) creates the Dominion of Canada covering the three former colonies of Canada, Nova Scotia and New Brunswick. Four provinces were to be established and to that end Canada as it stood under the Union Act, 1840, was to be taken as severed into Ontario[2] (old Upper Canada) and Quebec (old Lower Canada), while Nova Scotia and New Brunswick retained the same limits as at the passing of the Act. At that date, there were three other British colonies in North America, namely, Newfoundland, Prince Edward Island and British Columbia. The balance of British territory in North America was unorganized, except in so far as the government of the Hudson's Bay Company in Rupert's Land might be deemed an organized government. Part XI. of the Act makes provision for the admission of all these other parts to the Canadian Union. Newfoundland has so far declined all invitations to unite her fortunes with the Dominion, although she was one of the colonies represented at the Quebec Conference (1864), at which were adopted the resolutions upon which the scheme of Confederation is mainly based British Columbia and Prince Edward Island have since joined the union; and the remainder of British territory in North America has been annexed to Canada, and out of it have been carved the provinces of Manitoba, Saskatchewan and Alberta.

[2] See 52-53 Vict., c. 28 (Imp.), fixing the boundaries of Ontario in accordance with the award referred to in it. For the boundaries of the Dominion and of the individual provinces, see *Houston*, 'Const. Doc. of Canada,' p. 271.

There are now, therefore, nine provinces in Canada, exclusive of the Territories.

Part "*III.—Executive Power*" (secs. 9-16) has reference to the federal executive. As already pointed out,[3] there is no new creation of headship for the government of the Dominion. The executive government and authority of and over Canada is declared to continue and be vested in the Crown of the United Kingdom. It is administered locally by the Governor-General or other the chief executive officer or administrator for the time being carrying on the government of Canada, by whatever title he may be designated. He acts by and with the advice of the Privy Council for Canada; and so far as is necessary for the carrying on of the federal government all statutory powers, authorities, and functions previously possessed by the various governors of the pre-Confederation provinces are by the Act (sec. 12) vested in the Governor-General of Canada.

Part "*IV.—Legislative Power*" (secs. 17-57) has reference also to the Dominion Government only. Its title is not quite accurate. What is dealt with in this Part is the federal legislative machinery. Incidentally, some of its provisions confer legislative power of a constituent character,[4] but the main provisions of the Act as to the distribution of legislative power are contained in Part VI., sections 91 to 95.

The Parliament of Canada consists of the Crown, an Upper House, styled the Senate, and the House of Commons; and it must meet once at least in every year. The use of the term "Parliament" in reference to the Dominion Legislature only was formerly much relied on in argument to belittle the standing of provincial legislatures; but their

[3] Chap. III., *ante*, p. 25.
[4] See *ante*, p. 40.

co-ordinate rank with the Dominion Parliament, each being supreme within its sphere of legislative authority, is now finally established.[4a] The name bestowed upon any of these bodies is immaterial. The question is: Have they legislative powers in the proper sense of that term? The Crown is possessed of a share in legislation throughout the Empire, and it would require very express language in any Constitutional Act to warrant an inference that sovereign powers of legislation "in which the British Sovereign was to have no share" have been bestowed upon any colonial legislature.

Part "*V.—Provincial Constitutions*" (secs. 58-90) consists of two main subdivisions, "*Executive power*" and "*Legislative power.*" This last expression, it should be again noted,[6] is inexact. What is dealt with in this Part is the legislative machinery for the provinces. Some of the sections do, it is true, impliedly confer powers of legislation, but these are all of a constituent character,[7] and do not touch the distribution of legislative power as between the Dominion and the provinces. That is provided for in Part VI. of the Act.

Executive Power:—In each province the Crown is represented by "an officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by instrument under the Great Seal of Canada." He acts by and with the advice of the Executive Council of the province, that is to say, of the provincial ministry. In the case of Nova Scotia and New Brunswick, the provision was simple; the constitution of the executive authority in those provinces was continued, subject only to the

[4a] *Liquidator's Case* (1892), A. C. 437; 61 L. J. P. C. 75. See *post*, p. 350.

[6] See *ante*, p. 307.

[7] See Chap. V., *ante*, p. 40.

change in the method of appointment of the executive head of the province, and to those provisions of the British North America Act which limit the provincial sphere of legislative authority and, necessarily and co-relatively, the executive sphere as well. The same course was adopted in the Orders-in-Council admitting British Columbia and Prince Edward Island to the Canadian Union;[8] their executive government continued as before their admission, subject to the same qualifications as above mentioned. On the other hand, the division of (old) Canada into two provinces necessitated more detailed provision as to the constitution of the executive councils of those provinces. All statutory powers, authorities and functions which had previously been vested in the Governors or Lieutenant-Governors of (Old) Canada, Upper Canada, or Lower Canada, were by the Act (sec. 65) vested in the Lieutenant-Governors of the two new provinces, so far as the same might be capable of being exercised in relation to their government respectively. No such provision was necessary in the case of Nova Scotia or New Brunswick or, on their admission, in the case of British Columbia or Prince Edward Island. On the other hand, the corresponding section (12) vesting in the Governor-General all the statutory powers, etc., of the pre-Confederation governors, so far as the same might be capable of being exercised in relation to the government of Canada applies to all the provinces.[9]

Legislative Machinery:—For reasons already stated, new machinery had to be provided for Ontario and Quebec, while the constitution of the legislatures of Nova Scotia and New Brunswick

[8] The clauses are quoted in Chap. III., *ante*, and are also to be found in the appendix.

[9] See *ante*, p. 307.

was not interfered with, subject only to the change in the method of appointment of the Crown's representative. The range of legislative power possessed by the provincial assemblies prior to the passing of the Act was, of course, cut down, but that does not touch the constitutional arrangement of the legislative machinery. British Columbia and Prince Edward Island fall into the same category as Nova Scotia and New Brunswick;[10] while Manitoba, Saskatchewan and Alberta (like Ontario and Quebec) required new governmental machinery upon their establishment as provinces of Canada.

The only provision of this Part which applies to all the provinces originally joined by the Act, namely, section 90, also applies to all the present Canadian provinces; to those admitted by Imperial Orders-in-Council, as well as to those created by the Parliament of Canada under permissive Imperial Acts. This section will best explain itself:

The Four Provinces.

90. The following provisions of this Act respecting the Parliament of Canada, namely, the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of Acts, and the signification of pleasure on bills reserved, shall extend and apply to the legislatures of the several provinces as if those provisions were here re-enacted and made applicable in terms to the respective provinces and the legislatures thereof, with the substitution of the Lieutenant-Governor of the province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, of one year for two years, and of the province for Canada.

Part "*VI.—Distribution of Legislative Powers*" (secs. 91-95) determines for all purposes of government the spheres of authority of the Dominion on

[10] The clauses are quoted in Chap. III., *ante*.

the one hand and the provinces on the other, subject only to what has been said in Part I. of this book as to Imperial limitations. The whole field of Canadian self-government is divided and, speaking generally, matters of common interest to the whole of Canada are allotted to the control of the Parliament of Canada, while matters of more immediate local or provincial concern are left with the legislative assemblies of the various provinces. To draw the line between these two fields, as that line is fixed by the Act and by authoritative judicial decisions, is the main purpose of this Part of this book. As already noticed,[1] there are other sections of the Act which confer legislative power both upon the Parliament of Canada and upon the provincial legislatures; but these are in the nature of constituent powers and do not vitally affect the question as to the division of the field. This Part VI. is the really important matter.

Part "*VII.—Judicature*" (secs. 96-101) is really in the nature of a modification of the provisions made by sections 91 and 92 for the administration of justice in Canada. The topic will be fully dealt with hereafter. Here it will suffice to say that in the main justice is administered through the medium of provincial Courts, both of civil and criminal jurisdiction, constituted under provincial legislation. Criminal law and procedure in criminal cases is determined by federal law; and this Part VII. provides for the appointment of certain of the judges of the provincial Courts by the Dominion Ministry, for their payment out of the federal exchequer, and (sec. 101) for the establishment "notwithstanding anything in the Act" of a general Court of Appeal for Canada and of additional Courts for the better administration of federal law.

[1] See *ante*, p. 40.

The Supreme Court of Canada, and the Exchequer Court of Canada have been established under the powers conferred by this Part.

Part "*VIII.—Revenue, Debts, Assets, Taxation*" (secs. 102-126) deals with the division of Crown property as it existed in the various provinces immediately prior to the passing of the Act; with the sources of Crown revenue; and with the financial arrangements then deemed expedient as between the Dominion and the provinces, as well as between the two new provinces formed out of (Old) Canada. So far as tangible assets were concerned, certain enumerated classes of Crown property were to become the property of Canada, all others remaining the property of the provinces in which, respectively, they were situate. The line of division may be said to follow, roughly, the general line of division of the field for purposes of legislation and, necessarily and co-relatively, of executive government as well. Crown lands and the revenues thence arising were by the Act specifically allotted to the provincial governments, an arrangement which has not been followed in the case of the prairie provinces, Manitoba, Saskatchewan and Alberta.

Part "*IX.—Miscellaneous Provisions*" prescribes the form of the Oath of Allegiance to be taken by members, both federal and provincial, and the Declaration of Qualification to be made by senators of Canada and legislative councillors in Quebec. The only other provisions which need here be mentioned are those contained in sections 132 and 133. Section 132, which conveys to the Parliament and Government of Canada all powers necessary or proper for performing treaty obligations, has already been discussed.[2]

[2] See *ante* p. 134.

Section 133 provides for the use of the French language in the debates and records of the Dominion Parliament and of the Quebec Legislature; and for the publication of their statutes in both languages.

Part "*X.—Intercolonial Railway*" (sec. 145) calls for no comment.

Part "*XI.—Admission of other Colonies*" has already been referred to.[3] Under it, Imperial Orders-in-Council have been passed for the admission of British Columbia and Prince Edward Island to the Canadian Union as provinces thereof, and also for the admission of "Rupert's Land and the North-western Territory." The position of this later territory, both before and after the creation therein of the provinces of Manitoba, Saskatchewan and Alberta, will call for more extended treatment in a later chapter.[4]

Spirit of the Act: Responsible Parliamentary Government.—The British North America Act professedly intended to give to Canada a constitution similar in principle to that of the United Kingdom.[5] The one great legal principle which dominates British government is the supremacy of parliament. Side by side with it are what Dr. Dicey calls the "conventions of the Constitution," those unwritten constitutional usages which time has established to give more complete and easy operation to the legal principle; to ensure, in other words, that executive government in all its departments shall be carried on with full and easily-enforced responsibility to parliament and, through parliament, to the electors. While this book is not designed to treat of constitutional procedure and practice resting

[3] See *ante*, p. 306.
[4] Chapter XLIV., *post*.
[5] See preamble to the Act.

upon the unwritten "conventions of the Constitution," it would be incomplete if no attempt were made to show that responsible parliamentary government obtains in Canada, both in the federal and in the provincial spheres of government. This will necessitate some historical references to the constitutional position of the British Colonies in North America prior to Confederation. These will be found in Chapter XVI.

To further emphasize the fact that we have a constitution like that of the Motherland, and not, as some have contended, similar in principle to that of the United States, a brief comparison of the two is attempted in Chapter XVII.

Spheres of Authority.—Turning, then, to the more immediate purpose of this Part, the respective spheres of government occupied by the Dominion, on the one hand, and the provinces, on the other, the legal principle of the supremacy of parliament requires that attention should first be given to the division of the field for legislative purposes. Legislative jurisdiction and executive power go hand in hand. To fix the line which divides the field of colonial authority for legislative purposes between the Dominion Parliament and the provincial legislatures is to fix at the same time the same line of division for purposes of executive government. Those sections, therefore, of the British North America Act [6] which define the law-making spheres, federal and provincial, are the pivotal clauses upon which the scheme of Confederation turns.

Next will follow a brief examination of the machinery provided in and by the Act for the executive government of Canada and its provinces. The

[6] Particularly sections 91 to 95, both inclusive; but there are other sections also to be considered and, as will appear, other Imperial Acts.

division made by the Act of the Crown's assets throughout Canada will be discussed most conveniently in dealing with the legislative power of the Dominion and the provinces respectively over Crown property.[6a]

[6a] See Chap. XXIX., *post*.

CHAPTER XVI.

Pre-Confederation Constitutions.

Had the British North America Act created a governmental organism new in all its parts, justification might be lacking for historical retrospect. Many parts, however, of the machinery of government existing in the provinces prior to 1867 were retained under the federating Act. Indeed, in two of them, Nova Scotia and New Brunswick, the governmental machinery was left almost intact, and the same is true of British Columbia and Prince Edward Island upon their admission to the Union New machinery was obviously required for the new political creations, the federal government and the governments of Ontario and Quebec; and the same remark applies to the provinces since carved out of the North-West Territories, namely, Manitoba, Alberta and Saskatchewan. The earlier provincial constitutions which in the main features of their organization are thus continued merit careful study, and it is proposed to trace shortly the constitutional history of those provinces, but so far only as is necessary to a proper appreciation of the principles which underlie the working of the Canadian Constitution, federal and provincial, to-day.

To *Nova Scotia* belongs the distinction of being the oldest of the British Colonies in North America which now form part of the Dominion of Canada. The preamble to one of the earliest Acts of the Nova Scotia Assembly (1759)[1] declares that "this province of Nova Scotia or Acadie and the property thereof did always of right belong to the Crown of England, both by priority of discovery and ancient

[1] 33 Geo. II., c. 3 (Nova Scotia).

possession." The correctness of this declaration, France would probably not admit; but the contest would be of antiquarian interest merely, for by the Treaty of Utrecht in 1713, "Nova Scotia or Acadie, with its ancient boundaries," was ceded by France to Great Britain in the most ample terms of renunciation. Nova Scotia, as thus ceded, included the present province of that name (excluding Cape Breton), as well as what is now New Brunswick and part of Maine. For many years after its acquisition Nova Scotia was practically under the military rule of a Governor and council, whose authority was defined in the Governor's Commission. In 1749, a colonization scheme was set on foot and, anticipating an influx of settlers into the colony, the commission of Governor Cornwallis authorized the summoning of "general assemblys of the freeholders and planters within your government according to the usage of the rest of Our colonies and plantations in America." After much delay and the exhibition of much unwillingness on the part of the Governor and his council to act upon this direction, a scheme of representation was settled and the first parliament of Nova Scotia met at Halifax on the 2nd of October, 1758.

In 1763, the remaining portions of what are now known as the Maritime Provinces, namely, Cape Breton and Prince Edward Island, were ceded by France to Great Britain by the Treaty of Paris; and, by the proclamation which followed, were annexed to "our Government of Nova Scotia."[2]

Six years later, *Prince Edward Island* was made a separate province under a Governor, whose

[2] Of Cape Breton's constitutional vicissitudes it is unnecessary to make mention. They are set out in 5 Moo. P. C. 259 (*In re the Island of Cape Breton*). Finally in 1820 it was re-annexed to Nova Scotia, of which province it has ever since formed, and now forms, part.

commission, also, authorized the calling together of "general assemblys of the freeholders and planters within your government." The first parliament of Prince Edward Island met in 1773.

In 1784, *New Brunswick* was also created a separate province; and the commission of its first Governor authorized in somewhat similar phrase the summoning of a general assembly which shortly thereafter met.

So far as the Maritime Provinces by the Atlantic seaboard are concerned, their provincial legislatures of to-day are the lineal descendants of those early "general assemblys."[3]

Quebec, then embracing, roughly speaking, territory now occupied by the present provinces of Ontario and Quebec, was ceded by France to Great Britain by the same Treaty of Paris (1763), which secured to her Prince Edward Island and Cape Breton. By the proclamation which followed, Quebec was erected into a separate province; and, both by the proclamation itself[4] and by the commission to Governor James Murray, the institution of a representative assembly was contemplated. For reasons upon which it is unnecessary to enlarge here, no such assembly was summoned. Not until after the passage of the Constitutional Act, 1791,[5] dividing Quebec into the two provinces of Lower and Upper Canada and providing for a separate legislature for each, did such assemblies meet. The first parliament of Upper Canada met at Niagara on the 17th of September, 1792; that of Lower Canada at Quebec a few months later. By the

[3] The documents relating to the early constitutions of the Maritime Provinces are set out in Return No. 70, Can. Sess. Papers, 1883.

[4] See *ante*, p. 17.

[5] 31 Geo. III., c. 31 (Imp.)

Union Act, 1840,[6] the two provinces were re-united under the name of Canada in a legislative union, the severance of which was effected only by the British North America Act, 1867. Under this Act, the Canada of the Union Act was divided into the present provinces of Ontario and Quebec, corresponding to the earlier provinces of Upper and Lower Canada respectively.

British Columbia, as it existed at the date of the adoption by the Parliament of Canada of the Resolutions for its admission to the Dominion, had not a representative assembly and did not, therefore, enjoy responsible parliamentary government. Its introduction into the colony was then contemplated[7] and, in fact, was actually accomplished before the date (20th July, 1871) upon which the union took effect. By an Imperial Order-in-Council of 9th August, 1870, the Legislature of British Columbia was so altered as to make it a "representative legislature" within the meaning of the Colonial Laws Validity Act, 1865.[8] Theretofore it had consisted of a Governor and Legislative Council only, the latter containing both Crown-appointed and elective members. The appointed members, however, constituted a majority; and, in consequence, a strong agitation had arisen in the colony in favour of responsible government, under a wholly elective assembly. The Imperial Order-in-Council of August, 1870, above mentioned, was avowedly passed in order to bring this about. Under the Order-in-Council, the elective members were constituted a majority (9 to 6) of the Legislature, which, therefore, became clothed with power under the Colonial

[6] 3 & 4 Vict., c. 35 (Imp.)

[7] See Item No. 14 of the Terms of Union, as set out in the Order in Council, admitting British Columbia to the Union. In Appendix.

[8] See the Act in Appendix. See also *ante*, p. 38.

Laws Validity Act, 1865, to alter its own Constitution. This it promptly did; the Legislative Council was abolished and in its stead a legislative assembly of wholly elective members was established.[9] The provincial legislature of to-day in British Columbia is in its essential features but the continuation of the legislature so established. This short statement of the position of British Columbia will suffice to explain why no further reference to that province need be made in this chapter.

In making a survey of the forms of government established in the various provinces in order to learn their actual working, it will be convenient to confine attention, in the first place, to the constitutions established by royal prerogative [10] in the Maritime Provinces and to treat later of the statutory constitutions of the Upper Provinces. The survey, it should again be premised, is taken in order to show that, prior to Confederation, the Imperial Government had in a tangible way—evidenced partly by despatches, partly by instructions, partly by statutory enactments, partly, perhaps, by long disuse of power along certain lines—put upon record its recognition of the necessary connection which must exist between the legislative and executive departments of government, as well in the case of a colony as in the case of the United Kingdom.

As a preliminary to this survey reference must be made to what was, in the latter part of the eighteenth and the earlier decades of the nineteenth century, the accepted view of the British constitution. It was then chiefly commended because of the complete separation, as was supposed, of the legislative and executive departments. Legislative

[9] British Columbia Statutes, No. 147 of 34 Vict.

[10] See *ante*, p. 11, as to the position of the Crown in Council (Imp.) in this connection.

supremacy resided in the parliament, executive supremacy in the Crown. Opportunity for interference by parliament to control and regulate executive action was largely the result of the financial necessities of the executive head of the nation; but, to the extent to which the royal revenues rendered the Crown independent of parliament, the government of the nation was frequently carried on without the aid of that body. How the change was gradually brought about, until now the supremacy of parliament over the executive is a clearly established principle of the British constitution, is beyond the scope of this work to trace. Shortly stated, it was effected by the judicious use of the Commons' control over the purse strings, as a means to secure the consent of the Crown to the relinquishment to parliament of the most important of those common law powers of the executive known as "the prerogatives of the Crown." But in the latter part of the eighteenth century, the government of Great Britain was, to an extent very much larger than at present, carried on by the exercise of these prerogatives. It was more largely an executive government, and of no department was this more true than of the colonial, "the Board of Trade and Plantation." The very facts above alluded to—that for very many years after the settlement of Nova Scotia (practically until the British North America Act) no legislative interference by the Imperial parliament in the government of the Maritime Provinces took place; that provinces were enlarged, divided, joined, all without Act of parliament; and that, without Act of parliament, representative assemblies were established therein—make manifest the extent to which the government of the early provinces was in the nature of executive government,

by prerogative. And yet not entirely so, for in a celebrated case,[1] involving a consideration of the proclamation of 1763, Lord Mansfield held that, although on the acquisition of new territory by conquest or cession the Crown without parliament may make laws for the government of the conquered or ceded territory, nevertheless, on the grant to the inhabitants of the right to make laws through a representative assembly, the prerogative right of the Crown to legislate for the internal government of the colony is forever gone. Thereafter the Crown stands in the same relation to the representative assembly of the colony as in England to the Imperial parliament; and any withdrawal of the colony's right to make laws can only be effected by the Imperial parliament.[2]

So far, however, as related to the executive functions of government, the theory of executive independence which obtained in England was carried to its practical result in the work of government in the colonies. Theoretically and, indeed, legally, the Crown, by virtue of its position as a constituent branch of parliament, could prevent encroachment by the legislature upon its prerogatives (in other words, upon the executive department of government), but in England the financial necessities of the executive gradually led, as before observed, to the surrender to parliament, or at least to parliamentary control, of the entire executive government of the nation. The Crown occupied in the colonies the same position as a constituent branch of the legislature; but the financial necessities of the

[1] *Campbell* v. *Hall*, Cowp. 204; relating to Grenada. See *ante*, p. 17.

[2] See *Re Lord Bishop of Natal*, 3 Moo. P. C. (N.S.) 148. The position of the Crown in Council (Imp.) in relation to colonial government has already been largely discussed. See Chap. VIII., *ante*, p. 116 *et seq.*

executive government were, in those early colonial days, so largely met by the revenues arising from the sale of Crown lands, from fines, tolls, and other royalties of various sorts, and, for the balance, provided for in the Imperial budget, that the executive of a colony was to a large degree independent of the colonial assembly.

That the early "assemblys" of the provinces were intended to be confined to purely legislative work, and that, in the doing of it, they were not to interfere in the executive government of the colony, is apparent when one comes to study somewhat more closely the commissions of the early governors, the constitutional charters of those provinces.

There is no essential difference in the terms of these commissions. The first commission conveying authority to summon an assembly in the provinces now forming part of the Dominion was that to Governor Cornwallis of Nova Scotia.[3] "For the better administration of justice, and the management of the public affairs of our said province," the Governor was authorized to appoint "such fitting and discreet persons as you shall either find there, *or carry along with you,* not exceeding the number of twelve, to be of our council in our said province. As also to nominate and appoint, by warrant under your hand and seal, all such other officers and ministers as you shall judge proper and necessary for our service and the good of the people whom we shall settle in our said province until our further will and pleasure shall be known." Subsequent appointments to fill vacancies in the council were to be made by the authorities in *England.* With the advice and consent of this council, the governor was empowered to establish Courts of Justice and to appoint all the

[3] *Houston,* Const. Documents, p. 9.

necessary ministerial and judicial officers in connection therewith. The public revenue was to be disbursed by the Governor's warrant, issued by and with the advice of the council, with this limitation, however, that it was to be disposed of by the governor "for the support of the government, and not otherwise." It is hardly to be wondered at, having in view the mode of appointment, and of filling vacancies in this council, that the executive government of those days came to be designated by the familiar phrase, "the family compact."

Turning now to the part played in government by the assemblies: the commission to Governor Cornwallis commanded him to govern the colony according to his commission, the instructions therewith, or to be thereafter given, "and according to such reasonable laws and statutes as hereafter shall be made or agreed upon by you, with the advice and consent of our council and the assembly of our said province." The legislative power was in terms ample: "To make, constitute, and ordain laws . . . for the publick peace, welfare, and good government of our said province . . . and for the benefit of us, our heirs, and successors; which said laws are not to be repugnant, but, as near as may be, agreeable to the laws and statutes of this our Kingdom of Great Britain." All such laws, however, were subject to disallowance by the Imperial authorities, with no limitation as to the time within which such disallowance might take place.

The position of the Crown as a constituent branch of the assembly was recognized in a clause noteworthy for the frank and undisguised fashion in which it discloses the reason:

"And to the end that nothing may be passed or done by our said council or assembly to the prejudice of us, our heirs, and successors, we will and ordain that you, the said

Edward Cornwallis, shall have and enjoy a negative voice in the making and passing of all laws, statutes, and ordinances, as aforesaid."

The importance of the concession to the early provinces of the right to frame the laws by which, in local matters, they were to be governed, must not be under-rated. If it cannot be considered as in any fair sense a concession of the right of self-government, it must at least be admitted that it fell short only because of the theory which then obtained that the two departments of government should be kept strictly distinct and because of the inability of the colonial legislatures to withhold supplies until grievances in the executive department were remedied.

The form of government introduced into Quebec by Imperial statutes must now be examined. For eleven years after the Treaty of Paris, the commission to Governor Murray and his successors (read with the proclamation of 1763) was the charter of government; but, as already noticed, no assembly ever met in that province, and any legislation which was considered necessary was passed by the Governor and his council. Owing to the discontent of the inhabitants, then largely French, at the introduction (which was claimed to have taken place) of English civil law, and owing perhaps to a doubt of the legality of the ordinances of the Governor and his council, "*The Quebec Act, 1774,*"[4] was passed by the Imperial parliament. This statute revoked the right to a representative assembly and lodged both departments of government, legislative and executive, in the hands of the governor and his council; with this provision, however, that the members of the council were to be appointed from the

[4] 14 Geo. III., c. 83.

inhabitants of the province. A perusal of the Act discloses much milder checks on the legislative power than in the case of the earlier commissions; —no doubt because of the union of the legislative and executive powers of government in the same hands.

By the 13th section, the Governor and his council were expressly prohibited from laying taxes or duties within the province, with the exception of local assessments for municipal purposes. By an Act of the same session (c. 88), provision was made for raising a revenue by means of duties on rum, spirits, and molasses, to be disbursed by Imperial officers. It will be referred to again.

By "*The Constitutional Act, 1791*"—the King having signified "his Royal intention to divide his province of Quebec into two separate provinces"—provision was made for the establishment in each of a legislative council and assembly. Beyond giving the assembly so created the right to legislate as to time, place, and manner of holding elections to the assembly, the Act gave the legislature no larger measure of control over the executive than had been conferred on the assemblies in the Maritime Provinces.

The consent of the Crown by its representative in the colony to any Act of the colonial legislature curtailing the power of the Crown in the exercise of any prerogative right is as effective to that end as is an Act of the Imperial parliament in similar case;[5] but, by reason of the refusal to concede to the colonies the control of the revenues raised therein, the colonial assemblies were unable to force consent to Acts in curtailment of prerogative. Not being able to starve the executive, they were unable

[5] *Exchange Bank* v. *Reg.*, 11 App. Cas. 157; 55 L. J. P. C. 5.

to hold the officers of that department to responsibility for the due performance of their duties; and whether they had or had not the confidence of the representative branch of the legislature was practically a matter of indifference to these executive officers. The importance, therefore, of this question of revenue and its expenditure—the power to make provision for a revenue and to appropriate it when raised—becomes more and more apparent.

The treatment accorded by Great Britain to her colonies in the matter of taxation was entirely regulated by the view taken in England of the necessities of British trade and commerce. At first, the expense of governing the colonies was borne entirely by the home government, but as early as 1672,[6] the Imperial treasury levied tribute upon the colonies by the imposition, by Imperial Act, of export duties on certain articles shipped from the colonies for consumption elsewhere than in England; the proceeds of which duties were, of course, a set-off to the expense of government in those colonies. During the century which followed, Imperial Acts were from time to time passed providing for the collection of both export and import duties, but always as part and parcel of the regulation of trade and commerce. In 1763, permanent provision was made with regard to these colonial duties and it was provided that the net proceeds thereof should be reserved for the disposition of the Imperial parliament "towards defraying the necessary expenses of defending, protecting, and securing the British colonies in America."

This, then, was the position of affairs at the time when regular forms of civil government began to be established in Nova Scotia, Prince Edward

[6] 25 Car. II., c. 7.

Island, New Brunswick, and Quebec. The abandonment by the Imperial parliament of the principle that these duties should only be imposed when necessary for the due regulation of Imperial trade and commerce, and the extension of the Imperial power of taxation to matters of excise—to laying tribute, in other words, on the internal trade of a colony—and the consequent loss of the southern half of this continent, is a familiar story. During the progress of the struggle, but too late to win back the revolting colonies, the Imperial parliament passed the celebrated Renunciation Act of 1778,[1] by which it was declared and enacted that:

"The King and Parliament of Great Britain will not impose any duty, tax, or assessment whatever, payable in any of his Majesty's colonies, provinces, and plantations in North America or the West Indies; except only such duties as it may be expedient to impose for the regulation of commerce; the net produce of such duties to be always paid and applied to and for the use of the colony, province, or plantation in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective general courts or general assemblies of such colony, province, or plantation, are ordinarily paid and applied."

This principle was followed until the free trade campaign in England led to the abandonment of the system of taxing trade for the benefit of trade, and, with it, the regulation of colonial tariffs by British legislation.

During this period, however, the practical result of the colonial system was this: With the exception of such sums as the colonial assemblies were minded to raise (usually by the imposition of customs duties) for public improvement and to

[1] 18 Geo. III., c. 12. This Act is, of course, powerless to bind the Imperial parliament; but it is a most emphatic expression of a 'conventional" rule to be thereafter followed.

promote settlement, the revenues which came to the hands of the executive were, (1) the proceeds of customs, excise, and license duties, levied under Imperial Acts, and (2) the hereditary, territorial, and casual revenues of the Crown, consisting of the proceeds of the sale or lease of the " waste " lands in the colonies, fines, tolls, etc. The colonial legislatures could, of course, and did insist on retaining power of appropriation over the revenues arising under colonial Acts, and, so far as these revenues were concerned, could withhold supplies. But their action in such case made no difference to the executive, however it might do harm to the colony; the cost of the administration of justice and of civil government (including the salaries of the entire executive staff, administrative and judicial) was paid out of the other two sources of revenue, and over these the colonial assemblies had for many years no power of appropriation. To secure control of the executive—to make them *feel* responsibility—it was indispensably necessary to get control of these revenues and their appropriation; and the history of the growth of the principle of " Responsible government " is the history of the gradual acquisition by the colonial legislatures of the right to appropriate revenue from whatever source within the colony arising. The " tenure-of-office " question practically depended upon this question of control over the purse strings.

In all the provinces, the real issue was somewhat obscured by reason of the fact that under the then arrangement the legislative council, or second chamber, acted as a shield to the governor and his executive council, and was interposed to bear the brunt of all attacks upon executive methods. In the earlier stages of colonial history, the executive council was a branch of the legislature, and it always continued

potentially so, because its members formed the influential portion of the Crown-appointed legislative council. This position of affairs, however, gave the disputes between the assembly and the executive the appearance of being disputes between the two branches of the legislature; and it is not surprising, therefore, to find that the efforts of Howe, Wilmot, Papineau, and Baldwin were directly and ostensibly bent to secure reform in the constitution of the legislative council.[8] The real issue, however, was the question of executive responsibility, and that question largely depended upon the more sordid one as to control of expenditure. Perhaps there was a lack, too, of proper appreciation of the way in which the principle of responsible government was working its way into the fibre of the British constitution —through the medium of cabinet government—and this may have tended to the adoption of the less direct route to the establishment of responsible government here. It needed men like Lord Durham and Charles Buller, who were able to see through the intricacies of governmental machinery and discern the true principle of the British system, to point out how that same principle could be made effective in colonial government.

The first concession gained was of the power to appropriate the proceeds of Imperial tariffs in force in the colonies. As far back as the Constitutional Act, 1791, this power of appropriation was expressly given to the legislatures of Upper and Lower Canada over the proceeds of all customs duties levied as part of the commercial policy of the Empire. But the only Imperial tariff Act then in force in Canada, was the Act of 1774,[9] a *revenue* Act;

[8] *Sir John Bourinot*, "Responsible Government in Canada"—a paper read before the National Club, Toronto, during the winter of 1890-91, and published as "Maple Leaves," p. 43.

[9] See *ante*, p. 326.

and because that Act was thought not to come within the terms of the Constitutional Act, 1791, express legislation was necessary to give the colonial legislature control over the revenue arising under it. This was not obtained until 1831.[10]

For many years, however, in all the provinces, the "hereditary, territorial, and casual revenues" were amply sufficient to pay the salaries of all the executive staff, and these salaries the legislature had power neither to fix nor withhold. Secure in the enjoyment of the emoluments of office, the executive were able to thwart the wishes of the popular branch of the legislature and to ignore its claim to control and regulate their mode of conducting public business.

The history of the struggles, which in the Upper Provinces culminated at one time in open rebellion, and in all resulted in the firm establishment of responsible government, is beyond the scope of this work; but it is curious to note that the contemporary statutory record[1] appears in Acts relating to colonial control of colonial finances—the "tenure of office" question appearing only in despatches, instructions, etc. Not to dwell at undue length upon this point: first to New Brunswick and afterward to Canada (1847) and Nova Scotia (1849) full control over the revenues from all sources was conceded;

[10] 1 & 2 Wm. IV., c. 23. See *Houston* "Const. Doc." p. 106; *Andrew* v. *White*, 18 U. C. Q. B. 170.

[1] 1 & 2 Wm. IV. c. 23 (Imp.); 8 Wm. IV. c. 1 (N.B.); 3 & 4 Vic. c. 35 (Imp.); 6 & 7 Vic. c. 29 (Imp.); 6 Vic. c. 31 (Can.); 9 & 10 Vic. c. 94 (Imp.); 9 Vic. c. 114 (Can.); 10 & 11 Vic. c. 71 (Imp.); 12 & 13 Vic. c. (N.S.); 12 & 13 Vic. c. 29 (Imp.); 15 & 16 Vic. c. 39 (Imp.) 17 & 18 Vic. c. 118 (Imp.). For historical statements on this subject see *Mercer* v. *Atty.-Gen'l. of Ontario.*, 5 S. C. R. at p. 700, *et seq.*, *per* Gwynne, J.; *Ontario Mining Co.* v. *Seybold*, 31 O. R. 386, *per* Boyd, C.; *Algoma Central Ry. Co.* v. *Reg.*, 7 Exch. C. R. 239, *per* Burbidge, J.; *Todd* "Parl. Gov't in Brit. Col.," pp. 25-6, 169, *et seq.* As to the disposal of Crown lands, see also *Cunard* v. *Reg.*, 42 S. C. R. 88.

and, having that full control, the Legislative Assemblies slowly but surely overcame the stubborn resistance or active opposition of the governors of the early 'forties, and the principle of executive responsibility was firmly and permanently established in all the pre-Confederation provinces.

The nature of the constitutions existing in the provinces immediately prior to the coming into force of the British North America Act may now, perhaps, be defined with some approach to accuracy. What Lieut.-Gov. Archibald has said,[2] in reference to the Constitution of Nova Scotia is equally applicable to the other maritime provinces: "No formal charter or constitution ever was conferred, either on the province of Nova Scotia or upon Cape Breton while that island was a separate province. The constitution of Nova Scotia has always been considered as derived from the terms of the Royal commissions to the Governors and Lieutenant-Governors, and from the 'instructions' which accompanied the same, moulded from time to time by despatches from Secretaries of State, conveying the will of the Sovereign, and by Acts of the local legislature, assented to by the Crown; the whole to some extent interpreted by uniform usage and custom in the colony."

In (old) Canada, the form of government was prescribed by the Act of Union.[3] But as to all the provinces, it can be truly said that their constitutions were modelled on the pattern of the parent state. In outward form, there is a close resemblance between the British constitution and the constitution of those provinces—the same single executive, the same legislative machinery (even to a second chamber), with about the same apparent connection

[2] Can. Sess. Papers, 1883, No. 70.
[3] 3 & 4 Vic. c. 35 (Imp.)

between the two departments of government. And upon inquiry further, it is found that just as in the case of the Imperial parliament, so here in the case of the pre-Confederation provinces, one will look in vain for any statute laying down the rules which should govern in the matter of the formation, the continuance in office, or the retirement of the Cabinet. Constitutional usage had in the parent land gradually culminated in the full recognition of the principle of executive responsibility to parliament, and this principle was by the simple method of instructions to the Governors introduced as the working principle of the provincial constitutions.[4]

Of the causes which led to the adoption by the provinces of the Quebec Resolutions, upon which the British North America Act is founded, it is for the historian to treat. In agreeing to the establishment of a " general " government, charged with matters of common concern, the provinces resolved that such general government should be modelled, as were their own governments, on that of the United Kingdom, and that its executive authority should be administered according to the well-understood principles of the British constitution. Nowhere in the British North America Act is to be found any section laying down that the ministry, either federal or provincial, shall hold office only so long as it can command the confidence of the legislature. Such is, of course, the unwritten but undoubted constitutional rule, and no significance can be attached to its absence from the British North America Act. " It is evidently impossible to reduce into the form of a positive enactment a constitutional principle of this nature."[5] It may, therefore, be unhesitatingly

[4] Extracts from the despatches from the Col. Secy. to Lord Sydenham are given in the author's " Hist. of Canada," at p. 248.

[5] Lord Russell's famous despatch of Sept., 1839, introducing " Responsible Government " into Upper Canada: Can. Sess. Jour., 1841, pp. 390-6, App. BB.

affirmed of both the Dominion and the provincial governments:

"That great body of unwritten conventions, usages, and understandings, which have in the course of time grown up in the practical working of the English constitution, form as important a part of the political system of Canada as the fundamental law itself which governs the federation."[6]

[6] *Bourinot* "Maple Leaves," p. 37; see note *ante*, p. 330.

CHAPTER XVII.

"A Constitution Similar in Principle to that of the United Kingdom."

The preamble to the British North America Act recites that the provinces of Canada, Nova Scotia and New Brunswick, had expressed their desire[1] for a federal union into one Dominion "*with a constitution similar in principle to that of the United Kingdom,*" and one would naturally expect that the design so clearly announced would be effectually carried out in the enacting clauses of the Act. There have not been wanting, however, those who have contended that the performance has fallen far short of the promise; that the Act is in its preamble a notable instance of "official mendacity:"[2] and that its effect has been to establish in Canada a system of government presenting features analogous rather to those of the United States than to those of the United Kingdom. This view of the Canadian Constitution is quite erroneous and wanting in a proper regard for the underlying principle in conformity to which the pre-Confederation provinces had been governed and the Dominion and its federated provinces have since been governed—the principle of executive responsibility to the people through parliament, which is the chief distinguishing feature of the British form of government, the Empire over, as contrasted with that of the United States. Because the union of the provinces is federal, indicating, *ex necessitate*,[3] some sort of a

[1] In the Quebec Resolutions; see Appendix.

[2] *Dicey* (Prof. A. V.)—"The Law of Constitution," 3rd ed., p. 155. Modified in later editions to "diplomatic inaccuracy." See the criticism of this passage by Burton, J.A., in the *Pardoning Power Case*, 19 O. A. R. at p. 39.

[3] *Per* Ritchie, C.J.—*Valin* v. *Langlois*, 3 S. C. R. 1, at p. 10.

division of the field of governmental action and an allotment of some part of that field to a central government, the conclusion is rashly reached that these matters of outward and superficial resemblance between the Canadian system of government and that of the neighbouring Republic are sufficient to stamp them as essentially alike. A closer examination of the Act itself, coupled with some slight knowedge of the pre-existing provincial constitutions and their practical working, would have sufficed to show that, in essentials, the constitution of Canada is not like the constitution of the United States, but is in very truth "similar in principle to that of the United Kingdom."

To arrive at an intelligent conclusion upon this much-discussed question—to which form of government, the British or the American, does our government in principle conform?—one must necessarily first formulate in his own mind some definite notion of the difference in principle between these two systems. It may, perhaps, turn out that a candid comparison will disclose that the difference between them should hardly be characterized as a difference *in principle*—that in each the same motive power is applied to the same end, with some difference only in the mode of application.

The British Empire and the American Union consist, each of a central or national government, internationally recognized, side by side with subordinate local governments. In the case of the United States, the central or Federal government has always received treatment as a tangible national government over one compact territory; but the British constitution has, as a rule, been looked at as the constitution of Great Britain rather than as an Imperial constitution. The reason is partly geographical, partly historical. The Imperial con-

stitution, as it to-day exists, is the result of the gradual application to the government of an expanding empire of those principles of local self-government which were adopted, at the start, as the basis of the federal union of the American colonies. Thirteen colonies, mutually independent, having joined to destroy the common tie of subjection to the British Crown, but desiring still to perpetuate their union of race and common interest, faced the task of forming a central or union government in such fashion as to reconcile national unity with those ideas of the right of self-government which had been the cause of their separation from the Empire. Schooled by the failure of the "Articles of Confederation" to work this result, they formulated the "Constitution of the United States," under which they have lived and thrived for so many years.[4] That which by revolution and a formal written convention they accomplished has been brought to pass throughout the British Empire by peaceful evolution and unwritten conventions. The true federal idea is clearly manifest, to reconcile national unity with the right of local self-government; the very same idea that is stamped on the written constitution of the United States. The difference of position historically is quite sufficient to account for the difference of position legally. Given the independent self-governing communities which made up the American Commonwealth, the national government was super-imposed to secure unity, but upon conditions preservative of local autonomy.

[4] "I think and believe that it is one of the most skilful works which human intelligence ever created; is one of the most perfect organizations that ever governed a free people. To say that it has some defects is but to say that it is not the work of Omniscience but of human intellects."—*Sir John A. Macdonald*, Confed. Debates, 32.

With us, on the other hand, the central government stands historically first, but the various communities which grew out of it have now as full a measure of local self-government as is enjoyed by the individual States which together form the neighbouring Republic. The sum total of conceded power at any given period will be found to be commensurate with the opinion prevalent at such period as to the proper line of division between Imperial and local concerns.

Under both the British and the United States systems the Courts charged with the enforcement of law must decline to recognize the validity of any act, legislative or executive, done by any person or body of persons, beyond the limits to which they are legally subject. The enforcement by the Courts, colonial and British, of the legal limitations upon colonial legislative power is matter of legal notoriety, and there is a no less rigorous enforcement of the legal limits set to interference, otherwise than by Imperial legislation, with colonial rights of self-government.[5]

The difference in principle between the British and the American systems of government is not in respect of the federal idea—that is common to both; nor in respect of the rule of law, the enforcement by the Courts of the law of the constitution—that, too, is common ground. But in the *machinery* of government a difference runs through the national and local governments alike of these two systems. The difference in principle is in the connection between the law-making and the law-executing departments of government. In both the British and the American systems, the body which makes the law must necessarily be supreme over the body

[5] *Campbell* v. *Hall*, Cowp. 209; and see *Lenoir* v. *Ritchie*, 3 S. C. R. 575, 1 Cart. 488.

which simply carries out the law when made. In the British system not only is this supremacy recognized, but, by a certain arrangement of the machinery of government, the will of the law-making body is made to sympathetically affect and control the will of the executive in the administration of public affairs; and the administrative knowledge of the executive is utilized to the full in the work of legislation. The same supremacy of the legislature necessarily exists in the United States system; the executive department of the Federal government, or of any one of the State governments, must administer public affairs according to law. But in their system there seems apparent a determined effort to prevent co-operation and sympathy.

What then is this arrangement of machinery in the British system? Of late years it has been found necessary to revise somewhat our ideas concerning the British constitution. The older authorities dwell upon the division of power between the legislative and executive departments of government, and the subdivision, in turn, of the legislative department into King, Lords, and Commons; and they[6] dilate with quiet enthusiasm upon the "checks and balances" provided in and by such a division and subdivision of power. Gradually, however, this "literary theory," safe-guarding the ark of the constitution with its supposed division of sovereignty into departments, came to be recognized as an incomplete and, in truth, wholly erroneous explanation of the working of the constitution. Of comparatively recent writers, the late Walter Bagehot, in his most valuable essays, attacks with vigor this "literary theory" with its supposed checks and balances, and arrives at this conclusion:

[6] *E.g. Chitty*, "On the Prerogatives of the Crown," at p. 2.

"The efficient secret of the English constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt, by the traditional theory as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is *the Cabinet*. By that new word we mean a committee of the legislative body selected to be the executive body. The legislature has many committees, but this is its greatest. It chooses for this, its main committee, the men in whom it has most confidence. It does not, it is true, choose them directly; but it is nearly omnipotent in choosing them indirectly. . . . The Cabinet, in a word, is a Board of Control, chosen by the legislature, out of persons whom it trusts and knows, to rule the nation. . . . A cabinet is a combining committee—a *hyphen* which joins, a *buckle* which fastens, the legislative part of the State to the executive part of the State. In its origin it belongs to the one, in its functions it belongs to the other."

And he proceeds further to show how, by this practical fusion, this result is clearly attained—that the will of the people, constitutionally expressed through their elected representatives in the House of Commons, controls both the law-making and the law-executing power, and is, in very fact, the ultimate power in government. The responsibility of the executive to the people through the elective branch of parliament is the essential principle of the British constitution.

Turning now to the system of government across the border, one finds the same principle of ultimate responsibility to the people; but it is worked out in a very different and much less satisfactory way. It is not very far from the truth to say that the United States system is an attempt to work out the "literary theory" of the British constitution in actual practice. Take as an example the national

government at Washington, for the type is persistent throughout both the national and the local governments of the American Union, just as the British type is persistent throughout both the national and local governments of the British Empire. How it came about that the "literary theory" of the British constitution was embodied in the constitution of the United States has been the subject of frequent enquiry, and a quotation is ventured from a recent American work of great merit:[7]

"The Convention of 1787 was composed of very able men of the English-speaking race. They took the system of government with which they had been familiar, improved it, adapted it to the circumstances with which they had to deal, and put it into successful operation. . . . It is needful, however, to remember in this connection what has already been alluded to, that when the Convention was copying the English constitution that constitution was in a stage of transition, and had by no means fully developed the features which are now recognized as most characteristic of it. . . . . The English constitution of that day had a great many features which did not invite republican imitation. It was suspected, if not known, that the ministers who sat in Parliament were little more than tools of a ministry of Royal favorites, who were kept out of sight behind the strictest confidences of the Court. It was notorious that the subservient parliaments of the day represented the estates and the money of the peers and the influence of the King, rather than the intelligence and purpose of the nation. . . . It was something more than natural that the Convention of 1787 should desire to erect a Congress which would not be subservient, and an executive which could not be despotic; and it was equally to have been expected that they should regard an absolute separation of these two great branches of the system as the only effectual means for the accomplishment of that much desired end."

[7] *Prof. Woodrow Wilson*, "Congressional Government," 4th ed., p. 307. The above was first written in 1892 when it was not anticipated that the author of "Congressional Government" would one day become President of the United States.

Prof. Wilson, indeed, claims that Congress is now supreme over the executive of the federal government, and "subjects even the details of administration to the constant supervision, and all policy to the watchful intervention, of the Standing Committees of Congress"; but he laments the lack of executive responsibility to Congress. The President and the heads of the chief executive departments of government stand apart, isolated from Congress; bound to execute its laws, but with no greater influence in securing the passage of laws in aid of effective administration, or in preventing the passage of laws which may hamper administration, than is possessed by any other private citizen. By the terms of the Constitution itself they are debarred from seats in Congress,[s] and so have no initiative in legislation. On the other hand, Congress must go to the full extent of law-making in order to exercise its supremacy over the executive. But the trouble may be, not in the Act itself, but in its execution; no matter to what extent of detail an Act may make provision, an executive completely out of sympathy with the law will not be a very satisfactory administrator of it. In short, there is no guarantee of that harmony between the legislative and executive departments, that sympathy and co-operation, without which there must necessarily arise constant friction, lack of continuity in policy, and even a deadlock in the administration of public affairs. Congress and the executive are responsible, each directly to the people; but the retention of the confidence of Congress is in no way a condition to the retention of office. Congress has no such power to depose the executive as has the House of Commons in the British constitutional system. Moreover, the constant possibility

[s] Art. 1, s. 6.

of party diversity between the Executive and Congress renders it very difficult to fasten responsibility upon either. This difficulty is thus strongly put by Prof. Wilson:[9]

"Is Congress rated for corrupt, or imperfect, or foolish legislation? . . . Does administration blunder and run itself into all sorts of straits? The Secretaries hasten to plead the unreasonable or unwise commands of Congress, and Congress falls to blaming the Secretaries. The Secretaries aver that the whole mischief might have been avoided if they had only been allowed to suggest the proper measures; and the men who framed the existing measures, in their turn, avow their despair of good government so long as they must entrust all their plans to the bungling incompetence of men who are appointed by, and responsible to, somebody else. How is the school-master, the nation, to know which boy needs the whipping?"

In the preface to the same work, the distinction between the British and the American systems of government is thus shortly stated:

"It is our legislative and administrative machinery which makes our government essentially different from all other great governmental systems. The most striking contrast in modern politics is not between Presidential and Monarchical governments, but between Congressional and Parliamentary governments. Congressional government is *Committee* government; Parliamentary government is government by a responsible *Cabinet Ministry*.

"These are the two principal types which present themselves for the instruction of the modern student of the practical in politics: administration by semi-independent executive agents who obey the dictation of a legislature to which they are not responsible; and administration by executive agents who are the accredited leaders and accountable servants of a legislature virtually supreme in all things."

[9] Congressional Government, p. 283.

After this comparison of the two leading types of Anglo-Saxon self-government, it is easy to decide to which the Canadian Constitution conforms.

If, so far as the right of local self-government has been conceded, power is exercisable, the law-making power with the same efficacy, and the law-executing power under the same principle of responsibility to parliament and, through parliament, to the electorate, as in the United Kingdom, the preamble to the British North America Act is strictly accurate.

To any one who has knowledge of the constitutions of the provinces prior to Confederation,[10] it is unnecessary to point out that since the concession of "Responsible Government" and up to 1867 those constitutions were "similar in principle to that of the United Kingdom," and as to them all that has been said in reference to the British Constitution might be repeated.

Nor will it be contended that, under the British North America Act, the sum total of our rights of self-government has been lessened. Stronger language could not be used than that of Earl Loreburn, speaking for the Privy Council in a recent case:[1]

"In 1867, the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the Provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada."

[10] See Chap. XVI., *ante*, p. 331, *et seq.*

[1] *References Case* (1912), A. C. 571; 81 L. J. P. C. 210.

And no one who knows the actual working of the machinery of government in Canada will contend that either in the Dominion or the various provinces there exists other than responsible parliamentary government.

It has been usual to speak of the division of power under a federal system. In truth, this form of expression is most inapt and very inaccurately describes the division of labor which really exists. Its thoughtless use has been fruitful of much misconception of the true line or principle of division. There is in the system no division of *power* in the sense in which such division was, by the older writers, erroneously assumed to exist under the British form of government; and certainly none in the sense in which such division does actually exist in the individual systems of the United States. The true line of division is this: The various subject matters with which government may have to deal are divided into two great divisions[2]—matters of general and matters of local concern—but to each of such divisions the full equipment of power, legislative and executive, is given. The Dominion government and the Provincial governments are carried on (each within the sphere of its legitimate operation) on the same principle as is the government of the United Kingdom. Jurisdiction as to subject matter conceded, the will of the legislature, Dominion or Provincial, is supreme over the executive in the same sense as the will of the Imperial parliament is supreme over the executive in the United Kingdom. The legal principle, so strongly insisted upon by Dr. Dicey—the supremacy of parliament—as clearly appears here as in the United Kingdom; while, for the "conventional" aspect of

[2] See *e.g.*, *Bank of Toronto* v. *Lamb*, 12 App. Cas. 587; 56 L. J. P. C. 87.

the question, it is only necessary to point out that, as in the United Kingdom so here, the ultimate responsibility of the executive to the electorate through the elective branch of the legislature is clearly established in relation as well to each provincial as to the Dominion government. The elective branch of the legislature (Dominion Parliament or Provincial Legislative Assembly) represents, and is directly responsible to, the electorate—*as in the United Kingdom.* The Executive Committee (the cabinet), composed of members of the legislature, hold their positions by virtue of, and contingently upon, the retention of the confidence of the elective branch of that Legislature and are, therefore, practically directly responsible to that elective branch—*as in the United Kingdom.* The same chain of connected relation, the same source of motive power, and the same method of applying that power to the work of government, exists in each of our governmental bodies *as in the United Kingdom.*

CHAPTER XVIII.

A Charter of Self-Government.

In most of the cases which have arisen under the British North America Act the problem has been to reconcile those sections of the Act which divide the field between the Dominion and the provinces for purposes of legislation; and to that end a number of principles or rules of interpretation have been laid down as peculiarly applicable in dealing with such cases. But the cases are comparatively few in which the question is touched as to the view to be taken of the Act as being, what it undoubtedly is, a great constitutional charter. The Privy Council, indeed, has laid down [1] that Courts of law must treat the provisions of this Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish,[2] would be often subversive of parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British colony. Never perhaps was the matter better put than by Edward Blake in his argument before the Privy Council in the *Indian Title Case*:[3]

"The written Constitution of Canada in two aspects demands a very large, liberal and comprehensive interpre-

[1] *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; 56 L. J. P. C. 87.

[2] "In endeavouring to arrive at the meaning of a great statute which confers a Constitution upon a federal state the subject must be approached in a very different frame of mind from that in which one would consider the rights of a parochial authority."—*Per* Martin, J., in *Atty.-Gen. B. C.* v. *E. & N. Ry.* (1900), 7 B. C. 221.

[3] *St. Cath. Milling Co.* v. *R.*, 14 App. Cas. 46; 58 L. J. P. C. 54.

tation, a survey in which the interpreter shall look both before and after, if he is to effectuate and not to frustrate the objects of the statute. First, the Act is an attempt—perhaps a somewhat ambitious attempt—to create in one short document a very complicated written Constitution, dealing actually with five political entities, and potentially with many more; and dealing not merely with their creation or re-organization, but also with the distribution of political, legislative and executive power, and with the adjustment of their revenues and their assets. It is therefore an Act in its nature dealing with many topics, as has been truly said, of high political import. Thus, its very nature requires a large, comprehensive and liberal spirit of interpretation. But its frame also demands the same spirit. We know well that even where the draftsman has used an abundance of words, he is not always able to make his meaning clear; but upon this occasion there has been no attempt to expand the meaning of the draftsman; the attempt has rather been to deal in the fewest possible words with subject-matters of the highest possible importance. One sentence, one phrase, even one word, deals with a whole code or system of law or politics, disposes of national and sovereign attributes, makes and unmakes political communities, touches the ancient liberties and the private and public rights of millions of free men, and sets new limits to them all. And, therefore, we are bound, in attempting to ascertain the meaning of these clauses, to become very conversant with the surroundings, to allow due weight to the conditions, and to be thoroughly informed with the spirit of the law, in order that we may so read it as to accomplish its great intents."

Legislative Power in Canada.

Local self-government has always been favoured of British policy; and from the time of Lord Mansfield's celebrated judgment in the case of Grenada[1] down to the present the judgments of British Courts have taken cognizance of the policy which lay behind the grant of representative institutions

[1] *Campbell* v. *Hall*, Cowp. 209; see *ante*, p. 17.

to the various colonies. The question has chiefly been as to the nature and extent of the legislative power conferred; but the determination of this question determines all else. The sanction of a law is executive action and any attempt to divorce the two under a system of responsible parliamentary government would be foredoomed to failure. Their spheres are essentially co-extensive and complementary, and authorities which define the limits of the one equally in principle assert the same limits for the other. There is a clear and emphatic line of decisions by the Privy Council that, within the ambit of colonial authority, the legislative power of colonial legislatures is a plenary power to make laws having within the colony the force and effect of sovereign legislation. Within that ambit the power is as great and of the same nature as that of the parliament of the United Kingdom itself. First affirmed as to the assembly of Jamaica,[5] the proposition has been repeated as to the legislature of India,[6] of Ontario,[7] of New South Wales,[8] of each of the Canadian provinces,[9] of Victoria,[10] and of the parliament of Canada;[1] and may now be considered a principle permanently embodied in the constitution of the Empire.

Provincial Legislative Power.

In Canada, it is true, question has been raised as to the position of provincial legislatures as constituted under the British North America Act, but

[5] *Phillips* v. *Eyre*, L. R. 6 Q. B. 20; 40 L. J. Q. B. 28. See *ante*, p. 93.
[6] *R.* v. *Burah*, L. R. 3 App. Cas. 889. See *ante*, p. 94.
[7] *Hodge* v. *R.* (1883), 9 App. Cas. 117; 53 L. J. P. C. 1.
[8] *Powell* v. *Appollo Candle Co.*, 10 App. Cas. 282; 54 L. J. P. C. 7.
[9] *Liquidator's Case* (1892), A. C. 437; 61 L. J. P. C. 75.
[10] *Webb* v. *Outrim* (1907), A. C. 81; 76 L. J. P. C. 25.
[1] *Riel* v. *R.*, 10 App. Cas. 675; 55 L. J. P. C. 28.

that they, too, are sovereign legislatures is no longer open to question. The Privy Council has thus decisively ruled upon the matter:[2]

"When the British North America Act enacted that there should be a legislature for Ontario and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment and with the object of carrying the enactment into operation and effect. . . . It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact and can, whenever it pleases, destroy the agency it has created and set up another or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for courts of law, to decide."

and in the *Liquidator's Case*,[3] in which New Brunswick was concerned, the above passage is repeated, and this is added:

"The Act places the constitution of all provinces within the Dominion on the same level; and what is true with respect to the legislature of Ontario has equal application to the legislature of New Brunswick. It is clear, therefore, that the provincial legislature of New Brunswick does not

[2] *Hodge* v. *R.* (1883), 9 App. Cas. 117; 53 L. J. P. C. 1.
[3] (1892), A. C. 437; 61 L. J. P. C. 75.

occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation in the strictest sense of that word; and, within the limits assigned by section 92 of the Act of 1867, these powers are exclusive and supreme."—*per* Lord Watson.

In this matter, therefore, no distinction can be drawn between the Dominion parliament and provincial legislatures.[4] The principle of plenary powers has been invoked to uphold alike the local option features of the Canada Temperance Act[5] and the delegation of power to license commissioners under provincial Liquor License Acts.[6]

Confining attention now to the government of Canada and the Canadian provinces, this line of authority is for the present closed by a judgment of the Privy Council in 1912,[7] affirming the validity of those sections of the Supreme Court Act (Canada) which provide that the Governor-General in Council may refer important questions to that tribunal for hearing and report:

"In 1867, the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that

[4] *Bryden's Case* (1899), A. C. 580; 68 L. J. P. C. 118.
[5] *Russell's Case* (1882), 7 A. C. 829; 51 L. J. P. C. 77.
[6] *Hodge* v. *R.* (1883), 9 A. C. 117; 53 L. J. P. C. 1; and see also *R.* v. *Carlisle* (1903), 6 Ont. L. R. 718.
[7] *Re References* (1912), A. C. 571; 81 L. J. P. C. 210.

any point of internal self-government was withheld from Canada. . . . .

"In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous—as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either—recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself—as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada—or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act."—*Per* Earl Loreburn, L.C.

On all these decisions of the Courts, the Imperial parliament has placed the seal of its approval by the adoption of late years in many statutes of the phrases "self-governing colonies" and "self-governing dominions" as properly descriptive now of Canada, Australia, South Africa, New Zealand and Newfoundland.[8]

Ambit: How Determined.

The limitations upon the powers of self-government possessed by Canada and its provinces arising from the colonial status have been fully dealt with in Part I. of this book; and in the chapter on

[8] *E.g.*, 58 & 59 Vict c. 34 (the *Colonial Boundaries Act, 1895*: see *ante*, p. 257); 1 & 2 Geo. V. c. 46 (the *Copyright Act, 1911*: see *ante*, p. 254); 2 & 3 Geo. V. c. 10 (the *Seal Fisheries (North Pacific) Act, 1912*: see *ante*, p. 269).

Exterritoriality (Chapter VII.) much that appears in this chapter has been already said. It may be well, however, to repeat what was said by Lord Selborne in the *India Case*[9] as to the method of enquiry to be adopted in determining the ambit of self-government to which, under its charter, a colonial legislature is to be confined, and to apply that method to the interpretation of the British North America Act.

"The established Courts of Justice when a question arises whether the prescribed limits have been exceeded must of necessity determine that question; and the only way in which they can properly do so is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further or to enlarge constructively those conditions and restrictions."

In this passage Lord Selborne probably had not before his mind the case of colonies united under a federal system of government; and this must be kept in view in applying to the British North America Act the method of enquiry of which he approved.

Affirmatively: the power of legislation conferred by the Act is of the widest possible description. The parliament of Canada is given exclusive authority extending to "*all matters coming within the classes of subjects*" enumerated in section 91; provincial legislatures "may exclusively make laws *in relation to matters coming within the classes of*

[9] *Queen* v. *Burah*, L. R. 3 App. Cas. 889.

subjects" enumerated in section 92; and a general residuary[9a] power is lodged with the parliament of Canada "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects" assigned to the provinces. Clearly, as Lord Loreburn said in the passage quoted above from the *References Case*, these powers "cover the whole area of self-government within the whole area of Canada."

Negatively: Of express conditions or restrictions, apart from such as carry out the agreed-on federal division of spheres, there is really only one, the prohibition against interference with the office of Lieutenant-Governor contained in section 92, No. 1. That, however, is an item touching constituent powers, and it is to be borne in mind that Part VI. of the British North America Act which deals with the "Distribution of legislative powers" has, with the exception of that one item, nothing to do with the constituent powers of Canadian legislatures; as has been fully shown in Part I. of this book.[10] The limited power of the parliament of Canada in this regard as contrasted with the fuller powers of the provincial legislatures over the provincial constitutions is one of the results of the adoption of a federal system for Canada; and has little bearing on the subject matter of this chapter.[1]

There are, of course, other limitative phrases to be reckoned with; such, for example, as "*direct* taxation" and "the incorporation of companies *with provincial objects;*" and it will appear also that a somewhat special territorial limitation is suggested as arising from the insertion in some of the class-enumerations of section 92 of such phrases as

[9a] See, however, *post*, p. 452.
[10] See *ante*, Chap. V.
[1] See *ante*, p. 40 et seq.

"in the province," "within the province," etc. These, however, are part of the federation bargain and must be given their due effect as interpreted. Sections 91 and 92, indeed, contain competing and mutually exclusive class-enumerations; but, their respective scope established, there are no restrictive limitations to cut down plenary legislative power.

Constitutional Acts all in pari materia.

As a natural consequence of the cognizance taken by the Courts of the policy which lay behind the grant of constitutions to the colonies, the various constitutional Acts have been treated as *in pari materia* with each other, and with such statutes for example, as the Act for the Union of England and Scotland. Their language has been compared and phrases in one have been construed in accordance with the interpretation given to like phrases in another. It is "common form," for example, to grant power to make laws for "the peace, order and good government" of the colony; and these have been held in cases from India [2] and Canada [3] apt words "to authorize the utmost discretion of enactment for the attainment of the objects pointed to."

Again, in giving a wide interpretation to the words "property and civil rights" (*No. 13 of sec. 92*) justification was found in the Quebec Act, 1774, in which the same phrase was used in a clearly large sense; [4] while, on the other hand, in the same case the words, "the regulation of trade and

[2] *Queen* v. *Burah*, 3 App. Cas. 889.

[3] *Riel* v. *R.*, 10 App. Cas. 675; 55 L. J. P. C. 28, evidently following *Queen* v. *Burah*.

[4] *Parsons' Case*, 7 App. Cas. 96; 51 L. J. P. C. 11. The same words, taken evidently from the Quebec Act, were used in a large sense in the Act introducing English law into Upper Canada: see *ante*, p. 285.

commerce," were given a restricted meaning in accordance with the view taken by the Board of somewhat similar phraseology in the Act for the Union of England and Scotland.[5]

The words used to describe the various classes of subjects assigned to the Dominion parliament and to the provincial legislatures respectively should, *prima facie*, receive a large liberal interpretation; but there are so many cases in which the very general terms employed in the two leading sections, 91 and 92, are mutually inconsistent with each other and apparently overlap, that this larger rule of interpretaton is overshadowed by other rules invoked to aid in reconciling these apparent conflicts. The application of the larger rule, however, appears in certain cases in which no point of conflict as between federal and provincial jurisdiction arose. For example: the power to make laws relating to "direct taxation within the province for provincal purposes" was held in an early case[6] not to limit the provinces to laying taxes on the whole province or applicable only for the general benefit of the whole province. An Act authorizing a municipality to issue debentures as a bonus to a railway and to levy a tax upon the inhabitants to meet the obligation so incurred was upheld; and this decision stands as a warrant for the whole system of municipal taxation in operation to-day throughout the Canadian provinces. Again, in determining the extent of the legislative power conferred by No. 15 of section 92, to make laws in relation to "the imposition of punishment by fine, penalty, or imprisonment," the Privy Council declined to construe the words strictly as penal legislation; on the contrary, treating them as conveying plenary

[5] Other reasons were given as well: see *post* p. 684.

[6] *Dow* v. *Black*, L. R. 6 P. C. 272; 44 L. J. P. C. 52.

legislative power, their Lordships held that imprisonment " with or without its usual accompaniment, hard labour " might be imposed by provincial statutes;[7] a construction aptly characterized as broad, liberal, and quasi-political.[8] And again, the power given to a provincial legislature to make laws in relation to " the amendment of the constitution of the province " (*sec. 92, No. 1*) has been held to cover legislation as to the parliamentary privileges of the assembly and of its members, such legislation being " aptly and properly described as part of the constitutional law of the province."[9] And legislation as to the provincial franchise falls within the same category.[10] Federal jurisdiction over "aliens " and " immigration " authorizes deportation, even though necessarily involving some measure of extra-territorial constraint.[1]

The Omnipotence of Parliament.

When once it is determined that an Act passed by any Canadian legislature, federal or provincial, is within the power conferred by the British North America Act it is not for any Court of justice to enquire further.[2]

"Jurisdiction conceded, the will of the legislature is omnipotent according to British theory and knows no superior."[3]

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[7] *Hodge's Case*, 9 App. Cas. 117; 53 L. J. P. C. 1.

[8] By Burton, J.A., in the *Indian Lands Case*, 13 Ont. App. R. at p. 165.

[9] *Fielding* v. *Thomas* (1896), A. C. 600; 65 L. J. P. C. 103.

[10] *Tomey Homma's Case* (1903), A. C. 151; 72 L. J. P. C. 23.

[1] *Cain & Gilhula's Case* (1906), A. C. 542; 75 L. J. P. C. 81. See the chapter on "Exterritoriality," *ante*, p. 106.

[2] *Queen* v. *Burah*, 3 App. Cas. 889.

[3] Mowat, A.-G., *arguendo* in *Severn* v. *R.*, 2 S. C. R. at p. 81. The theory is not exclusively British. "Jurisdiction conceded," the same rule obtains in the United States.

"It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say."[4]

Courts of law are interpreters merely in such case and have no right to enquire whether the jurisdiction has been exercised wisely or unwisely,[5] justly or unjustly.[6] *Magna Charta* may be interfered with;[7] taxation imposed without regard to uniformity or equality;[8] class legislation and laws discriminating against race may be enacted;[9] one man's property may be taken from him and given to another without compensation;[10] *ex post facto* legislation passed;[1] in short, the power may be abused but "the only remedy is an appeal to those by whom the legislature is elected.[2]

Division of Assets.

In dealing with this feature of the Act, the Courts, again, have not been unmindful of the wide

[4] *Re References* (1912), A. C. 571; 81 L. J. P. C. 210.

[5] *Dryden's Case* (1899), A. C. 580; 68 L. J. P. C. 118; *Re C. P. R. & York*, 25 Ont. App. R. at p. 79, *per* Meredith, J.

[6] *Re McDowell & Palmerston* (1892), 22 Ont. R. 563; *Atty.-Gen.* v. *Victoria*, 2 B. C. 1.

[7] *Per* Day, J., in *Ex p. Gould*, quoted with approval by Boyd, C., in *Re McDowell & Palmerston*, *supra*.

[8] *Fortier* v. *Lambe*, 25 S. C. R. 422.

[9] *Tomey Homma's Case* (1903), A. C. 151; 72 L. J. P. C. 23; *Quong Wing* v. *R.*, 49 S. C. R. 440.

[10] *McGregor* v. *Esquimalt & N. Ry.* (1907), A. C. 462; 76 L. J. P. C. 85; *Fiddick* v. *Esquimalt & N. Ry.*, 14 B. C. 412; *Florence Mining Co.* v. *Cobalt, &c.*, 18 Ont. L. R. 375 (affirmed in the Privy Council; see C. R., 1911, A. C. 412); *Re Goodhue*, 19 Grant 366.

[1] *Phillips* v. *Eyre*, L. R. 6 Q. B. 20; 40 L. J. Q. B. 28: *Atty.-Gen.* v. *Foster*, 31 N. B. 153.

[2] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90.

"I fail to see how any Court can say that the legislature—that is, the Crown, the Lords, and the Commons—has not jurisdiction to set up a despotism in any of the Dominions of the Crown, or, indeed in the United Kingdom itself, although the results might be even more disastrous than the attempt in the 18th century to tax the American Colonies:" *per* Farwell, L.J., in *R.* v. *Crewe* (1910), 79 L. J. K. B. at p. 891.

sweep of the statute. For example, in construing section 109 which reserves certain sources of revenue to the provinces, the Privy Council has said:[3]

"The general subject of the whole section is of a high political nature; it is the attribution of royal territorial rights for purposes of revenue and government."

Executive Power.

The same broad view of the British North America Act which led the Privy Council to affirm with final authority that the Crown is a constituent branch of all Canadian legislatures, of each provincial assembly as well as of the parliament of Canada, led also and in the same case to an equally authoritative pronouncement that:

"A Lieutenant-Governor, when appointed, was as much the representative of Her Majesty for all purposes of provincial government, as the Governor-General himself was for all purposes of Dominion government."[4]

The Crown's headship in Canada in both departments of government, legislation and executive administration, has already been largely discussed in a previous chapter. And it may seem needless to enlarge further upon what, under responsible government, would appear to be axiomatic, namely, that legislative jurisdiction and executive power go hand in hand. It is now authoritatively settled that legislative power in Canada in reference to any particular prerogative of the Crown rests with that legislature, Dominion or provincial, which may make laws in relation to the subject matter to which such prerogative appertains. Executive action

[3] *Mercer* v. *Atty.-Gen'l.* (Ont.), 8 App. Cas. 767; 52 L. J. P. C. 84; 3 Cart. 1.

[4] *Liquidator's Case* (1892), A. C. 437; 61 L. J. P. C. 75.

would then properly follow and be based on such legislation.[5]

Question, however, has been raised with reference to those prerogative rights of the Crown which have not been "taken possession of by statute law;"[6] but the law seems clear that they are to be exercised, so far as they fall within the scope of Canadian self-government, by the Governor-General or the Lieutenant-Governors respectively upon the same principle of division; that where the legislature of the Dominion is empowered to make laws upon any given subject matter, any prerogative right capable of exercise in relation to such matter can only be exercised by the executive of the Dominion, and so of each of the provincial governments. The whole power of government, legislative and executive, in relation to any given subject matter, rests with that government to which it is assigned for legislative purposes. The decision in the *Liquidator's Case,* from which the above passage is extracted, has been uniformly so interpreted. It related to the Crown's prerogative right in respect of Crown debts to priority of payment over other creditors and there was no provincial statute on the subject; nevertheless effect was given to the Crown's claim in an action brought on behalf of the province by the proper provincial officer.[7] Prior to this decision Mr. Justice Burton had thus expressed himself in the Court of Appeal for Ontario:

[5] The *Q. C. Case* (1898), A. C. 247; 67 L. J. P. C. 17 (affirming the judgment of the Court of Appeal for Ontario, 23 Ont. A. R. 792); the *Pardoning Power Case,* 23 S. C. R. 458; *Atty.-Gen. (Can.)* v. *Cain & Gilhula* (1906), A. C. 542; 75 L. J. P. C. 81.

[6] The expression is Mr. *Lefroy's.* See his "Leg. Power in Can.," 144 (*n.*)

[7] Reference is made in the judgment to *Exchange Bank* v. *R.,* 11 App. Cas. 157; 55 L. J. P. C. 5; in which the Board had given effect to a provincial statute of Quebec limiting this prerogative in that province.

"I have always been of opinion that the legislative and executive powers granted to the province were intended to be co-extensive, and that the Lieutenant-Governor became entitled, *virtute officii*, and without express statutory enactment, to exercise all prerogatives incident to executive authority in matters in which provincial legislatures have jurisdiction; that he had in fact delegated to him the administration of the royal prerogatives as far as they were capable of being exercised in relation to the government of the provinces, as fully as the Governor-General has the administration of them in relation to the government of the Dominion."[8]

And in a later case[9] he repeats this, adding: "This opinion seems to have been fully sustained and confirmed by the subsequent decision of the Privy Council" in the *Liquidator's Case*. Speaking of the same decision Mr. Justice Maclennan says:

"That judgment determined conclusively that the Crown stands in the same relation to the several provinces of the Dominion as to the Dominion itself, with respect to powers of legislation and government; and that Her Majesty is a part of the government of the provinces in the same sense as she is part of the government of the Dominion. That being so, it follows that those prerogatives of the Crown which properly belong or relate to the portion of legislation and government assigned to the provinces are to be exercised by the respective Lieutenant-Governors as representing Her Majesty, precisely as those belonging to the Dominion are to be exercised by the Governor-General. In short the effect of the British North America Act is to distribute prerogative powers as well as powers of legislation between the Dominion and the provinces."[10]

The same question was raised in a case which came before the Privy Council in 1891 in reference

[8] The *Pardoning Power Case*, 19 Ont. App. R. at p. 38.

[9] The *Q. C. Case*, 23 Ont. App. R. at p. 802.

[10] The *Q. C. Case*, 23 Ont. App. R. at p. 805; and see also *per* Hagarty, C.J.O., *ib.*, at p. 798. See also a state paper by Sir Oliver Mowat, Ont. Sess. Papers, 1888, No. 37.

to the exclusion of Chinese from the colony of Victoria;[1] but was not decided because the Board held that a colonial Act upon which the officer concerned had acted was sufficient to sustain what he had done. The discussion in the Courts of Victoria had largely proceeded upon the hypothesis that the colonial Act might not apply to the particular exclusion; in which view the question was whether or not the Crown without statutory authority could exclude an alien[2] and, if so, whether or not the colonial executive, i.e. the governor acting on the advice of his colonial ministers, could exercise the prerogative. The Privy Council declined to discuss this larger question involving, as their Lordships intimated, important considerations and points of nicety. Although, as they also intimate, the question might never become of practical importance (because statutes may easily be passed[3] taking possession of these prerogatives) the deliberate refusal of their Lordships to pass upon it raises a doubt as to the extent of the powers of self-government in Canada as well as in other self-governing colonies which, it is submitted, should not exist. If there are any such prerogative rights to be exercised by the Sovereign personally in reference to matters within the scope of the British North America Act, such rights must be exercised upon the advice of the Imperial ministry, there being no provision in the constitutional system of the Empire for a direct tender of advice to the Sovereign by a colonial ministry. This would be that government from Downing street which the self-governing colonies have

[1] *Musgrove* v. *Chun Teeong Toy* (1891), A. C. 272; 60 L. J. P. C. 28.

[2] See chapter X., *ante*, p. 191 *et seq.*

[3] For example, the Canadian Immigration Act, and the Alien Labour Act: see *Cain & Gilhula Case* (1906), A. C. 542; 75 L. J. P. C. 81.

been taught to regard as a thing of the past. There are of course prerogatives which are truly imperial as pointed out in an earlier chapter, and the question consequently must be limited to those prerogatives of the Crown which relate to or are connected with subjects committed to the power of colonial legislatures, and which fall therefore within the sphere of colonial self-government. It is submitted that what Kerford, J., said of Victoria in *Musgrove's Case*[4] is *a fortiori* true of Canada:

"All the prerogatives necessary for the safety and protection of the people, the administration of the law, and the conduct of public affairs in and for Victoria, under our system of responsible government, have passed as an incident to the grant of self-government (without which the grant itself would be of no effect) and may be exercised by the representative of the Crown on the advice of responsible ministers."

The question must turn upon the proper construction to be placed upon the various Imperial Acts conferring constitutions upon the self-governing colonies. The powers of the Governor-General and of the various Lieutenant-Governors are defined in and limited by their respective commissions, but these commissions expressly refer to the office as created and defined by the British North America Act. That Act speaks of these officers as carrying on the government of Canada (s. 10), and of the respective provinces (s. 62), and provides expressly for the Dominion that there shall be a council to aid and advise in the government of Canada (s. 11). It is noteworthy, too, that the title of "viceroy" denied to colonial governors in ordinary cases[5] has been lately applied by the Privy

[4] 5 Cart. at p. 606.

[5] *Musgrave* v. *Pulido*, 5 App. Cas. 102; 49 L. J. P. C. 20.

Council to the Governor-General of Canada,[6] and would seem to be of equally proper application to a Lieutenant-Governor; indicating in each case a general delegation of the Crown's authority in regard to Dominion and provincial government respectively.[7]

Historical Aids to Interpretation.

The British North America Act, it has now been shown, has been interpreted as a great constitutional charter. Upon a broad and statesmanlike view of British policy it has been held as intended to confer full powers of self-government subject only to the supremacy of the Imperial parliament as the sole constitution-maker for the Empire and as the embodiment and upholder of national unity in the face of the world. And in determining the scope of words and phrases used as descriptive of the subjects upon which the federal and provincial legislatures respectively may legislate, it is of course proper to have regard to the circumstances surrounding the passage of the Act.[8] But the rule is of limited application. It cannot, for example, be invoked to contradict or even modify unambiguous language in the statute itself.

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[6] *Liquidator's Case, supra;* and see *per* Strong, J., in *R.* v. *Bank of Nova Scotia*, 11 S. C. R. 19.

[7] The following additional cases, in none of which had the prerogative there in question been the subject of legislation, have a bearing upon the subject: (1) *Mercer's Case* (8 App. Cas. 767; 52 L. J. P. C. 84; 3 Cart. 1), in which the right of the Crown to escheats was enforced at the suit of the Atty.-General of Ontario for the behoof of that province; (2) *The Precious Metals Case* (14 App. Cas. 295; 58 L. J. P. C. 88; 4 Cart. 241), in which British Columbia was held entitled at the suit of the provincial Atty.-General to the precious metals within the C. P. R. "railway belt" in that province.

[8] *Severn* v. *R.* (1878), 2 S. C. R. 70; *per* Ritchie, C.J., at p. 87; *St. Cath. Milling Co.* v. *R.* (1887), 13 S. C. R. at p. 606, *per* Strong, J.; *Brophy's Case, infra.*

"If the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous . . . recourse must be had to the context and scheme of the Act."[9]

The leading case, perhaps, on this proposition is *Barrett's Case*[10] in which the Privy Council had to pronounce upon the validity of certain Manitoba legislation which was attacked as prejudicially affecting the rights of the Roman Catholic minority in that province in regard to separate schools. Section 93 of the British North America Act confides "education" to provincial legislatures with this proviso:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union.

When Manitoba was made a province, the above proviso was altered as to that province by inserting after the words "have by law" the words "or practice." Their Lordships held in effect that the insertion of these words had not placed Manitoba in a position different from that of the older provinces. This decision was much criticized; but in a later case,[1] the Board adhered to the interpretation adopted in *Barrett's Case* and thus justified it:

"It was not doubted that it was proper to have regard to the intent of the legislature and the surrounding circumstances in interpreting the enactment. But the question which had to be determined was the true construction of the language used. The function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its

[9] *References Case* (1912), A. C. 571; 81 L. J. P. C. 210.
[10] (1892), A. C. 445; 61 L. J. P. C. 58.
[1] *Brophy's Case* (1895), A. C. 202; 64 L. J. P. C. 70.

duty is to interpret not to enact. It is true that the construction put by this Board upon the first sub-section reduced within very narrow limits the protection afforded by that sub-section in respect of denominational schools. It may be that those who were acting on behalf of the Roman Catholic community in Manitoba, and those who either framed or assented to the wording of that enactment, were under the impression that its scope was wider and that it afforded protection greater than their Lordships held to be the case. But such considerations cannot possibly influence the judgment of those who have judicially to interpret a statute. The question is not what may be supposed to have been intended but what has been said. More complete effect might in some cases be given to the intentions of the legislature if violence were done to the language in which their legislation has taken shape, but such a course would on the whole be quite as likely to defeat as to further the object which was in view. Whilst, however, it is necessary to resist any temptation to deviate from sound rules of construction in the hope of more completely satisfying the intention of the legislature, it is quite legitimate where more than one construction of a statute is possible, to select that one which will best carry out what appears from the general scope of the legislation and the surrounding circumstances to have been its intention."

Then, again, the introduction of federalism into colonial government was a new departure; and it would not be right as between the federating provinces to construe the Act in the light, as has been said, of any one provincial candle. For example, in defining the area covered by the class "municipal institutions in the province" (*sec. 92, No. 8*), the Privy Council declined[2] to accede to the argument that the power to create such institutions necessarily implied the right to endow them with all the functions which had been ordinarily possessed and exercised by them before the time of the Union. This contention was thus negatived by the Board:

[2] *Local Prohibition Case* (1896), A. C. 348; 65 L. J. P. C. 25.

"Their Lordships can find nothing to support that contention in the language of section 92, No. 8, which according to its natural meaning simply gives provincial legislatures the right to create a legal body for the management of municipal affairs. Until Confederation the legislature of each province as then constituted could if it choose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the parliament of Canada. Since its date a provincial legislature cannot delegate any power which it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of section 92 other than No. 8."

Upon a like broad outlook, the Privy Council, in opposition to the view of all the Ontario Courts and of a majority of the Supreme Court of Canada, construed the phrase "lands reserved for Indians" (*sec. 91, No. 24*) as having reference, not only to the special "Indian reserves," so much referred to in the statute law of (old) Canada, but also to the larger areas covered by the proclamation which followed upon the Treaty of Paris (1763), namely, all areas in respect of which there had been no surrender by the Indian tribes of their aboriginal "title."[4]

The Quebec Resolutions.—As is well known, the British North America Act is largely founded upon the Quebec Resolutions.[5] Canadian judges have frequently quoted from them and have utilized them in construing doubtful passages in the Act. The Privy Council, however, never referred to them in its judgments until within the last year, when they were somewhat casually spoken of as the material upon which the Act was drafted.[5a] For instance,

[4] *St. Cath. Milling Co.* v. *R.* (1889), 14 App. Cas. 46; 58 L. J. P. C. 59.

[5] Printed in full in the Appendix.

[5a] *John Deere Plow Co. Case* (1915), A. C. 330; 84 L. J. P. C. 64.

the words "Rivers and Lake Improvements" in the schedule to section 108 were held[6] to convey to the Dominion not the rivers themselves, but, in the words of the Quebec Resolutions, "River and Lake Improvements:"[7] but the decision was reached on considerations *ab inconvenienti* without reference either to the Resolutions or to the French version of the Act, both of which clearly negative the view contended for by counsel for the Dominion. How far the British North America Act should be judicially interpreted as expressing the will of the Imperial parliament rather than of the federating provinces is a question affecting the use to be made of these resolutions. The fact, too, that they were subjected at London to revision by the delegates from the various provinces renders them somewhat unreliable as legal guides to the interpretation of the British North America Act. Nevertheless, in the latest case[8] in the Supreme Court of Canada involving consideration of the class "the incorporation of companies with provincial objects," reference was freely had both by counsel and by the Court to these Resolutions and to the historical record in Mr. Pope's book[9] of the changes made from time to time in the draft bills before parliament up to the final passage of the Act. In an earlier case before the Supreme Court, Ritchie, C.J., is reported as saying: "The inference is that they altered it advisedly."[10] If so, a comparison of the Resolutions with the Act.

[6] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90.

[7] See No. 55 (5).

[8] *Re Provincial Companies* (1913), 48 S. C. R. 331. See particularly *per* Idington, J., at p. 362, and *per* Brodeur, J., at p. 462.

[9] "*Confederation Documents*," edited by Sir Joseph Pope, 1895 (Carswell & Co.)

[10] *Re Portage Extension of Red R. Ry.*, Cassel's Sup. Ct. Dig. 487. See *Lefroy*, Legislative Power in Canada, 4 (*n*).

and of the Act with the draft bills, should throw some light on the meaning to be attached to the phrase finally adopted. This is clearly so if it is proper to consider the Act as an agreement put into statutory form; and this is in terms affirmed by a recent decision of the Privy Council:

"In 1867, the desire of Canada for a definite constitution embracing the entire Dominion was embodied in the British North America Act."[1]

A Federal Union.

To establish such a union is the avowed object of the British North America Act. The Act is to be so interpreted. The subject, however, is of such wide scope and importance that it should be given a separate chapter.

[1] *Re References* (1912), A. C. 571; 81 L. J. P. C. 210.

CHAPTER XIX.

A Federal Union: Principles Involved.

The provinces originally united by the British North America Act, 1867, asked for a federal union.[1] The Act was passed to embody their desire as its preamble avowedly states, and as is recognized in the familiar language of Lord Watson, speaking for the Privy Council, in the *Liquidator's Case*:[2]

> "The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers, executive and legislative, and all public property and revenues which had previously belonged to the provinces, so that the Dominion Government should be vested with such of those powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government."

Whether the term "federal union" should, as a matter of scientific accuracy, be applied to the Canadian Constitution is a question for constitutional philologists. It is the term in fact used in our Act, as well as in the Australian Commonwealth Act, 1900,[3] to designate a union which, at all events,

[1] See Quebec Resolutions, 1, in Appendix.

[2] (1892), A. C. 437; 61 L. J. P. C. 75.

[3] "Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom

was not to be a Legislative Union; not, in other words, a merger for all purposes of government as a legislative union must be in any land under the rule of law. Apart from detail, the term federal union in these modern times implies an agreement between two or more communities which, as between themselves, are independent and autonomous. Having arrived at a point where community of interest in certain matters is recognized, they agree to commit all their people to the control of one common government in relation to such matters as are agreed upon as of common concern, leaving each local government still independent and autonomous in all other matters. Moreover, and this is the point of difference most plainly discernible between ancient and modern forms of federalism, the central or common government, upon its establishment, is itself independent and autonomous; it operates, as does each local government, upon the individual directly and not through the medium of any other government.[1] And, finally, and as a necessary corollary in any land governed by law, the whole arrangement constitutes a fundamental law to be recognized in and enforced through the agency of the Courts.

The exact position of the line which is to divide matters of common concern to the whole federation from matters of local concern in each unit is not of the essence of federalism. Where it is to be drawn in any proposed scheme depends upon the view adopted by the federating communities as to what, in their actual circumstances, geographical, com-

of Great Britain and Ireland and under the Constitution hereby established: . . . Be it therefore enacted, etc."—63 & 64 Vict., c. 12 (Imp.).

[1] See "*The Federalist*," Nos. 15 & 16 (written by Hamilton), in which it is shown how the absence of this principle in the "Articles of Confederation" which preceded the present Constitution of the United States threatened a dissolution of that confederacy.

mercial, racial, or otherwise, are really matters of common concern and as such proper to be assigned to a common government. But the maintenance of the line, as fixed by the federating agreement, is of the essence of modern federalism; at least, as exhibited in the three great Anglo-Saxon federations of to-day, the United States of America, the Commonwealth of Australia, and the Dominion of Canada. Hence the importance and gravity of the duty thrown upon the Courts as the only constitutional interpreters of the organic instrument which contains the fundamental law of the land. The line is described by metes and bounds, stated in very general terms; and upon a broad, liberal, and statesman-like interpretation of those terms, clearly defining and yet reconciling them, the stability of our institutions largely depends.

The above brief statement of general principles would seem to indicate as proper for treatment in this chapter the following topics: (1) The position of the Courts in reference to questions of legislative competency; (2) the independence of each government, federal or provincial, both as to legislative and executive action and as to proprietary rights; (3) the necessity in some cases for conjoint action to effect desired results; and (4) the aid, if any, to be obtained from United States and Australian decisions.

I. *The position of the Courts in reference to questions of legislative competence.*

All questions as to the constitutional validity of colonial legislation based, as all such legislation is, upon Imperial charter must be determined by the Courts, which will bring them to the touchstone of the charter and so determine whether the limits

therein prescribed have or have not been exceeded.[5] Apart, therefore, from any question concerning federalism, the problem as to any Canadian Act, federal or provincial, is simply this: Is the Act repugnant to the British North America Act?[6] Does the impugned Act overstep the limits prescribed by this Imperial charter for federal or provincial legislation, as the case may be?

But, treating the matter upon larger general principles, it would seem axiomatic that in any country under the rule of law, it necessarily devolves upon the Courts to enquire and determine in any given case whether an Act of a legislature having authority over a limited range of subject-matters is within or without its powers, is or is not law. "A statute emanating from a legislature not having power to pass it is not law."[7] It cannot confer rights or impose liabilities.[8] It is a *nullitas nullitatum*[9] and can affect nobody.[10] And the same law which has prescribed bounds to the legislative power has imposed upon the Judges the duty of seeing that these bounds are not overstepped.[1] This proposition, seemingly so self-evident, was elaborately attacked in argument before the Supreme Court of the United States in 1803 and as elaborately affirmed in the well-known judgment of Chief Justice

[5] *Queen* v. *Burah:* see passage quoted *ante*, p. 94.

[6] The question is not often stated now in this way. It was so stated by the reporter with strict accuracy in *L'Union St. Jacques* v. *Belisle*, L. R. 6 P. C. 31.

[7] *Valin* v. *Langlois*, 5 Que. L. R. at p. 16, *per* Meredith, C.J.

[8] *Theberge* v. *Landry*, 2 App. Cas. at p. 109; 46 L. J. P. C. at p. 4.

[9] *Lenoir* v. *Ritchie*, 3 S. C. R. at p. 625, *per* Taschereau, J.

[10] *Bourgoin* v. *Mont., O. & O. Ry.*, 5 App. Cas. at p. 406; 49 L. J. P. C. at p. 81.

[1] *L'Union St. Jacques* v. *Bélisle*, 20 L. C. Jur. at p. 39, *per* Duval, C.J.

Marshall.[2] It was clearly stated by Lord Hobhouse, speaking for the Privy Council, in *Parsons' Case*:[3]

"In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers."

This duty British Courts in England, Australia, and Canada exercise daily without question and already their decisions upon this branch of Imperial jurisprudence would fill many volumes. The omnipotence of parliament has no place here. It is, no doubt, settled law that the powers of Canadian legislatures, each in its sphere, are plenary powers of legislation; but this is always "jurisdiction conceded."[4]

And where the question of jurisdiction or legislative competence depends under the British North America Act upon a question of fact or a mixed

[2] *Marbury* v. *Madison*, 1 Cranch. 137. In a recent case from Australia, *Webb* v. *Outrim* (1907), A. C. 81; 76 L. J. P. C. 25, the judgment delivered by Lord Halsbury contains, with great deference be it said, some questionable matter. Contrasting the position of an Act of the Victoria legislature with that of a State legislature in the United States, Lord Halsbury says of the former: "If indeed it were repugnant to the provisions of any Act of Parliament extending to the colony it might be inoperative to the extent of its repugnancy; but, with this exception, no authority exists by which its validity can be questioned or impeached. The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a statute upon the ground that it is unconstitutional." The jurisdiction is not to annul; and, until *Marbury* v. *Madison* settled the matter for all time, it was a disputed point whether the Supreme Court could treat as void an Act of Congress repugnant to the written Constitution. It may be added that in Australia *Webb* v. *Outrim* is a much criticized decision. See Law Quart. Rev. No. 90.

[3] 7 App. Cas. 96; 51 L. J. P. C. 11.

[4] See *ante*, p. 357.

question of law and fact, the Courts must determine this preliminary question. For example, the parliament of Canada may deal with matters which are local or private and as such within the ordinary scope of section 92 in cases where such federal legislation is "necessarily incidental" to the exercise of the powers conferred upon the parliament of Canada by the enumerative heads of section 91.[5] It is for the Courts and not for the parliament of Canada to lay down the line of necessity in each case;[6] otherwise, as has been pointed out, the federal character of the union might be ended if the judgment of parliament were to be decisive.[7] Legislative bodies are proverbially impatient of constitutional limitations upon their power; and convenient provisions might easily be deemed necessary provisions. In the one case in which the federal parliament has the right to extend the limit of its own jurisdiction, namely, in the case of local works and undertakings, by declaring them to be for the general advantage of Canada (*sec. 92, No. 10 c.*) complaint is heard of practical usurpation.[8] In all other cases, it is for the Courts to restrain colourable encroachment. The Privy Council had intimated this in several cases before actually interposing in the *Through Traffic Case* just referred to.[9]

[5] *Local Prohibition Case* (1896), A. C. 348; 65 L. J. P. C. 26. See extract, *post*, p. 432.

[6] *Montreal Street Ry.* v. *Montreal*, 43 S. C. R. 197; *per* Duff, J., at p. 229; *per* Anglin, J., at p. 245. The Chief Justice and Girouard, J., concurred in the judgment of Duff, J., and the decision was upheld in the Privy Council: (1912), A. C. 333; 81 L. J. P. C. 145. The question was as to the right of the Dominion parliament to force provincial railways to make certain prescribed agreements with federal railways as to "through traffic."

[7] *Per* Duff, J., at p. 232.

[8] The federal railway in the *Through Traffic Case* just mentioned is a rather startling example. "Small and provincial though it was" is the language of Lord Atkinson in describing it.

[9] See *Russell* v. *Reg.*, 7 App. Cas. 829; 51 L. J. P. C. 77; *Brewers' License Case* (1897), A. C. 231; 66 L. J. P. C. 34; *Atty.-*

Again, the jurisdiction of the Dominion parliament under the opening "peace, order, and good government" clause of section 91 has been held to be "strictly confined to such matters as are unquestionably of Canadian interest and importance." The Courts must accept the heavy responsibility of deciding this question of fact. In the *Local Prohibition Case*,[10] their Lordships of the Privy Council speak of being relieved of this responsibility in reference to the Canada Temperance Act by the previous decision of the Board in *Russell's Case*.[1] No Dominion statute has yet been held *ultra vires* upon this ground as a colourable invasion of the provincial field unless, indeed, the decision of the Privy Council holding invalid the Dominion Liquor License Acts, 1883 and 1884,[2] was based upon this view; but as no reasons were ever published, this must remain uncertain. To what extent the Courts may, in deciding such a question of fact, take judicial notice of conditions, political, social, and industrial, throughout the Dominion may be a very difficult problem. It was held in an early case that the *onus* is on those who assert that a matter in itself local or provincial does also come within one of the enumerated classes of section 91;[3] and it may well be argued that the *onus* would be still harder to satisfy if it were sought to have it established that the matter was unquestionably one of Canadian interest and importance.[3a]

Gen. (Que.) v. *Queen Ins. Co.*, 3 App. Cas. 1090; *Man. Liquor Act Case* (1902), A. C. 73; 71 L. J. P. C. 28. See also *B. C. Elec. Ry.* v. *V. V. & E. Ry.* (1914), 83 L. J. P. C. 374.

[10] (1896), A. C. 348; 65 L. J. P. C. 26.

[1] 7 App. Cas. 829; 51 L. J. P. C. 77.

[2] Commonly called the McCarthy Act. See 4 Cart. 342 *n.*

[3] *L'Union St. Jacques* v. *Bélisle*, L. R. 6 P. C. 31, referred to with approval in *Dow* v. *Black*, *ib.* 272; 44 L. J. P. C. 52.

[3a] See *Re Insurance Act, 1910*, 48 S. C. R. at p. 307, *per* Anglin, J.

Again, the opinion has been expressed that the question as to what are provincial objects within the meaning of *section 92, No. 11,* "the incorporation of companies with provincial objects" must be settled in each case as a question of fact.[4]

It has been suggested that a person may be estopped from setting up the unconstitutionality of a statute;[5] but upon principle this cannot be so. A person may be estopped by his own acts from denying liability, as, for instance, by entering into contracts which, though contemplated by invalid legislation, are valid apart from such legislation; but in any such case, the statute, as a statute, must be treated as non-existent.[6]

In conclusion upon this branch, it is obvious that it is not at all an essential feature of a federal system that some particular Court or Courts should be created for the decision of questions of legislative competency. Any court of law must determine, at the instance of any suitor, the question of the validity of any statute put forward as affecting the rights of the litigants before it, and it is not at all necessary that the Crown by its Attorney-General (federal or provincial) should first intervene.[7] Further discussion of this phase will appear more appropriately when the constitutional law as to the administration of justice in Canada is examined.[8]

[4] *In re Companies Incorporation*, 48 S. C. R. at p. 399, *per* Duff, J. Presumably the facts would have to be taken from the instruments constituting the charter of incorporation. The whole difficult subject is now before the Privy Council.

[5] *Lefroy*, Legislative Power in Canada, 200, n. 1.

[6] *Cooley* on Const. Limitations, 6th ed., at p. 222; *Ross* v. *Guilbault*, 4 Leg. News (Mont.) 415; *Ross* v. *Can. Agric. Ins. Co.*, 5 Leg. News, 23; *Forsyth* v. *Bury*, 15 S. C. R. 543; *McCaffrey* v. *Ball*, 34 L. C. Jur. 91.

[7] *Bourgoin* v. *Montreal, O. & O. Ry.*, 5 App. Cas. 406; 49 L. J. P. C. at p. 81.

[8] See chap. XXVIII., *post*, p. 589.

Daily experience in Canadian Courts supports the general propositions above advanced.

II.—Autonomy.

Neither government (federal or provincial) has power to enlarge its own or the other's sphere of authority, or to take property belonging to the other; unless, in either case, authorized so to do by the Federation Act itself.

(a) *Legislative Jurisdiction.*

The above proposition appears upon reflection to be self-evident, even as to Crown property; but it is thought better, for reasons which will appear later, to confine attention in the first place to legislative jurisdiction simply. The British North America Act defines the limit of jurisdiction in each case; and the proposition, confined as indicated, seems but a re-statement of what has already appeared in a previous chapter in reference to the constituent powers of Canadian legislatures.[8] Any legislation, federal or provincial, which attempted to alter the range of legislative power, as prescribed in the Act, either by increase or diminution of jurisdiction, would be so clearly repugnant to the Act and so subversive of the federating compact which is embodied in it, that it seems unnecessary to dwell at any length on the general question. What Mr. Justice Duff said of the Dominion in the *Through Traffic Case* applies equally to the provinces:

"I do not think there can be found in any of the cases the slightest suggestion that the Dominion has power of its

[8] Chap. V., *ante*, particularly at p. 34-5.

own will to enlarge the limits of its legislative authority. Those limits are fixed by the Act itself."[10]

Express power to enlarge, at its own will, its range of legislative power is in one instance conferred by the Act upon the Dominion parliament, namely, by declaring a local work, though wholly situate within a province, a work for the general advantage of Canada (*sec. 92, No. 10 c.*). The maxim *expressio unius exclusio est alterius* would seem to apply, if it were not so obviously unnecessary to invoke it. The power of the Dominion parliament to pass remedial laws in reference to the educational rights of denominational minorities upon appeal from provincial legislation (sec. 93) is an exceptional power of interference in affairs *primâ facie* provincial, and affords no argument against, but rather as just indicated in favour of the general proposition now under discussion.

Veto power not relevant.—Nor does the existence of the *veto* power in the Governor-General in Council over provincial legislation touch the proposition. It is a matter in which, as was said by the Privy Council in reference to the appointment of a provincial Lieutenant-Governor, the Dominion Government has "no power and no functions, except as representatives of the Crown." It is the Crown's Imperial prerogative, taken by Imperial statute from the Crown in Council (Imperial) and lodged with the Crown in Council (Canadian). It is one feature of "a carefully balanced Constitution under which no one of the parts can pass laws for itself, except under the control of the whole acting through the Governor-General."[1] But in no way

[10] *Montreal Street Ry.* v. *Montreal* (1910), 43 S. C. R. at p. 229; concurred in by the Chief Justice and Girouard, J., and affirmed in the Privy Council (1912), A. C. 333; 81 L. J. P. C. 197.

[1] *Lambe's Case*, 12 App. Cas. 575; 56 L. J. P. C. 87.

does it touch the question of legislative competence, or the essentially federal character of our Constitution.[2]

Federal Act cannot enlarge provincial ambit.—It is equally clear upon authority that a federal statute cannot enlarge the ambit of provincial authority as fixed by the British North America Act. Provincial legislative power in reference to the incorporation of companies is limited to "the incorporation of companies with provincial objects." If this has the effect of preventing provincially incorporated companies from extending their activities beyond the bounds of the incorporating province—and that is a very moot point[3]—the unanimous view of the Judges of the Supreme Court of Canada is that a Dominion Act purporting to license such companies to carry on business anywhere in Canada is quite powerless to that end; nor would a provincial Act of like character be effectual in such province as to a company incorporated in another province.[4] The question, however, is not without its difficulties; and certain recent federal legislation concerning Sabbath observance appears to be based upon the view that the Dominion parliament may validly empower a provincial legislature to make laws in relation to subjects within federal jurisdiction; a view which, it is conceived, is radically unsound, but which nevertheless has the support in this instance of very high authority. The question merits closer examination.

The right of a sovereign legislature to delegate to a subordinate body some part of its legislative

[2] This subject is discussed more at length in chap. VIII., *ante*, p. 150 *et seq.*

[3] Now before the Privy Council on appeal in the case cited in the next note.

[4] *In re Companies* (1913), 48 S. C. R. 331.

functions is beyond question;[5] and the parliament of Canada and the assemblies of the several provinces are all sovereign legislatures within their respective spheres. They can take advantage of the existence within the territorial limits of their jurisdiction of any person or body of persons or of any corporation, municipal or other, to confer rights or impose duties upon such persons or corporations; in other words, as previously intimated, federal or provincial laws competently enacted operate directly upon the individual, natural or artificial.[6] For example, the parliament of Canada has adopted for the purposes of criminal procedure the juries selected under provincial law, and has thereby effectually imposed federal duties, so to speak, upon the persons so selected.[7] It has also adopted as the proper qualification for the federal voter the provincial franchise, and has thereby effectually clothed the provincial voter, speaking generally, with the right to vote at federal elections.[8] This is sometimes spoken of as legislation by reference and no serious question has ever been raised as to its validity.

And the parliament of Canada or a provincial legislature can confer power upon a subordinate agency to make regulations for the better carrying out in detail of the scheme of any enactment. As was said in *Hodge's Case*,[9] a legislature committing important regulations to agents or delegates does not efface itself. On the contrary—

"It retains its powers intact and can, whenever it pleases, destroy the agency it has created and set up another or take the matter directly into its own hands. How far

[5] *Hodge's Case* (1883), 9 App. Cas. 117; 53 L. J. P. C. 1.
[6] *Ante*, p. 371.
[7] *R.* v. *O'Rourke*, 32 U. C. C. P. 388; 1 Ont. R. 465: *R.* v. *Provost*, 29 L. C. Jur. 253; *R.* v. *Plante*, 7 Man. L. R. 537.
[8] See R. S. C. (1906) c. 6, part I.
[9] *Ubi supra.*

it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for courts of law, to decide."

But, it is conceived, there is nothing in all this to give any countenance to the notion that by Canadian legislation, federal or provincial or both, a readjustment of the respective spheres of legislative authority as fixed by the British North America Act can be brought about; that, for example, the Dominion parliament can confer upon a provincial assembly any power of legislation not possessed by such assembly under the imperial statute. No such constituent power has been given by the Act to either legislature.[10] It is not covered by any affirmative words and is radically repugnant to the principle underlying the use of the mutually restrictive word "exclusive" as applicable to the two competing groups of class-enumerations. Provincial legislation which, *ex hypothesi*, requires federal legislation to support it is not legislation at all.

Nevertheless, as a mere question of method, the Dominion parliament may legislate as it will by reference. It may enact as law the resolutions of a debating club; and this, in principle, is what has been attempted in connection with Sabbath observance laws. Such laws have been held by the Privy Council to fall within the class "the criminal law" and therefore within the exclusive legislative authority of the parliament of Canada. But by the Lord's Day Act [1] and by a section in the Railway Act of Canada,[2] the federal parliament has purported, apparently, to throw upon the provincial legislative assemblies a constitutional burden which is clearly not theirs. If, however, those assemblies

[10] See *ante*, p. 34 *et seq.*

[1] R. S. C. (1906) c. 153.

[2] R. S. C. (1906) c. 37, sec. 9.

choose to express in what is not a valid legislative Act views which they have no constitutional right to put forward as the views of the provincial electorate, there would seem to be no doubt that the resulting document—in itself a *nullitas nullitatum*[3] —may be made federal law by federal enactment. Whether, on the proper construction to be placed upon the federal enactments as they now stand, this is what has been done, may be doubted.

The Lord's Day Act contains a section (16) expressly saving " any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada "; but this could not operate upon any Act or law which was not really federal law, that is to say, which was not a law which, if non-existent, the parliament of Canada could enact.[4] In other words, the Lord's Day Act leaves untouched existing Sabbath observance laws which otherwise might be deemed to be repealed by it. Manifestly it could not touch any law, whether pre-confederation or post-confederation, in force in any province which, if enacted after the union, would be properly classified as provincial and not federal.[5]

Some of the prohibitive clauses of the Act declare it to be unlawful for any person to do certain things on the Lord's Day " except as provided herein or in any provincial Act or law now or hereafter in force." If the word "provincial" was intended to mean " passed by a post-confederation provincial legislative assembly " — the word " hereafter " points to that conclusion—the Dominion parliament has attempted to confer upon a provincial legislature the power to repeal as to the province some of the provisions of the Lord's Day Act. In a recent

[3] See *ante*, p. 373.

[4] *Dobie's Case*, 7 App. Cas. 136; 51 L. J. P. C. 26; *Local Prohibition Case* (1896), A. C .343; 65 L. J. P. C. 26.

[5] See *post*, p. 405.

case before the Supreme Court of Canada, Mr. Justice Davies expressed a strong opinion in favour of the right of the parliament of Canada to confer such a delegated authority;[6] and in a still later case in British Columbia, Hunter, C.J., spoke of the provision as enabling the province "to reduce the scope or mitigate the severity of the general prohibition in respect of the topics mentioned in the section."[7] The true view, it is submitted with all respect, is that taken by Mr. Justice McPhillips in the Court of Appeal for British Columbia,[8] that it is not competent for a provincial legislature to enact any legislation in the nature of criminal law nor is it competent for the parliament of Canada to confer upon or delegate to a provincial legislature any authority to enact such legislation. To repeal or alter or modify existing criminal legislation, such as the Lord's Day Act of Canada, is to pass criminal legislation.[9] The judicial utterances above referred to were *obiter*, as the attempted provincial enactment in each of the above cases was prohibitive and not by way of exception. If, however, a provincial legislature can reduce the scope or mitigate the severity of the Lord's Day Act it can delegate the power to a municipal body;[10] otherwise the anomaly would exist of an assembly possessed both of the power of legislation in the proper sense of that term and of certain other power exercisable as a strictly delegated power only, not capable of being further delegated.

The section of the Railway Act of Canada on the subject of Sabbath observance above referred to is

[6] *Ouimet* v. *Bazin* (1912), 46 S. C. R. 502, at p. 514.

[7] *R.* v. *Walden* (1913), 19 B. C. 539. See also *R.* v. *Laity*, 18 B. C. 443.

[8] *Ib.* at p. 545.

[9] "Parliament is the sole custodian of authority to make, amend, or repeal criminal laws."—*Ib.*, *per* Macdonald, C.J., at p. 342.

[10] *Hodge's Case*; see *ante*, p. 350.

limited to conferring power upon provincial legislatures to prohibit labour on Sunday upon railways situate wholly within a province, but brought within federal jurisdiction by a declaration by the parliament of Canada that they are for the general advantage of Canada.[1] The effect of this legislation was elaborately discussed by Chancellor Boyd in a recent case in Ontario.[2] He treated the enactment as in the nature of a modification of the effect of the declaration; as restoring to the province a legislative power over the railway which the declaration had taken from it. He thought the legislation *intra vires;* but a perusal of the judgment discloses that it was as federal legislation by reference rather than as provincial legislation. And it should be noted that the description which he gives of the two legislatures, federal and provincial respectively, as "a superior and a subordinate legislature," is contrary to the authoritative pronouncement of the Privy Council in the *Liquidator's Case.*[3] The judgment of the Chancellor was reversed by the Court of Appeal, but upon the ground that as the railway was one within federal jurisdiction by reason of the fact that it extended (potentially) beyond the province, it did not fall within the permissive section of the Railway Act of Canada, which covered only railways which, but for the declaration, would be provincial railways.[4] The question of delegation was not discussed.

Question of concurrent powers here irrelevant.—It is now definitely settled that the classes enumerated in sections 91 and 92 do to some extent interlace and that there may be a domain in regard to which either legislature may legislate if the field be clear. If in such a domain the two legislations meet,

[1] B. N. A. Act, 1867, sec. 92, No. 10 (c).
[2] *Kerley* v. *London & L. E. Trans. Co.*, 26 Ont. L. R. 588.
[3] See extract *ante*, p. 351.
[4] 28 Ont. L. R. 606. See *post*, p. 747.

then the Dominion legislation must prevail.[5] This is the proper interpretation of the British North America Act as determined by the Courts; as will more fully appear later. This question of concurrent or overlapping powers is one of the most intricate and difficult of the many questions which arise under a federal system; but a little reflection will make clear that it does not touch the proposition now under discussion. A federal Act, in the case put, intervenes, and so long as it remains in force, overrides provincial law; but it does so because and only because it is *intra vires* federal legislation. For example, the law governing generally the relations between master and servant is provincial law ("civil rights in the province:" sec. 92, No. 13) which, in the absence of any federal law to the contrary, would govern the relations between a federal railway and its employees. But the Dominion parliament, it has been said, is entitled by virtue of its legislative jurisdiction over federal railways (*sec. 92, No. 10a*) to make laws governing the relations between such railways and their employees.[5a] In other words, such a law is within and not without the limits of Dominion competence as fixed by the Act. It does not alter the range; it keeps within it, as the Privy Council has decided.

(*b*) *Neither Government Can Take Property Belonging to the Other.*

There is a broad distinction between legislative jurisdiction and proprietary rights.

There can be no *a priori* probability that the British legislature in a branch of the statute which professes to deal

[5] *Grand Trunk Ry.* v. *Atty.-Gen. Can.* (1907), A. C. 65; 76 L. J. P. C. 23.

[5a] *Contracting-out Case*, cited in last note.

only with the distribution of legislative power intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets.[6]

For example, the legislative power over "Indians and lands reserved for Indians" conferred by No. 24 of section 91 upon the parliament of Canada is "not in the least degree inconsistent with the right of the provinces to a beneficial interest in those lands."[7] And so as to "fisheries" (*sec. 91, No. 12*), proprietary rights may be vested in the Crown in right of a province side by side with and notwithstanding the legislative power of the Dominion parliament over that particular subject, although, of course, the exercise of such legislative power may materially affect the proprietary rights of individuals or of the provinces.[8]

On the other hand, the ownership in the Crown, in right of the Dominion or of a province, of public property places such property within the exclusive legislative control of the Dominion parliament or of the provincial legislature, as the case may be. This has been expressly held in the case of Dominion public property;[9] and is indeed covered by one of the enumerated classes of sec. 91, "the public debt and property" (No. 1). This obviously has reference to the public debt of the Dominion, as a unit, assumed at Confederation or since incurred, and to the public property held by the Dominion govern-

[6] *St. Catherines Milling Co.* v. *Reg.*, 14 App. Cas. 46; 58 L. J. P. C. 59.

[7] *Ib.*; followed in the *Indian Claims Case* (1897), A. C. 199; 66 L. J. P. C. 11; and in *Ont. Mining Co.* v. *Seybold* (1903), A. C. 73; 72 L. J. P. C. 5.

[8] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90.

[9] *Burrard Power Co.* v. *R.* (1911), A. C. 87; 80 L. J. P. C. 69; *Re British Columbia Fisheries* (1914), A. C. 153; 83 L. J. P. C. 169.

ment for Canada, as a whole.[10] The companion item, so to speak, of section 92, No. 5, "the management and sale of the public lands belonging to the province and the timber and wood thereon," is more limited in its phraseology; but the power of appropriation, which is a legislative power, over all Crown revenues and assets in the provinces prior to Confederation was clear and section 117 of the British North America Act provides:

> 117. The several provinces shall retain all their respective public property not otherwise disposed of by this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country."

Salus populi suprema lex; but this, it is conceived, is the only case in which the right of one government in Canada to expropriate the property of another government exists under the Act. The *Indian Lands Cases* lay down this proposition very clearly as to the provincial interest in lands which are still subject to the 'Indian title;' the Dominion cannot by its legislation or by treaty with the Indians thereunder, effect the proprietary rights of the province.[1] And so as to the proprietary rights of a province in fisheries, arising from its ownership of the public lands; those rights cannot be alienated by Dominion legislation.[2] Referring to these cases, Mr. Justice Duff said:

> "The reasoning upon which these decisions are based appears to involve the principle that except in the special case mentioned in section 117 the distribution of property

[10] *Burrard Power Case*, 43 S. C. R. at p. 51, *per* Duff, J., in whose judgment the Chief Justice and Sir Louis Davies, J., concurred.

[1] *St. Catherines Milling Co.* v. *R.*, 14 App. Cas. 46; 58 L. J. P. C. 59; *Ontario Mining Co.* v. *Seybold* (1903), A. C. 73; 72 L. J. P. C. 5.

[2] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90.

between the Dominion and the provinces is not subject to be readjusted at the will of one of the parties and, consequently, that a province cannot take away either for the benefit of itself or for the benefit of another any of the property appropriated by the British North America Act to the Dominion."[3]

The principle was applied in the *Water Rights Case,* from which the above extract is taken, in favour of the Dominion as against the province of British Columbia which had assumed to grant water rights in the Railway Belt of that province, which under the terms of union agreed to when British Columbia entered the Canadian Union had become Dominion property;[4] but, as stated, the principle covers the converse case of federal legislation attempting to take provincial property. And if the Dominion cannot itself take, it cannot authorize any person, natural or corporate, to take. The Privy Council has, however, held that a federal railway may expropriate provincial Crown land;[5] but it was not necessary to the decision of the case to take such broad ground, and the opinion expressed is opposed in principle to that underlying the other decisions above mentioned. The question was as to the right of the Canadian Pacific Railway to expropriate Crown property on the foreshore of Burrard Inlet in front of the City of Vancouver. The foreshore there was held to be part of a public harbour and therefore property belonging to the Dominion; and that holding was sufficient to dispose of the case. Moreover, the rights of that railway in British Columbia rest largely upon the Terms of

[3] *Burrard Power Co.* v. *R.*, 43 S. C. R. 27, at p. 52. As already noted, the Chief Justice and Davies, J., concurred in the opinion of Duff, J. The judgment was affirmed in the Privy Council (1911), A. C. 87; 80 L. J. P. C. 69.

[4] See Appendix.

[5] *Atty.-Gen. B. C.* v. *Can. Pac. Ry.* (1906), A. C. 204; 75 L. J. P. C. 38, usually referred to as the *Vancouver Street Ends Case.*

Union which were embodied in the Order-in-Council (Imperial) admitting that province to the Canadian Union and which, under section 146 of the British North America Act, have the force of an Imperial Act. The view was expressed in the Court below that the Terms of Union gave the Dominion power to take Crown land, whether provincial or federal, for the construction of the Canadian Pacific Railway.[6]

In a very recent case in the Exchequer Court, however, the right of the Dominion to expropriate provincial Crown lands is treated as settled by the decision of the Privy Council in the case just noted.[6a]

(*c*) *No government in Canada, federal or provincial, can in the exercise of its constitutional functions create of its own will alone obligations to be met by any other government.*

The Dominion or a province in the exercise of its powers of government under the British North America Act acts for itself and upon its own responsibility. It is not the constitutional agent of or trustee for any other government, so as to impose by any action of its own any liability upon such other government to indemnify it for expenditures incurred or any legal obligation to implement its action; unless, indeed, there is something in the nature of a contractual or quasi-contractual relation between the two or more governments concerned in reference to the action in question.

The position of the Courts in reference to the Crown in Canada and to controversies between the different governments of His Majesty in Canada

[6] *Atty.-Gen. B. C.* v. *Can. P. Ry.*, 11 B. C. 28; *per* Hunter, C.J., and Martin, J.

[6a] *R.* v. *Tweedie*, 15 Exch. Ct. R. 177. The land was taken for the Intercolonial Railway and the province concerned disclaimed any interest in it. The opinion expressed was therefore *obiter*.

will come up for somewhat detailed discussion later. Here it may be premised that, apart from statutory agreement, such controversies could not come before the Courts. The Crown cannot ordinarily be impleaded without its own consent. Any difficulty, however, on this score has been obviated by the passage by the Dominion parliament and by each of the provincial legislatures of statutes conferring upon the Exchequer Court of Canada jurisdiction to decide such controversies, not only between the Dominion and a province, but also as between two or more provinces.[7] The decision, however, must be rested upon " some recognized legal principle."[8]

Under this statute, the Dominion brought suit against Ontario, claiming to be indemnified for expenditures incurred and obligations undertaken by the Dominion in arranging what is known as the North-West Angle Treaty with the Indians of North-Western Ontario for the surrender of the " Indian Title."[9] The removal of the burden of that title from a large area of land within the boundaries of Ontario enured, no doubt, to the benefit of that province in a marked degree; but, as the Treaty has been negotiated without the concurrence of Ontario—so that no question of contractual relationship, express or implied, could be seriously argued —it was held by the Supreme Court of Canada,[10] on appeal from the Exchequer Court, that no right to indemnity existed. This decision was affirmed by the Privy Council;[1] and the judgment of that

[7] The Dominion Statute is R. S. C. (1906), c. 140, the " Exchequer Court Act."

[8] Case cited in note 10, *infra*.

[9] The question as to " Indians and lands reserved for the Indians " will, of course, be more fully dealt with later. See *post*, p. 633.

[10] *Indian Treaty Indemnity Case (Ontario v. Canada)*, 42 S. C. R. 1, reversing 10 Exch. Ct. R. 445 (Burbidge, J.)

[1] (1910), A. C. 637; 80 L. J. P. C. 32.

tribunal, it is conceived, fully supports what has been said above. It should be noted, however, that the question as to "the liability of the Ontario government to carry out the provisions of the treaty so far as concerns future reservations of land for the benefit of the Indians" was left open by the Board; but the earlier decision in the *Special Reserves Case*[2] to the effect that any definite reserve "could only be effectually made by the joint action of the two governments," seems to put the obligation of Ontario no higher than "an honourable engagement" only, which no Court could measure or enforce. The particular question, no doubt, may never arise, as statutory agreements have been made for joint action in the selection of reserves; but the suggestion that the Dominion by its legislation and by treaty thereunder could place any legal obligation upon a province to part with any portion of its public lands without its own consent, seems irreconcilable with the principles laid down in the earlier cases. What Court could measure the extent of the obligation or usurp the right of His Majesty's provincial government to decide for itself how far it would be just to the province to implement a possibly impolitic and extravagant Dominion bargain to which the province, *ex hypothesi*, was not a party?[3]

In conclusion upon this branch of our subject, as well as in affirmance of the exclusive right of each government in Canada to control its public property, the following passage from the judgment of Mr. Justice Duff, in the *Treaty Indemnity Case*,[4] is cited:

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[2] *Ont. Mining Co.* v. *Seybold* (1903), 73; 72 L. J. P. C. 5.

[3] See *ante*, p. 136 *et seq.*, as to the power of the Crown to affect private rights or alter the law by treaty.

[4] 42 S. C. R. at p. 127. Maclennan, J., concurred *simpliciter* with Duff, J.; and the judgment of the Privy Council is based upon the principle stated in this extract.

"The Crown on the advice of the Legislature of a province (acting within the limits prescribed by the 'British North America Act") may authorize the undertaking on behalf of the province of a financial or other obligation. I do not think the Act creates any other agency having authority to fasten upon a province as such any such obligation. The view advanced on behalf of the Dominion, as I have just indicated it, is, of course, the negation of this; but, as I conceive, that view is incompatible with the true view of the status of the provinces under the British North America Act. . . . .

"The independence of the provinces as regards their control of the property and revenues appropriated to them by the Act has been emphasized in a series of decisions; and it has been frequently pointed out that the parts of the Act in which property and revenues are declared to "belong to" or to be "the property of" the provinces import simply that the public property and revenues referred to while continuing to be vested in the Crown are made subject to the exclusive disposition of the provincial legislatures."[5] . . .

"I am unable to reconcile these views touching the constitutional position of the provinces and the measure of control conferred upon the provincial legislatures respecting the property and revenues vested in them with the contention that the grant to the Dominion of legislative power in respect of the subjects enumerated in section 91 implies the right in the exercise of that power to dispose, indirectly (without the consent of the provincial legislatures) of such properties and revenues by fastening upon the provinces without any such consent obligations of a financial character. This view, if accepted, would, I think, be simply destructive of what Lord Watson in the passage quoted above describes as 'the independence and autonomy of the provinces.'"

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[5] *St. Catherines Milling Co.* v. *R.*, 14 App. Cas. 46; 58 L. J. P. C. 59; *Mercer's Case*, 8 App. Cas. 767; 52 L. J. P. C. 84; and the *Fisheries Case* (1898), A. C. 70; 67 L. J. P. C. 90; are then cited and quotations extracted.

III.—*Necessity for Conjoint Action.*

A federal union, as has been well said, has the defects of its qualities. There are some things perhaps that cannot be done at all; at all events, there are things that cannot be done in the way and shape in which they could be done by the one legislature of a legislative union.[6] The Crown's proprietary rights in Canada as they exist under the British North America Act cannot be altered, except by conjoint action, and disputes between governments in Canada can be submitted to judicial determination only by agreement. But, apart from the relations *inter se* of the various governments, there are cases in which the interest of the public cannot be fully conserved, in which great evils may flourish, unless by concerted action on the part of the federal and provincial authorities the situation is met, the evil suppressed. These propositions, it is conceived, are fully supported by decided cases. For example:

Public rights.—The adjustment of the rights or just claims of the Indians who are under federal wardship, both as to their persons and property, and of the provinces to whom belong the lands upon which the burden of the "Indian title" rests, can be effected satisfactorily only by harmonious concert. In dealing with the Indians, the Dominion government may desire to establish special reserves in which the Indians will possess a higher proprietary right than their aboriginal title gives them over the area to be surrendered; and this cannot be done without the concurrence of the provincial government within whose jurisdiction the lands lie.[7]

"The Crown acts on the advice of Ministers in making treaties; and, in owning public lands, holds them for the

[6] Mr. Edward Blake, *arguendo*, in the *Indian Lands Case.*

[7] *Ontario Mining Co.* v. *Seybold* (1903), A. C. 73; 72 L. J. P. C. 5.

good of the community. When differences arise between the two governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands, they must be adjusted as though the two governments are separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively."[8]

Again, mining rights in the "Railway Belt" of British Columbia can be satisfactorily dealt with and fully vested in private parties only by the conjoint action of the federal and provincial authorities. The Crown in right of Canada is possessed of the public land in that belt, including the baser metals; while the right to gold and silver is held by the Crown in right of the province.[9] The miner's grant to be practically effective must come from the Crown in both capacities.[9a] And the same is true of the right to the use of water from streams which flow in one part of their course over provincial or private lands and over the federal lands of the belt in another.[10] Concerted action is necessary if a uniform and practical code is to be established.

Again, the due administration of justice requires concerted action. The provinces have jurisdiction to constitute, maintain, and organize provincial courts (*sec. 92, No. 14*); but the appointment and payment of the Judges of the Superior District and County Courts is in the hands of the federal government (*secs. 96, 100*). Refusal to co-operate might easily result in chaos.

[8] *Indian Treaty Indemnity Case* (1910), A. C. 637; 80 L. J. P. C. 32. The two governments are invested by the Act of the Crown-in-parliament (Imperial), that is to say, by the British North America Act, with these distinct and independent rights. *Pro hac vice* Sovereignty is divided.

[9] *Precious Metals Case*, 14 App. Cas. 295; 58 L. J. P. C. 88.

[9a] See, however, *post*, p. 624, note 2.

[10] *Burrard Power Co.* v. *R.* (1911), A. C. 87; 80 L. J. P. C. 69; *Re B. C. Fisheries* (1914), A. C. 153; 83 L. J. P. C. 169.

Private rights.—The same necessity exists in the field of private rights, personal and corporate. For example, the provinces control local works and undertakings other than those specified (*sec. 92, No. 10*); amongst those specified are federal railways. The just claims of the public in regard to traffic, freight and passenger, passing over both a federal and a provincial railway can be satisfactorily met only by concerted action on the part of all the governments concerned, federal or provincial.[1]

The litigation over the Temporalities Fund of the Presbyterian Church affords another example. The division of (old) Canada into the two provinces of Ontario and Quebec left corporations created by the parliament of (old) Canada in a peculiar situation. By section 129 of the British North America Act, all pre-existing laws in force in (old) Canada, Nova Scotia and New Brunswick were continued, subject to be repealed, abolished, or altered by the parliament of Canada or by the legislature of Ontario or Quebec "according to the authority of the parliament or of that legislature under this Act." The result would be that in a case where the objects of incorporation were clearly "provincial objects" as to Ontario or Quebec as the case might be, the Act of Incorporation would, after Confederation, be a provincial statute; in all others, it would be a federal or Dominion Act. The Board for the management of the Temporalities Fund had its head office in Montreal, the funds were largely invested in the province of Quebec, but the beneficiaries were in both provinces and the Synod of the Church which had some measure of control over the Board was not local to either of the new provinces. An Act of the Quebec legislature providing for the

[1] *Through Traffic Case* (1912), A. C. 333; 81 L. J. P. C. 147; 43 S. C. R. 197.

future disposal of this fund upon the taking place of the contemplated union of the various Presbyterian bodies throughout the Dominion was held *ultra vires*. The province of Ontario had passed a similar statute. But it was held that the corporation and the corporate funds were not capable of division according to the limits of provincial authority and that a re-arrangement, such as contemplated, could be accomplished only by the concurrent action of all three legislatures. The two provincial Acts could not operate to repeal a federal statute and so work a dissolution of the corporation. That could only be done by a federal Act; after which the fund could be divided on provincial lines and in each province be committed to the control of a provincially incorporated body.[2]

A similar difficulty arose in attempting to transfer an existing federal railway to the government of Quebec, with a view to amalgamating it with a provincial road. Federal legislation was held necessary to work a dissolution of the existing corporation or to transfer its undertaking.[3]

IV.—*Decisions of United States' and Australian Courts.*

(*a*) *United States' Cases.*—There is another matter which merits mention in this place, the extent, namely, to which Canadian Courts may avail themselves of the decisions of the United States Courts as to the powers of Congress and the State legislatures respectively. They are not, of course, authorities binding upon our Courts, but under proper safeguards are very valuable aids to the

[2] *Dobie* v. *Temp. Fund Board*, 7 App. Cas. 136; 51 L. J. P. C. 26.
[3] *Bourgoin* v. *Mont., O. & O. Ry.*, 5 App. Cas. 381; 49 L. J. P. C. 68.

study of the British North America Act.[4] The real difficulty, the risk even, in utilizing them for purposes of illustration arises from the difference not only in the principle, but also in the method, of division. There are certain matters on which neither the Dominion parliament nor a provincial legislature can legislate;[5] and so, under the American system, there are certain laws which neither Congress nor a State legislature can pass. But there is not the slightest ground for comparison as to the nature and character of the subjects which are withheld from the legislative competence of Canadian legislatures and theirs, respectively. Canadian legislatures are debarred from legislating upon certain matters because those matters are deemed to be of Imperial concern, while the legislative power of both Congress and the State legislatures is circumscribed mainly in favor of individual liberty;[5a] and, in some of the State constitutions more lately adopted, the limitations on the legislative power of the State legislatures certainly go to very extreme lengths.[6] It cannot be said, therefore, in reference to the American system that if power over a certain subject matter is not with Congress, it must be with the State legislatures, for it may be with neither. The "people of the United States," as a grand aggregate, have limited the power of Congress, and the people of the individual States, viewed as smaller aggregates, have likewise limited the sphere of authority of the different State legislatures. The matters allotted to Congress are, in a sense, specially enumerated, the unenumerated residuum being reserved (subject to certain prohibitions set out in

[4] See the remarks of Hagarty, C.J., in *Leprohon* v. *Ottawa*, 2 O. A. R. at p. 533.

[5] See Part I. of this book.

[5a] See Art. I., ss. 9 and 10.

[6] *Bryce's* "American Commonwealth," Vol. I., 423 *et seq.*

the constitution of the United States)[7] to the States or to the people; but the State legislatures again may be, and in many cases are, under the State constitutions, bodies with specially enumerated powers. In short, in the American system there are matters over which no body has legislative power, matters held in reserve, as it were, by the people of the United States or by the people of the respective States.

Confining attention to Congress: After the enumeration of the special matters (themselves described in very comprehensive terms) over which the Congress is to have legislative power, there follows this clause:[8]

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof":

and under this clause, as construed by Marshall and his successors, the powers of Congress in relation to the national government of the United States can hardly be said to be specially enumerated powers only.[8a]

Nothing short of the most thorough mastery of the United States constitutional system would warrant one in drawing analogies between the line of division they have adopted and that drawn by the British North America Act. The Judicial Committee of the Privy Council, while not slow to express their admiration for the Supreme Court of the United States, and the eminent jurists who from time to time have occupied seats upon that tribunal,

[7] Art. I., s. 10.

[8] Art. I., s. 8.

[8a] *Woodrow Wilson*, "Congressional Government;" see *ante*, p. 341.

have always deprecated any attempt to draw analogies between the Canadian and the American systems:

> Their Lordships have been invited . . . to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each State may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution, Chief Justice Marshall found one of those limits at the point at which the action of the state legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures, under section 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the confederated provinces a carefully balanced constitution under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question which they have to answer is whether the one body or the other has power to make a given law."

This passage suggests that, in the view of the committee, the absence of the power of disallowing state legislation may have led the United States Courts to scrutinize that legislation more closely, and may have caused the adoption of a wide interpretation of the article of the United States Constitution conferring power upon Congress "to make all laws which shall be necessary and proper

for carrying into execution" the enumerated powers.[9]

By giving a wide scope to the "implied powers" of Congress and by refusing to sit in judgment upon the view taken by Congress as to the necessity for its legislation, so long as its aim appeared legitimate to the Court,[10] the Supreme Court of the United States has established the proposition that "the States have no power, by taxation or otherwise, to impede, burden or in any manner control any means or measures adopted by the federal government for the execution of its powers."[11] It is to be noted, too, that there are not in the Constitution of the United States two groups of class enumeration, federal and state, to be interpreted and reconciled as under the British North America Act; so that, with us, a power which might readily be implied under the general words of section 91 cannot be so implied, because some clause of section 92 forbids the implication, and *vice versâ*. With them, on the other hand, there is not any class enumeration for the States; they have an *unenumerated residuum;* and full play, therefore, has been possible for the doctrine of implied powers in support of federal Acts.

(*b*) *Australian Cases.* — The Constitution of Australia was intended, it is said, to follow the United States' rather than the Canadian pattern. Upon this view, the High Court of Australia held, upon the principle elaborated by Chief Justice

[9] See *Atty.-Gen.* (*Que.*) v. *Queen Ins. Co.* (1878), 22 L. C. Jur. 309; *per* Ramsay, J.; *Reg.* v. *Gold Comm.*, 1 B. C. (pt. 2) 260, *per* McCreight, J.

[10] *United States* v. *Fisher* (1804), 2 Cranch. 358; *McCulloch* v. *Maryland* (1819), 4 Wheat. 316; *Story* on the Const., 5th ed., Vol. II., 153.

[11] Henry Hitchcock, LL.D., in Mich. Univ. Law Lectures, 1889, at p. 94 (G. P. Putnam's Sons, London and New York, 1889).

Marshall in *McCulloch* v. *Maryland*,[2] that State legislation could not impose taxation upon federal officials. But the Privy Council declined to recognize the analogy and reversed the colonial decision.[3] Nevertheless, the view is still, apparently, strongly held in Australia that the analogy exists and that United States decisions are peculiarly helpful in construing the Australian Commonwealth Act. The Australian States have an unenumerated *residuum;* but whether this will result in the adoption of the wide United States doctrine of implied powers in support of federal legislation is questionable.[3a] The uncertainty of the position, however, makes it dangerous to express any decided view.

In conclusion upon the subject matter of this chapter, this quotation may be pardoned:

"We live under a federal system of government. With regard to certain matters the Canadian people speak as a unit; while, as to other matters we speak separately and, if we choose, diversely by provinces. The system was brought to birth only after long travail. The minds of our best men were long occupied in fixing upon the proper line of division between matters of general or Canadian concern and matters of more immediately local or provincial concern; and the result of their labours as embodied in the British North America Act should be loyally recognized and respected. No doubt honest differences of opinion may exist in many cases as to where the line is drawn in that Act or as to the question on which side of the line a particular matter should properly fall. But to suggest doubt where no real doubt exists, and particularly as to matters apt to inflame, is not to be commended."[4]

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[2] (1819), 4 Wheat. 316.

[3] *Webb* v. *Outrim* (1907), A. C. 81; 76 L. J. P. C. 25. See note *ante*, p. 374. See also *post* p. 641.

[3a] See *Atty.-Gen. for Australia* v. *Colonial Sugar R. Co.* (1914), A. C. 237; 83 L. J. P. C. 154.

[4] *In re Nakane* (1908), 13 B. C. at p. 376.

The best qualities of restraint and forbearance, as well as a loyal desire for co-operation in all that tends to Canadian well-being, may find full play under the system of federal government established by the British North America Act.

CHAPTER XX.

The Division of the Field.

There are certain sections of the British North America Act which confer legislative power of a constituent character in relation to the conduct of business in the different legislatures and in relation to elections and the electoral franchise which have already been discussed at sufficient length.[1] These may be classed as of a subjective character. As said by Chief Justice Ritchie:[2]

"It will be observed that of the classes of subjects thus enumerated either in respect to the powers of the provincial legislatures or those of the parliament of Canada, there is not the slightest allusion, direct or indirect, to the rights and privileges of parliament or of the local legislatures,[3] or to the election of members of parliament or of the houses of assembly, or the trial of controverted elections, or proceedings incident thereto. The reason of this is very easily found in the statute and is simply that, before these specific powers of legislation were conferred on parliament and on the local legislatures, all matters connected with the constitution of parliament and the provincial constitutions had been duly provided for, separate and distinct from the distribution of legislative powers and, of course, overriding the powers so distributed. For, until parliament and the local legislatures were duly constituted, no legislative powers, if conferred, could be exercised."

What may be called, then, the objective division of the field for legislative purposes is provided for

[1] Chapter V., *ante*, p. 38 *et seq.*

[2] *Valin* v. *Langlois*, 3 S. C. R. 1, at p. 11.

[3] Section 92, No. 1 ("the amendment from time to time . . . of the Constitution of the Province, etc.") has since been held to cover these matters in the provincial sphere. See *ante*, p. 45.

in Part VI. of the Act (sections 91 to 95, both inclusive), in section 101, and in section 132; though the appropriation clauses of Part VIII. should not be overlooked.[4]

Reference, however, should first be particularly drawn to section 129 of the Act:

> 129. Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the parliament of Great Britain or of the parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the parliament of Canada, or by the legislature of the respective province, according to the authority of the parliament or of that legislature under this Act.

This body of laws and legal institutions may be considered the raw material, so to speak, upon which the post-Confederation legislatures were to operate, each according to its authority under the British North America Act. It must be borne in mind that there are many laws, common law as well as statutory, on many subjects, which have come down from pre-Confederation days; and these can be altered, modified, or repealed only by that legislative body which could now enact them were they non-existent.[5] The division, therefore, effected by the Act was a present division of the whole body of existing law in its widest sense, as well as a division of the field for future exercise of legislative

[4] See *ante*, p. 325, *et seq.*

[5] *Dobie* v. *Temporalities Fund Board*, 7 App. Cas. 136; 51 L. J. P. C. 26; *Local Prohibition Case* (1896), A. C. 343; 65 L. J. P. C. 26.

authority. At once upon the Act taking effect, that portion of existing law in each province which fell within the sphere of the authority of the parliament of Canada became a body of federal law, while the remainder might not inaptly be styled a body of provincial law.

It should be noted that the exception as to Imperial Acts in force in the pre-Confederation provinces refers, of course, to Imperial Acts of express colonial application. The section emphasizes what has been already said,[6] that such Acts cannot be repealed or amended by Canadian legislation, unless, indeed, permission to that end is contained in the Imperial Act itself.

But of the whole body of law within the ken of self-government, the British North America Act works a division as follows:

VI.—*Distribution of Legislative Powers.*

Powers of the Parliament.

91. It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, 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:

[6] See *ante*, p. 56.

1. The public debt and property.
2. The regulation of trade and commerce.
3. The raising of money by any mode or system of taxation.
4. The borrowing of money on the public credit.
5. Postal service.
6. The census and statistics.
7. Militia, military and naval service, and defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada.
9. Beacons, buoys, lighthouses, and Sable Island.
10. Navigation and shipping.
11. Quarantine and the establishment and maintenance of marine hospitals.
12. Sea coast and inland fisheries.
13. Ferries between a province and any British or foreign country, or between two provinces.
14. Currency and coinage.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings banks.
17. Weights and measures.
18. Bills of exchange and promissory notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and insolvency.
22. Patents of invention and discovery.
23. Copyrights.
24. Indians and lands reserved for the Indians.
25. Naturalization and aliens.
26. Marriage and divorce.
27. The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.
28. The establishment, maintenance, and management of penitentiaries.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES.

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:

1. The amendment from time to time, notwithstanding anything in this Act, of the constitution of the province, except as regards the office of Lieutenant-Governor.

2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.
3. The borrowing of money on the sole credit of the province.
4. The establishment and tenure of provincial offices, and the appointment and payment of provincial officers.
5. The management and sale of the public lands belonging to the province and the timber and wood thereon.
6. The establishment, maintenance and management of public and reformatory prisons in and for the province.
7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals.
8. Municipal institutions in the province.
9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local or municipal purposes.
10. Local works and undertakings other than such as are of the following classes,—
    a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;
    b. Lines of steamships between the province and any British or foreign country;
    c. Such works as, although wholly situate within the province, are before or after their execution declared by the parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.
11. The incorporation of companies with provincial objects.
12. The solemnization of marriage in the province.
13. Property and civil rights in the province.
14. The administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.
15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section.
16. Generally all matters of a merely local or private nature in the province.

Education.

93. In and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union;

(2) All the powers, privileges, and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec;

(3) Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall lie to the Governor-General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

(4) In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section.[1]

[1] This section, 93, applies in all the provinces except Manitoba, Alberta, and Saskatchewan. In those provinces some modifications of the section have been introduced as will appear later.

Uniformity of Laws in Ontario, Nova Scotia and New Brunswick.

94. Notwithstanding anything in this Act, the parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the Courts in those three provinces and from and after the passing of any Act in that behalf the power of the parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the parliament of Canada making provision for such uniformity shall not have effect in any province unless and until it is adopted and enacted as law by the legislature thereof.

Agriculture and Immigration.

95. In each province the legislature may make laws in relation to agriculture in the province, and to immigration into the province; and it is hereby declared that the parliament of Canada may from time to time make laws in relation to agriculture in all or any of the provinces, and to immigration into all or any of the provinces; and any law of the legislature of a province relative to agriculture or to immigration shall have effect in and for the province as long and as far only as it is not repugnant to any Act of the parliament of Canada.

* * * * * * *

101. The parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a general Court of Appeal for Canada,

and for the establishment of any additional Courts for the better administration of the laws of Canada.

* * * * * * *

132. The parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

CHAPTER XXI.

The Scheme of Distribution: View of the Privy Council.

A perusal, the most cursory, of the classes enumerated in sections 91 and 92 reveals that if, in every case, the full natural meaning is to be given to the words employed, the classes must inevitably overlap. Such a conflict could not have been intended;[1] the Act is clear that the jurisdiction in each case is exclusive; and, therefore, in the case of one of the sections, or of the other, or of both, that full natural meaning cannot be given. If either one of them is to be so read as to give to the language used in every one of its class enumerations its full natural meaning, the other section must necessarily be read as a subordinate section, and the scope of its various classes so limited as to exclude those subject matters monopolized by the classes of the favored section. This method was favored by the earlier decisions of the Supreme Court of Canada. Section 91 was set up as the predominant section, and this formula was suggested, and practically adopted by the majority of the Court, as an unerring guide in determining the line of division:

> "All subjects of whatever nature not exclusively assigned to the local legislatures are placed under the supreme control of the Dominion parliament: and no matter is exclusively assigned to the local legislatures unless it be within one of the subjects expressly enumerated in section 92, *and at the same time does not involve any interference with any of the subjects enumerated in section 91.*"[2]

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[1] *Parsons' Case*, 7 App. Cas. 96; 51 L. J. P. C. 11. And see *per* Mackay, J., in *Ex p. Leveille* (1877), 2 Steph. Dig. at p. 446; 2 Cart. at p. 349.

[2] *Per* Gwynne, J., in *Frederickton* v. *Reg.*, 3 S. C. R. 505. See also *Parsons' Case*, 4 S. C. R. at p. 330.

Fortunately, perhaps, for the provinces, the Privy Council has decisively rejected this formula, while at the same time adopting it up to a certain point as a method of enquiry. The labors of the Courts would certainly have been materially lightened had the Committee accepted this formula. While, in a sense, it reconciled sections 91 and 92, it did away with any necessity for an attempt to reconcile their respective class enumerations. Had it been finally adopted, the provinces would have become large municipalities merely, and the Union would be legislative rather than federal.

Although the Judicial Committee of the Privy Council has frequently reiterated the caution against "entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand,"[3] stress of circumstances has gradually forced a wider exposition of the scheme of distribution effected by these sections, until it is now possible to outline it in a few fairly exhaustive propositions deducible from the judgments of that Court of last resort. But before attempting to formulate any such propositions, it may be useful to collect in one place those passages in Privy Council judgments in which the scheme is discussed in general terms. A study of these will disclose an interesting evolution.

1875.—*L'Union St. Jacques* v. *Belisle*.[4]

The question was as to the validity of a provincial Act (Quebec) which, in view of the embarrassed state of the society's finances, forced com-

[3] *Parsons' Case*, 7 App. Cas. 96; 51 L. J. P. C. 11. One of the latest references to this passage is in the *Manitoba Liquor Act Case* (1902), A. C. 73; 71 L. J. P. C. 28, in which it is described as "advice often quoted but not, perhaps, always followed." See also the *John Deere Plow Co. Case*, extract, *post* p. 444.

[4] L. R. 6 P. C. 31; 1 Cart. 63.

mutation upon certain annuitants, of whom Dame Julie Belisle, the respondent, was one. This Act was attacked as legislation relating to "bankruptcy and insolvency" (*sec. 91, No. 21*); but was upheld by their Lordships as relating to a matter "of a merely local or private nature in the province" (*sec. 92, No. 16*). The scope of section 91 is thus discussed:

> "Their Lordships observe that the scheme of enumeration in that section is to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated except what may be properly described as general legislation; such legislation as is well expressed by Mr. Justice Caron when he speaks of the general laws governing *Faillité*, bankruptcy and insolvency, all which are well-known legal terms expressing systems of legislation with which the subjects of this country and probably of most other civilized countries are perfectly familiar"—*per* Lord Selborne.

If this language is to be taken literally, special or "private bills" legislation by the federal parliament would be entirely precluded. Such legislation, however, is recognized in many cases [5] and was upheld in one case in the Supreme Court of Canada in 1891, where the argument suggested was expressly advanced.[6] Such legislation is, in fact, of yearly occurrence and has never been seriously questioned. Under section 91, No. 26 ("marriage and divorce") legislation has so far been exclusively of this character. The above passage has, nevertheless, never been adversely criticized in any subsequent judgment of the Privy Council. But if the view suggested were really entertained in 1875, it cannot be

[5] *E.g.*, *Col. Bldg. Ass.* v. *Atty.-Gen.* (*Que.*), 8 App. Cas. 157; 52 L. J. P. C. 27; *Comp. Hydraulique* v. *Continental Heat Co.* (1909), A. C. 194; 78 L. J. P. C. 60.

[6] *Quirt* v. *Reg.* 19 S. C. R. 510.

supported now, although as late as 1880, the Privy Council again spoke of the power of the parliament of Canada under section 91, No. 21 ("bankruptcy and insolvency") as a power authorizing interference with property and civil rights, "so far as a general law relating to those subjects might affect them."[7] As a matter of fact, the language used in enumerating the classes of section 92 is quite as general as that used in section 91,[8] and in each case the power is a plenary power of sovereign legislation in relation to all matters coming within the classes of subjects therein enumerated, as the Act expressly states. The power is not to legislate on each class as a whole (though that is necessarily implied), but on any matter, great or small, falling within the class.

1875.—*Dow* v. *Black*.[8a]

A provincial Act (New Brunswick) authorizing a particular town to raise money by the issue of municipal debentures as a bonus to a railway (alleged to be federal), and to levy a rate upon the inhabitants to meet such debentures was upheld as legislation in relation to "direct taxation within the province in order to the raising of a revenue for provincial purposes" (*sec. 92, No. 2*) or, in the alternative, as relating to a matter "of a merely local or private nature in the province" (*sec. 92, No. 16*). It was held not to be properly classed as a law in relation to a federal railway, even if the road were, as contended, a federal railway. The division effected by sections 91 and 92 is thus described:

"Sections 91 and 92 purport to make a distribution of legislative power between the parliament of Canada and the

[7] *Cushing* v. *Dupuy:* see extract, post, p. 418.
[8] See extract from the *References Case*, *post*, p. 442.
[8a] L. R. 6 P. C. 272; 44 L. J. P. C. 52.

provincial legislatures, section 91 giving a general power of legislation to the parliament of Canada subject only to the exception of such matters as by section 92 were made the subjects upon which the provincial legislatures were exclusively to legislate"—*per* Sir James W. Colville.

This passage is little more than a paraphrase of the opening clause of section 91, emphasizing, perhaps, the exhaustive character of the distribution of legislative power effected by the British North America Act. The entire field is given over to the federal parliament, after the provincial sphere is fully occupied; but, as will appear, the largest *residuum* of unenumerated subjects is really with the provinces under the grant of power to make laws in relation to "generally all matters of a merely local or private nature in the province" (*sec. 92, No. 16*) as that item is now to be viewed.[9]

1879.—*Valin* v. *Langlois*.[10]

A Dominion Act imposing upon certain existing provincial Courts the duty of determining election petitions relating to federal elections was held not to be a law in relation to "the administration of justice in the province, including the constitution, maintenance and organization of provincial Courts" (*sec. 92, No. 14*). It was not necessary to invoke section 91 to support the Act, as section 41 was held to be sufficient to warrant Dominion legislation upon the subject of federal election trials.[1] Nevertheless, their Lordships said:

"If the subject matter is within the jurisdiction of the Dominion parliament it is not within the jurisdiction of the provincial parliament, and that which is excluded by the

[9] See *post*, p. 449, *et seq.*, 829.
[10] 5 App. Cas. 115; 49 L. J. P. C. 37.
[1] See *ante*, p. 40.

91st section from the jurisdiction of the Dominion parliament is not anything else than matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces."—*per* Lord Selborne.

And section 41 is then again referred to as making it clear that the trial of election petitions could not reasonably be held to fall within the administration of justice, as that term is used in section 92 (No. 14).

In view of subsequent cases as to overlapping areas and so-called concurrent powers, it has been suggested [2] that the above passage should be somewhat modified; that the phrase "it is not within the jurisdiction of the provincial parliament" should read "it is not, in its entirety, within the jurisdiction, etc." The question really is to determine the subject-matter of legislation in each case, the "pith and substance" of the enactment.[3]

1880.—*Cushing* v. *Dupuy*.[4]

The Insolvent Act of 1875 (Dominion), in addition to provisions usual in such enactments for the compulsory transfer of the insolvent's assets to the assignee in insolvency and for their realization and distribution among creditors, contained provisions for proceedings in the Courts and, amongst others, one which made the decisions of certain Courts in insolvency litigation final, so far as any appeal as of right was concerned. These provisions were attacked as being laws in relation to (1) "property and civil rights in the province" (*sec. 92, No. 13*); and (2) "procedure in civil matters" (*sec. 92, No.*

[2] *Lefroy*, Leg. Power in Canada, 347.
[3] See *post*, p. 484, *et seq.*
[4] 5 App. Cas. 409; 49 L. J. P. C. 63.

14). They were, however, upheld as relating to "bankruptcy and insolvency" (*sec. 91, No. 21*). Although the discussion was limited to the question of the legitimate effect of laws relating to bankruptcy and insolvency upon property and civil rights and upon procedure in the Courts, the principle is so obviously applicable to federal legislation upon many of the enumerated classes of section 91—e.g., banking,[5] copyright, navigation and shipping, patents, federal railways and kindred undertakings—that it is thought proper to quote the passage here:

"It was contended for the appellant that the provisions of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the legislature of the province. The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some special mode of procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities, of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the provinces,

[5] See extract, *post*, p. 429, from the judgment of the Board in *Tennant* v. *Union Bank*. In that extract a reference will be found to *Cushing* v. *Dupuy* as a direct authority upon the principle involved in the *Tennant Case*.

so far as a general law relating to those subjects might affect them."—*per* Sir Montague Smith.

Sir George Jessel, M.R., had suggested in an earlier case [6] the possibility of concurrent powers or overlapping areas. The question first assumes practical shape before the Privy Council in *Cushing* v. *Dupuy*, from which the above passage is extracted. It has since been constantly to the front, as succeeding extracts will show.

1881.—*Citizens Ins. Co.* v. *Parsons* [7] (usually referred to as *Parsons' Case*).

A provincial Act (Ontario) providing for uniform conditions in fire insurance policies was attacked as being legislation in relation to "the regulation of trade and commerce" (sec. 91, No. 2). This contention was rejected and the Act was declared *intra vires* as legislation relating to "property and civil rights in the province" (sec. 92, No. 13). The judgment of the Committee contains the first comprehensive survey of the scheme of distribution undertaken by that tribunal:

"The most important question is one of those, already numerous, which have arisen upon the provisions of the British North America Act, 1867, relating to the distribution of legislative powers between the parliament of Canada and the legislatures of the provinces; and, owing to the very general language in which some of these powers are described, the question is one of considerable difficulty. . . . .

"The scheme of this legislation, as expressed in the first branch of section 91, is to give to the Dominion parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislature. If

[6] *Atty.-Gen. (Que.)* v. *Queen Ins. Co.*, 3 App. Cas. 1090.
[7] 7 App. Cas. 96; 51 L. J. P. C. 11.

the 91st section had stopped here, and if the classes of subjects enumerated in section 92 had been altogether distinct and different from those in section 91, no conflict of legislative authority could have arisen. The provincial legislatures would have had exclusive legislative power over the sixteen classes of subjects assigned to them, and the Dominion parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into, and were embraced by, some of the enumerated classes of subjects in section 91; hence an endeavor appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section, "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section," that (notwithstanding anything in the Act) the exclusive legislative authority of the parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of section 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of section 92.

"Notwithstanding this endeavor to give pre-eminence to the Dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion parliament. Take as one instance the subject 'marriage and divorce,' contained in the enumeration of subjects in section 91; it is evident that solemnization of marriage would come within this general description; yet 'solemnization of marriage in the province' is enumerated among the classes of subjects in section 92, and no one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So 'the raising of money by any mode or system of taxation' is

enumerated among the classes of subjects in section 91; but, though the description is sufficiently large and general to include 'direct taxation within the province in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by section 92, it obviously could not have been intended that in this instance also the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, *the two sections must be read together, and the language of one interpreted and, where necessary, modified by that of the other.* In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for a decision of the particular question in hand.

"The first question to be decided is, whether the Act impeached in the present appeal falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the legislatures of the provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature *prima facie* falls within one of these classes of subjects, that the further questions arise, viz.: whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, *and whether the power of the provincial legislature is, or is not, thereby overborne.*" . . . .

"It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited."—*per* Sir Montague Smith.

The italicized passages constitute the essential distinction between the formula of Mr. Justice Gwynne quoted on a previous page [8] and the method of enquiry adopted by the Privy Council. That formula did away with the third enquiry, namely, "whether the power of the provincial legislature is, or is not, thereby overborne," and, as a necessary consequence, with all necessity for a reconciliation of the various class enumerations of sections 91 and 92. The statute impugned in *Parsons' Case* was a provincial enactment, but in *Russell's Case* [9] in the next year the same method of enquiry was adopted as to a Dominion Act, and it has since been often reaffirmed by the Privy Council as the proper method in regard to both federal and provincial legislation. Its propriety rests upon the exhaustive character of the distribution of legislative powers effected by the British North America Act as now authoritatively established.[10]

While it is not intended to discuss here the general rules laid down in these judgments—that will come later—it is desirable perhaps to indicate in what respect, if any, the views expressed have been radically modified in later cases. As to *Parsons' Case*, the only serious departure has been as to the application of the paragraph at the end of sec. 91

[8] See *ante*, p. 412.

[9] 7 App. Cas. 829; 51 L. J. P. C. 77.

[10] *Lambe's Case* (1887), 12 App. Cas. 575; 56 L. J. P. C. 87; *The References Case* (1912), A. C. 571; 81 L. J. P. C. 210; and see *post*, p. 483, *et seq.*

The Committee say that "this paragraph applies in its grammatical construction only to No. 16 of sec. 92"; but in the *Local Prohibition Case*[1] in 1895 this view was abandoned and it is now held that the paragraph correctly describes and was intended to cover all the class-enumerations of sec. 92 as being, from a provincial point of view, of a local or private nature. As will appear, this change of view has had important consequences.

It may further be noted that when the two matters of marriage and taxation, used as illustrations in *Parsons' Case,* themselves came up for consideration, the Board adhered to the views expressed in this case. It was held in the Marriage Reference Case[2] that legislation in relation to "the solemnization of marriage in the province" (sec. 92, No. 12) is within the exclusive authority of the provinces even to the extent of imposing conditions affecting the validity of the marriage. And in *Lambe's Case* provincial powers in relation to "direct taxation within the province" (sec. 92, No. 2) were established upon a wide basis.

1882.—*Russell* v. *Reg.*[3] (usually cited as *Russell's Case.*)

A Dominion statute, the Canada Temperance Act, 1878, was attacked in this case as an invasion of the provincial field in three respects: as being a law in relation to (1) "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes"—*sec. 92, No. 9;* (2) "property and civil rights in the province"—*sec. 92, No. 13;* (3) "generally, all matters of a merely local or private

[1] (1896), A. C. 348; 65 L. J. P. C. 26.
[2] (1912), A. C. 880; 81 L. J. P. C. 237.
[3] 7 App. Cas. 829; 51 L. J. P. C. 77.

nature in the province"—*sec. 92, No. 16.* These three grounds of objection are examined at length and rejected; and the Act was upheld upon the grounds appearing in the following extract:

"The general scheme of the British North America Act with regard to the distribution of legislative powers, and the general scope and effect of sections 91 and 92, and their relation to each other, were fully considered and commented on by this Board in *Parsons' Case.*[4] According to the principle of construction there pointed out, the first question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in section 92 and assigned exclusively to the legislature of the province. If it does, then the further question would arise, namely, whether the subject of the Act does not also fall within one of the enumerated classes of section 91, and so does not still belong to the Dominion parliament. But if the Act does not fall within any of the classes of subjects in section 92 no further question will remain; for it cannot be contended, and indeed was not contended at their Lordships' bar, that if the Act does not come within one of the classes of subjects assigned to the provincial legislatures, the Parliament of Canada had not, by its general power 'to make laws for the peace, order, and good government of Canada,' full legislative authority to pass it. . . . .

"Laws of this nature, designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal prosecution and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the parliament of Canada. It was said in the course of the judgment of this Board in the case of *Citizens* v. *Parsons* that the two sections must be read together and the language of one interpreted and, where necessary, modified by that of the other. Few, if any, laws

[4] See extract, *ante*, p. 419.

could be made by parliament for the peace, order, and good government of Canada, which did not in some incidental way affect property and civil rights; and it could not have been intended when assuring to the province exclusive legislative authority on the subject of property and civil rights, to exclude the parliament from the exercise of this general power whenever any such incidental interference would result from it. *The true nature and character of the legislation in the particular instance under discussion must always be determined in order to ascertain the class of subject to which it really belongs.*" . . . .

"Parliament deals with the subject as one of general concern to the Dominion upon which uniformity of legislation is desirable, and the parliament alone can so deal with it. There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local or exists only in one province, and that parliament, under color of general legislation, is dealing with a provincial matter only. It is therefore unnecessary to discuss the considerations which a state of circumstances of this kind might present"—*per* Sir Montague E. Smith.

The grounds put forward in the above passage as indicating the view to be taken of the legislative character of the Canada Temperance Act have been much criticized and it is not going too far to say that the views above expressed have been very largely modified by subsequent decisions of the Board. Such legislation must now be taken as based solely upon the opening, residuary, "peace, order, and good government" clause of section 91, and not upon any of the enumerated classes of that section. The cases as to the liquor traffic will come up for discussion in their proper place. Suffice it to say here that the provinces may legislate freely, even to the extent of provincial prohibition, so long as the traffic is dealt with in its local provincial aspect; but that, in the words of Lord Watson in the *Local Prohibition Case*,[5]—

[5] See extract, *post*, p. 432.

"The decision in *Russell* v. *Reg.* must be accepted as an authority to the extent to which it goes—namely, that the restrictive provisions of the Canada Temperance Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments relating to the peace, order, and good government of Canada."

1883.—*Hodge* v. *Reg.*[7] (frequently cited as *Hodge's Case.*)

A provincial Liquor License Act (Ontario) was attacked upon the ground, among others, that it was a law in relation to "the regulation of trade and commerce" (*sec. 91, No. 2*). Adhering to the view taken in *Parsons' Case*[8] as to the proper scope of that class, the Board held that the local regulation of a particular trade or business within a province did not fall within it; and that the provincial Act might properly be viewed as a law relating to "municipal institutions in the province" (*sec. 92, No. 8*) or to a matter "of a merely local or private nature in the province" (*sec. 92, No. 16*). This assignment of the Act to these particular classes would not now be followed in its entirety; but that is a question to be discussed later. One passage in their Lordships' judgment has become classic as indicative of one most important consideration which should be borne in mind in examining any impugned Act. After referring to *Russell's Case*, the judgment proceeds:

"Their Lordships do not intend to vary or depart from the reasons expressed for their judgment in that case. The principle which that case and *Parsons' Case* illustrate is that *subjects which in one aspect and for one purpose fall within*

[7] 9 A. C. 117; 53 L. J. P. C. 1.
[8] 7 App. Cas. 96; 51 L. J. P. C. 11: see *post*, p. 683.

section 92 may in another aspect and for another purpose fall within section 91"—per Sir Barnes Peacock.

1887.—*Bank of Toronto* v. *Lambe*[9] (often cited as *Lambe's Case.*)

A provincial Act (Quebec) imposing taxation upon banks carrying on business in the province, the amount of the tax depending in part upon the amount of the bank's paid-up capital and in part upon the number of its branches in the province, was upheld as legislation in relation to "direct taxation within the province in order to the raising of a revenue for provincial purposes" (*sec. 92, No. 2*). It was contended on behalf of the banks that the taxation was not direct taxation, that it was not taxation within the province, and that banks as the offspring of federal legislation (*sec. 91, No. 15*) were not proper subjects of provincial taxation. This last argument was fortified by reference to many United States authorities.[10] The judgment of the Board thus deals with this phase of the argument:

"Their Lordships have been invited to take a very wide range on this part of the case and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the Constitution of the United States. Under that constitution, as their Lordships understand, each State may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution, Chief Justice Marshall found one of those limits at the point at which the action of the state legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow

[9] 12 App. Cas. 175; 56 L. J. P. C. 87.

[10] See *ante*, p. 397, *et seq.*

no power to the provincial legislations, under section 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the confederated provinces a carefully balanced constitution under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question which they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion parliament. . . . .

"It has been suggested that the provincial legislatures possess powers of legislation either inherent in them, or dating from a time anterior to the Federation Act, and not taken away by that Act. Their Lordships have not thought it necessary to call on the respondent's counsel, and therefore possibly have not heard all that may be said in support of such views. But the judgments below are so carefully reasoned, and the citation and discussion of them here has been so full and elaborate, that their Lordships feel justified in expressing their present dissent. . . . They adhere to the view which has always been taken by this committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures, rests with the parliament."—*per* Lord Hobhouse.

1894.—*Tennant* v. *Union Bank*.[1]

A provision in the Bank Act (Dominion) which empowered banks to take warehouse receipts as col-

[1] (1894), A. C. 31; 63 L. J. P. C. 25.

lateral security for the repayment of moneys advanced to the holders of such receipts was upheld as a law relating to "banking" (*sec. 91, No. 15*). It was attacked as legislation in relation to "property and civil rights in the province" (*sec. 92, No. 13*), but their Lordships were of opinion that though it did affect such rights it interfered with them no further than the fair requirements of a banking Act would warrant:

"Section 91 gives the parliament of Canada power to make laws in relation to all matters not coming within the classes of subjects by the Act exclusively assigned to the legislatures of the provinces and also exclusive legislative authority in relation to certain enumerated subjects. . . . Section 92 assigns to each provincial legislature the exclusive right to make laws in relation to the classes of subjects therein enumerated. . . . The objection taken by the appellants to the provisions of the Bank Act would be unanswerable if it could be shown that by the Act of 1867 the parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislatures by section 92. But section 91 expressly declares that 'notwithstanding anything in this Act' the exclusive legislative authority of the parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that parliament so long as it strictly relates to those matters is to be of paramount authority. To refuse effect to this declaration would render nugatory some of the legislative powers specially assigned to the Canadian parliament. For example, among the enumerated classes of subjects in section 91 are 'patents of invention and discovery' and 'copyright.' It would be practically impossible for the Dominion parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the provinces. . . . The power to legislate conferred by that clause (91) may be fully exercised, although with the effect of modifying civil rights in the province.

This is not the first occasion on which the legislative limits laid down by sections 91 and 92 have been considered by this Board. In *Cushing* v. *Dupuy*,[2] their Lordships had before them the very same question of statutory construction which has been raised in this appeal "—*per* Lord Watson.

In *Cushing* v. *Dupuy*, as already noticed,[3] the discussion was limited to the particular items involved. In the passage just quoted the question is avowedly treated as one of principle. How far the field is open for provincial occupation in the absence of Dominion legislation upon the enumerated heads of section 91 is a question dealt with in the next extract.

1894.—*Atty.-Gen.* (*Ont.*) v. *Atty.-Gen.* (*Can.*),[3a] usually referred to as the *Voluntary Assignments Case.*

A provincial Act (Ontario) respecting assignments and preferences by insolvent persons contained the now usual provision that an assignment for the general benefit of creditors should take precedence over all judgments and over all executions not completely executed by payment. This was attacked as a law relating to "bankruptcy and insolvency" (*sec. 91, No. 21*); but their Lordships held that though the provision was one which might well find a place in insolvency legislation properly so called it was within the competence of a provincial legislature, in the absence of a federal insolvency law, as legislation in relation to "property and civil rights in the province" (*sec. 92, No. 13*):

"A system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may

[2] 5 App. Cas. 409; 49 L. J. P. C. 63.
[3] See *ante*, p. 418.
[3a] (1894), A. C. 189. 63 L. J. P. C. 59.

be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislatures. Their Lordships do not doubt that it would be open to the Dominion parliament to deal with such matters as part of a bankruptcy law, and the provincial legislatures would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion parliament. But it does not follow that such subjects as might properly be treated as ancillary to such a law, and therefore within the powers of the Dominion parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion parliament in existence." —*per* Lord Herschell, L.C.

1896.—*Atty.-Gen. (Ont.)* v. *Atty.-Gen. (Can.)*[4] usually referred to as the *Local Prohibition Case.*

The power of a provincial legislature to pass prohibitory liquor laws was in question. A provincial Act (Ontario) purported to confer upon municipal authorities (subject to the vote of the electors) power to prohibit within the municipality the sale by retail of intoxicating liquors, and the main point involved was as to the validity of such provincial legislation in view of the existence of a Dominion Act (the Canada Temperance Act, 1886) covering much the same ground, the validity of which had been affirmed in *Russell's Case.*[5]

This is the first general survey of the scheme of distribution effected by sections 91 and 92 made by the Board since *Parsons' Case.* A comparison of the two judgments discloses a marked advance, particularly toward a solution of the ever-recurring

[4] (1896), A. C. 348; 65 L. J. P. C. 26.
[5] See *ante*, p. 423.

question of concurrent powers or (to use Lord Watson's own phrase) interlacing powers. It should be noted, however, that the main question to which the Committee addressed itself was as to the extent of the jurisdiction conferred upon the parliament of Canada by the opening, "peace, order, and good government" clause of section 91, as contrasted with that of provincial legislatures under No. 16 of section 92.

"It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the parliament of Canada by section 91 might occasionally and incidentally involve legislation upon matters which are *prima facie* committed exclusively to the provincial legislatures by section 92. In order to provide against that contingency the concluding part of section 91 enacts that 'any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.' It was observed by this Board in the *Parsons' Case* that the paragraph just quoted 'applies in its grammatical construction only to No. 16 of section 92.' The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in section 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of section 92 as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. . . . .

"The general authority given to the Canadian parliament by the introductory enactments of section 91 is 'to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces,' and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the parliament of Canada has power to legislate because they concern the peace, order, and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation the exception from section 92 which is enacted by the concluding words of section 91 has no application; and in legislating with regard to such matters the Dominion parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the parliament of Canada in regard to all matters not enumerated in section 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the parliament of Canada by section 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate to the exclusion of the provincial legislatures.

"In construing the introductory enactments of section 91 with respect to matters other than those enumerated,

which concern the peace, order, and good government of Canada, it must be kept in view that section 94, which empowers the parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, does not extend to the province of Quebec; and also that the Dominion legislation thereby authorized is expressly declared to be of no effect unless and until it has been adopted and enacted by the provincial legislatures. These enactments would be idle and abortive if it were held that the parliament of Canada derives jurisdiction from the introductory provisions of section 91 to deal with any matter which is in substance local or provincial and does not truly affect the interest of the Dominion as a whole. Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian parliament in passing laws for their regulation or abolition in the interests of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial and has become matter of national concern in such a sense as to bring it within the jurisdiction of the parliament of Canada." . . . .

"It is not necessary, for the purposes of the present appeal, to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16, is authorized by the one or the other of these heads.[6] It cannot, in their Lordships' opinion, be logically held to fall within both of them. In section 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in section 91. It assigns to the provincial legislature all matters in a provincial sense local or private which have been omitted from the preceding enumerations; and

[6] In the *Manitoba Liquor Act Case* (1902), A. C. 73; 71 L. J. P. C. 28, such legislation is put squarely upon No. 16 of sec. 92.

although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated." . . . .

"It has been frequently recognized by this Board, and it may now be regarded as settled law that, according to the scheme of the British North America Act, the enactments of the parliament of Canada in so far as they are within its competency must override provincial legislation. But the Dominion parliament has no authority conferred upon it by the Act to repeal directly any provincial statute [1] whether it does or does not come within the limits of jurisdiction prescribed by section 92. The repeal of a provincial Act by the parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion; and if the existence of such repugnancy should become matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the provincial legislatures, but must be submitted to the judicial tribunals of the country." . . . .

"The question must next be considered whether the provincial enactments, to any, and, if so, to what extent, come into collision with the provisions of the Canadian Act of 1886. In so far as they do, provincial must yield to Dominion legislation and must remain in abeyance unless and until the Act of 1886 is repealed by the parliament which passed it."—*Per* Lord Watson.

1898.—*Atty.-Gen. (Can.)* v. *Atty.-Gen. (Ont., Que., and N.S.)*,[2] usually called the *Fisheries Case.*

How far a provincial legislature may pass laws relating to fisheries, fishing rights, etc., was one of the questions before the Board. It was held that laws in relation to all matters falling within the class "sea-coast and inland fisheries" (*sec. 91, No. 12*) could be passed only by the Dominion parliament. Provincial legislation thereon is *ultra vires*:

[1] Post-confederation is of course meant. See *ante*, p. 405.

[2] (1898), A. C. 700; 67 L. J. P. C. 90.

"The earlier part of section 91, read in connection with the words beginning 'and for greater certainty,' appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in section 91 is not within the legislative competence of the provincial legislatures under section 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in section 91 are within the 'exclusive' legislative authority of the Dominion parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a provincial legislature is, in their Lordships' opinion, incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid unless and until the Dominion parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of section 91, and in particular to the word 'exclusively.' It would authorize, for example, the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act."—per Lord Herschell.

This view is reaffirmed in the next extract.

1899.—*Union Colliery Co.* v. *Bryden*,[8] (usually referred to as *Bryden's Case*).

A provincial Act prohibited Chinamen from working in coal mines below ground. It was held to be in its pith and substance a law in relation to a matter coming within the class "naturalization and aliens" (sec. 91, No. 25). It was argued that the only Dominion legislation on that subject, the Naturalization Act, left the field largely open and

[8] (1899), A. C. 580; 68 L. J. P. C. 118.

that provincial legislation might lawfully occupy the portion not covered by the Dominion Act; in which view the provincial legislation should be upheld as a law relating to "local works and undertakings" (sec. 92, No. 10). The argument is thus answered:

"The abstinence of the Dominion parliament from legislating to the full limits of its powers could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by section 91 of the Act of 1867"—*per* Lord Watson.

It should be added here that though the view taken in this *Bryden Case* as to the scope of the class "naturalization and aliens" cannot now, it is conceived, be supported,[9] this does not affect the proposition laid down in the above passage.

1906.—*Grand Trunk Ry.* v. *Atty.-Gen.* (Can.),[10] sometimes cited as the *Contracting-out Case.*

A provision in the Railway Act of Canada designed to prevent railway employees from entering into agreements with their employers, federal railways, relieving the latter from liability in case of accidents to the former, was upheld as a law relating to federal railways (sec. 91, No. 29; sec. 92, No. 10a), even though it might modify the general law of the province in relation to "civil rights" (sec. 92, No. 13):

"The point therefore comes to be within a very narrow compass. The respondent maintains, and the Supreme Court has upheld his contention, that this is truly railway legislation. The appellants maintain that, under the guise of railway legislation, it is truly legislation as to civil rights, and, as such, under section 92, sub-section 13 of the British North America Act, appropriate to the province.

[9] See *post*, p. 672 *et seq.*

[10] (1907), A. C. 65; 76 L. J. P. C. 23.

The construction of the provisions of the British North America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decision. But a comparison of two cases decided in the year 1894—namely, *Atty-Gen. of Ontario* v. *Atty-Gen. of Canada* (1894)[1] and *Tennant* v. *Union Bank of Canada* (1893),[2]—seems to establish these two propositions: First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear, and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation."—*per* Lord Dunedin.

In the next case from which an extract is taken the above passage is quoted with approval; and it would hardly be necessary to insert the following extract were it not that it pointedly distinguishes between the 'substantive' and 'ancillary' provisions of a statute.

1907.—*Toronto* v. *Canadian Pacific Ry.*[3]

By the Dominion Railway Act power was given to the Railway Committee of the Privy Council of Canada to direct the carrying out of protective measures for the safeguarding of the public at places where a federal railway might cross public highways and also to apportion the cost of such protective measures among those benefited by them. This power of apportionment was attacked as not being truly railway legislation and as unduly interfering with provincial powers in relation to "municipal institutions in the province" (*sec. 92, No. 8*)

[1] *Voluntary Assignments Case:* see extract, *ante*, p. 430.
[2] See extract, *ante*, p. 429.
[3] (1908), A. C. 54; 77 L. J. P. C. 29.

and to "property and civil rights in the province" (*sec. 92, No. 13*). It was, however, upheld as a reasonable ancillary provision to be inserted in a railway Act:

"In the present case it seems quite clear to their Lordships that if, to use the language above quoted, 'the field were clear,' the sections impugned do no more than provide reasonable means for safeguarding in the common interest the public and the railway which is committed to the exclusive jurisdiction of the legislature which enacted them, and were therefore *intra vires*. If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and in the view of their Lordships there is nothing *ultra vires* in the ancillary power conferred by the sections on the Committee to make an equitable adjustment of the expenses among the persons interested. This legislation is clearly passed from a point of view more natural in a young and growing community interested in developing the resources of a vast territory as yet not fully settled, than it could possibly be in the narrow and thickly populated area of such a country as England. To such a community it might well seem reasonable that those who derived special advantages from the proximity of a railway might bear a special share of the expenses of safeguarding it. Both the substantive and the ancillary provisions are alike reasonable and *intra vires* of the Dominion Legislature, and on the principles above cited must prevail even if there is legislation *intra vires* of the provincial legislature dealing with the same subject-matter and in some sense inconsistent"[4]—*per* Lord Collins.

1912.—*Montreal* v. *Montreal Street Ry.*[5] (the *Through-Traffic Case*).

The Board of Railway Commissioners for Canada in an effort to prevent what they considered an unjust discrimination in the rates charged to passengers carried over certain tram lines operating in Montreal and its suburbs, directed one of the

[4] Compare with this case *B. C. Elec. Ry.* v. *V. V. & E. Ry.* (1914), A. C. 1067; 83 L. J. P. C. 374.

[5] (1912), A. C. 333; 81 L. J. P. C. 145.

roads concerned, a federal railway (within *sec. 91, No. 29; sec. 92, 10 c.*), to make all the necessary arrangements to remove the grievance complained of; and it also ordered the other road concerned, a provincial railway (within *sec. 92, No. 10*), to enter into any agreement or agreements that might be necessary to enable the federal railway to carry out the Board's orders. The Dominion Railway Act purported to give to the Board power to make such orders, and the question was as to the validity of the Dominion Act in this particular. The Act was held to be *ultra vires* so far as it attempted to control the rates to be charged by a provincial railway. The judgment is important, for our present purpose, as containing a summing up of the scheme of distribution effected by sections 91 and 92 as established by previous decisions of the Privy Council and as affording therefore in some degree an authoritative commentary on those decisions:

"It has, no doubt, been many times decided by this Board that the two sections 91 and 92 are not mutually exclusive, that their provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a provincial Legislature over a field of jurisdiction common to both the former must prevail; but, on the other hand, it was laid down in *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada*[58]—first, that the exception contained in section 91 near its end, was not meant to derogate from the legislative authority given to provincial Legislatures by section 92, subsection 16, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in section 91; secondly, that to those matters which are not specified amongst the enumerated subjects of legislation in section 91 the exception at its end has no application, and that in legislating with respect to matters

[58] *The Local Prohibition Case:* see extract, *ante*, p. 432.

not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial legislature by section 92; thirdly, that these enactments—sections 91 and 92—indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in section 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subject enumerated in section 92; fourthly, that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by section 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in section 91—namely, the regulation of trade and commerce. Taken in their widest sense, these words would authorise legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in section 92, and would seriously encroach upon the local autonomy of the province"—*per* Lord Atkinson.

1912.—*Atty.-Gen. (Ont. etc.)* v. *Atty.-Gen. (Can.)*,[6] to be cited as the *References Case.*

The judgment of the Privy Council in this case affirms the validity of those provisions of the Supreme Court Act (Canada) which authorize the Governor-General in Council to refer important questions—as enumerated they are chiefly of a constitutional character—to the Supreme Court for

[6] (1912), A. C. 571; 81 L. J. P. C. 210.

hearing and consideration. The reasons given in support of the judgment touch many phases of our constitutional law as will be manifest throughout this book:

"In 1867, the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now there can be doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation), general terms are necessarily used in describing what either is to have; and with the use of general terms comes the risk of some confusion, whenever a case arises in which it can be said that the power claimed falls within the description of what the Dominion is to have, and also within the description of what the province is to have. Such apparent overlapping is unavoidable, and the duty of a Court of law is to decide in each particular case on which side of the line it falls in view of the whole statute.

In the present case, however, quite a different contention is advanced on behalf of the provinces. It is argued, indeed, that the Dominion Act authorising questions to be asked of the Supreme Court is an invasion of provincial rights, but not because the power of asking such questions belongs exclusively to the provinces. The real ground is far wider. It is no less than this—that no Legislature in Canada has the right to pass an Act for asking such questions at all. This is the feature of the present appeal which makes it so grave and far-reaching. It would be one thing to say that under the Canadian Constitution what has been done could be done only by a provincial Legislature within its own

province. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter affecting the internal affairs of Canada, and, on the face of it, regulating the functions of a Court of law, which are part of the ordinary machinery of Government in all civilised countries." . .

"A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the Judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the laws of Canada, nor is any Court of law entitled to suppose that they have not been or will not be duly so weighed. So far as it is a matter of wisdom or policy, it is for the determination of the Parliament. It is true that from time to time the Courts of this and other countries, whether under the British flag or not, have to consider and set aside, as void, transactions upon the ground that they are against public policy. But no such doctrine can apply to an Act of Parliament. It is applicable only to the transactions of individuals. It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is, whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the constitutional law of Canada.

"In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous—as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either—recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that

the power is bestowed in some quarter unless it be extraneous to the statute itself—as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada —or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act. It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and obviously bestowed by the British North America Act. Indeed it might ensue from the breach of almost any power."—*per* Earl Loreburn, L.C.

1914.—*John Deere Plow Co.* v. *Wharton.*[1]

The decision of the Board in this case was that a provincial legislature cannot require a trading company, incorporated under the Federal Companies Act for the purpose of carrying on its business throughout Canada, to take out a certificate as an extra-provincial company as a condition of its right to carry on its business in such province. As the latest expression of the Privy Council's view as to the way in which the class-enumerations of the British North America Act should be approached, the method of enquiry, and the danger of a too free indulgence in *a priori* generalization, the passages extracted deserve careful study:

The distribution of powers under the British North America Act, the interpretation of which is raised by this appeal, has been often discussed before the Judicial Committee and the tribunals of Canada and certain principles are now well settled. The general power conferred on the Dominion by section 91 to make laws for the peace, order, and good government of Canada, extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the legislatures of the provinces.

[1] (1915), A. C. 330; 84 L. J. P. C. 64.

But if the subject matter falls within any of the heads of section 92, it becomes necessary to see whether it also falls within any of the enumerated heads of section 91; for if so, by the concluding words of that section it is excluded from the powers conferred by section 92.

Before proceeding to consider the question whether the provisions already referred to of the British Columbia Companies Act, imposing restrictions on the operations of a Dominion company which has failed to obtain a provincial license, are valid, it is necessary to realize the relation to each other of sections 91 and 92 and the character of the expressions used in them. The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them, the remark applies which was made by this Board about the Australian Commonwealth Act in a recent case,[2] that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms overlapping each other have been placed side by side, shews that those who passed the Confederation Act intended to leave the working out and interpretation of these provisions to practice and to judicial decision.

The structure of sections 91 and 92, and the degree to which the connotation of the expressions used overlaps render it, in their Lordships' opinion, unwise on this or any other occasion, to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by

[2] *A.-G. for the Commonwealth* v. *Colonial Sugar Refining Co.* (1914), A. C. 237, at 254.

confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal, that injustice to future suitors can be avoided. Their Lordships adhere to what was said by Sir Montague Smith in delivering the judgment of the Judicial Committee in *Citizens Insurance Co.* v. *Parsons,*[3] to the effect that in discharging the difficult duty of arriving at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words "civil rights" in particular cases. An abstract logical definition of their scope is not only, having regard to the context of the 91st and 92nd sections of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases, but it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context. . . . .

For the reasons already indicated, it is impracticable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by the 91st and 92nd sections and between their various sub-heads *inter se.* Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each

[3] A. C. 96, at p. 109.

of which individually the Courts have to determine on which side of a particular line the facts place them. But while in some cases it has proved, and may hereafter prove, possible to go further and to lay down a principle of general application, it results from what has been said about the language of the Confederation Act, that this cannot be satisfactorily accomplished in the case of general questions such as those referred to—*per* Lord Moulton.

From the principles laid down in these various extracts, illustrated by other decisions as well, it is now in order to attempt to deduce some leading propositions as to the scheme of division and as to the canons of construction to be applied for the reconciliation of the class enumerations.

CHAPTER XXII.

The Cardinal Principle of Allotment.

It may now be affirmed with some degree of assurance that the British North America Act embodies a system of government based on principles truly federal.[1] The aim was to reconcile a Dominion-wide unity of action and control in all matters of common Canadian concern with local and independent control by each province of all matters of merely local or private concern in a provincial sense in each province. To this end the Act as now authoritatively construed assigns to the parliament of Canada all such matters only as are of common Canadian concern, while the provincial jurisdiction embraces in each province all such matters as are of merely provincial concern. In this view and if there were in the Act no further attempt to limit more definitely the respective fields of federal and provincial authority, either jurisdiction might be taken as the starting point for investigation; but in each of the two leading sections, 91 and 92, there is an enumeration of classes and a method of cross-reference which renders it advisable to investigate, as it were, from both ends.

Federal Jurisdiction is only over matters of common concern.—Section 91 provides as its main substantive enactment that the parliament of Canada may make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned by the Act to the exclusive jurisdiction of the provincial legislatures. This early cross-reference

[1] See *ante*, p. 370, *et seq.*

requires that attention should at once be paid to section 92 which defines the limits of exclusive provincial jurisdiction. The underlying principle of the section is to be found in No. 16 of its class enumerations: "Generally, all matters of a merely local or private nature in the province." In the *Local Prohibition Case*[2] their Lordships of the Privy Council expressly stated that all the matters enumerated in the 16 heads of section 92 are from a provincial point of view of a local or private nature. Of No. 16 they say:

> "In section 92, No. 16, appears to them to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in section 91. It assigns to the provincial legislature all matters in a provincial sense, local or private, which have been omitted from the preceding enumeration; and, although its terms are wide enough to cover, they were obviously not meant to include provincial legislation in relation to the classes of subjects already enumerated."

The point their Lordships were making was that it would not be logical to treat a particular provincial enactment as falling both within No. 16 and also within one of the other classes of section 92; just as it would not in one sense be logical to treat a particular federal enactment as falling both within the opening clause of section 91 and also within one of the enumerated classes of that section.[2a] But there is a marked difference in the method of enactment adopted in the two sections, 91 and 92, respectively. Section 91 introduces certain class enumerations only for greater certainty, but not so

[2] (1896), A. C. 348; 65 L. J. P. C. 26. See extract, *ante* p. 432.
[2a] See judgment of Lord Moulton in the *John Deere Plow Co. Case* (1915), A. C. 330; 84 L. J. P. C. 64. Extract, *ante*, p. 444.

as to restrict the generality of the substantive enactment of the opening clause; on the other hand, the enactment of section 92 is entirely by class enumerations, ending with the comprehensive residuary No. 16.

Bearing in mind then that provincial jurisdiction has been authoritatively held to cover all matters in a provincial sense local or private, one must realize that the opening clause of section 91, though in form residuary, is dealing only with matters of common concern to the whole Union. And in the same *Local Prohibition Case* it was so held.[3] Collecting the various phrases used in that case to describe the scope of the opening clause of section 91, the above quoted passage dealing with No. 16 of section 92, applied *mutatis mutandis* to section 91, would read thus: "The introductory clause of section 91 assigns to the Dominion parliament all matters in a Dominion sense of national concern, matters unquestionably of Canadian interest and importance affecting the body politic of the Dominion, not covered by the enumeration which follows." The words were obviously intended to cover the enumerated classes because those classes had been recognized by the agreement of the federating provinces as of common Canadian concern; but, to avoid doubt, the exclusive legislative authority of the parliament of Canada is "for greater certainty" declared—not enacted—to extend to those classes. All matters, therefore, within the legislative authority of the federal parliament, whether within the class enumerations or unenumerated, are ear-marked as of quasi-national concern, as one would expect in a federal union; and, it is not arguing in a circle to say that this principle of allotment is to be borne in mind in interpreting the

[3] See extract, *ante*, p. 432.

language of the class enumerations of section 91, particularly where there is an apparent inconsistency as between the class enumerations of sections 91 and 92 respectively.

Following the class enumerations of section 91 this clause follows:

> And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

In *Parsons' Case*[4] it was intimated that in its true grammatical construction this clause referred only to No. 16 of section 92; but in the *Local Prohibition Case*[5] this view was abandoned and it is now settled that it refers to and correctly describes all the classes enumerated in section 92 as being from a provincial point of view of a local or private nature. It is to be read therefore as a limiting proviso to section 92. In other words,

Provincial Jurisdiction extends to all matters in a provincial sense local or private within the province; subject, however, to this proviso that any matter really falling within any of the class enumerations of section 91 is to be deemed of common Canadian concern and not in any sense a matter local or private within any province.

This large principle of allotment, on the one side matters of quasi-national concern and on the other side matters of local concern in each province, is to be borne in mind in interpreting the language of the class enumerations of sections 91 and 92 respectively. The principle has not been propounded

[4] 7 App. Cas. 96; 51 L. J. P. C. 11. See extract, *ante*, p. 419.
[5] (1896), A. C. 348; 65 L. J. P. C. 26. See extract, *ante*, p. 432.

as the necessary conclusion from the language employed in the respective class enumerations taken alone. It stands out rather as the basic principle of federalism and, as a matter of authoritative interpretation, is deduced by the Privy Council in the *Local Prohibition Case* from the language of the opening and main substantive clause of section 91 on the one hand as compared and contrasted with the language of the comprehensive residuary clause No. 16, of section 92 on the other. It is not therefore, as already intimated, arguing in a circle to say that the language of the class enumerations of both section 91 and section 92 is to be interpreted in the light of this large principle of allotment which is now recognized as underlying the distribution of legislative power as between the Dominion and the provinces respectively effected by the British North America Act.

The residuum, so called.—This marked dividing line clearly recognized, matters of common Canadian concern on one side and matters of provincial concern in each province on the other, it would appear to be a misnomer to say of either jurisdiction that it carries with it the *residuum* of legislative power in Canada, except in the sense in which it might be said that one particular half of a divided orange represents a *residuum*. There is in fact a residuary or supplementary clause in each of the two sections 91 and 92; but in each case it carries with it the *residuum* of federal or provincial subjects, as the case may be, not covered by the respective class-enumerations. For example, federal jurisdiction is over matters of quasi-national concern. Certain classes of subjects had been agreed upon as falling within that category and these, for greater certainty, are set out in the class-enumerations of section 91. All other matters of quasi-

national concern are covered by the opening clause of section 91. In other words, that clause covers only a *residuum* of matters of quasi-national concern. And so as to section 92: certain classes of subjects had been agreed on as of local provincial concern and these are specially enumerated in the fifteen classes of the section while the large *residuum* of matters of local provincial concern is covered by No. 16: "Generally, all matters of a merely local or private nature in the province": as that item has been authoritatively interpreted. As will appear later, the provincial *residuum* covers, in the number of its topics at least if not in their importance, a much larger legislative field than that covered by the opening clause of section 91. However, the important point here is that the use of the word *residuum* as indicating any real principle of distribution as between federal and provincial jurisdiction is entirely out of place under the British North America Act as now interpreted. Nevertheless,

The Distribution is Exhaustive.—The whole field of self-government in Canada is covered in the distribution of legislative power effected by the British North America Act. Whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces within the limits of the Act.[6] Whatever is not thereby given to the provincial legislatures rests with the parliament of Canada.[7]

[6] *Re References* (1912), A. C. 571; 81 L. J. P. C. 210. See extract, *ante*, p. 442.

[7] *Lambe's Case*, 12 App. Cas. 575; 56 L. J. P. C. 87; see extract *ante*, p. 427. Previously indicated in *Dow* v. *Black* (extract *ante*, p. 415); *Valin* v. *Langlois* (extract *ante*, p. 416); and *Russell* v. *Reg.* (extract *ante*, p. 424). See also *Brophy's Case* (1895), A. C. 202; 64 L. J. P. C. 70; and *Union Colliery Co.* v. *Bryden* (1899), A. C. 580; 68 L. J. P. C. 118.

What of reservation is wrapped up in the qualifying phrase "within the limits of the Act" has been the subject of enquiry in previous chapters.[8] There are, undoubtedly, matters upon which neither the federal parliament nor any provincial assembly can legislate; matters touching the fundamentals of the British Constitution, particularly in its Imperial aspect, and matters deemed to be of concern to the Empire at large and as such covered by Imperial enactments. But these, while not to be lost sight of[9] are not here of immediate concern. What is emphasized is that of the entire field of self-government constitutionally allotted to Canada the British North America Act works a division, assigning to the federal parliament all such matters (specifically enumerated or not) as are of general Canadian interest and importance while all matters of local provincial concern are placed in the hands of the provincial assemblies.

As already intimated, there are certain sections of the British North America Act which confer upon Canadian legislatures, federal and provincial, powers of a constituent character.[10] These are not part of the scheme of distribution as between the Dominion and the provinces now under consideration. They have regard to the constitutional machinery and not to the objects upon which that machinery may operate. And as to them in one particular at least it has been held that the British North America Act is not necessarily exhaustive. The constitution of the legislative and executive authority in the pre-Confederation provinces is expressly continued by the Act, and the provisions of the Colonial Laws Validity Act, 1865, as to the

[8] Part I., Chapters I. to XIII.

[9] *Per* Idington, J., *In re Insurance Act, 1910*, 48 S. C. R. at p. 290; *per* Anglin, J., in *Re References*, 43 S. C. R. at p. 593.

[10] See Chapter V., *ante*, p. 40; also p. 311.

amendment by colonial legislatures of their own constitutions, have been held by the Privy Council to be still operative in relation to the legislatures of those provinces.[1] But the point would appear to be of little practical importance as the Board was of opinion that the impugned Act of the Nova Scotia legislature was well warranted by the British North America Act itself, section 92, No. 1, conferring upon all the Canadian provinces, post-confederation[2] as well as pre-confederation, power to amend the provincial constitutions. This question, however, is mentioned here merely to emphasize the fact that the scheme of distribution as between the Dominion and the provinces now under examination has reference solely to the objective range of legislative power; and as to that the distribution is exhaustive, as indeed the opening clause of section 91 clearly intimates.

[1] *Fielding* v. *Thomas* (1896), A. C. 600; 65 L. J. P. C. 103.

[2] Including Ontario and Quebec as in a sense post-confederation provinces.

CHAPTER XXIII.

Class-enumerations.

Although the large principle of allotment which underlies the distribution of legislative power under the British North America Act is to assign matters of common Canadian concern to the parliament of Canada and matters of local concern in a provincial sense in each province to the provincial legislatures, the fact remains that the distribution is very largely effected by class-enumerations. Apart from these or even with their assistance it is often difficult to determine whether a particular subject not covered by any class-enumeration in either section 91 or section 92 is a matter of common Canadian concern and as such falls within the opening clause of section 91, the federal *residuum*, or, on the other hand, is in each province a matter of local concern and as such falls within No. 16 of section 92, the provincial *residuum*. But the chief difficulty has been to reconcile the respective class-enumerations. The Act in terms declares the two jurisdictions, federal and provincial, to be mutually exclusive and it was not intended that there should be any real conflict between them.[1] But a perusal of the respective class-enumerations discloses that if in each case the full natural meaning is to be given to the words employed the classes must inevitably overlap; and in one case indeed, the Privy Council has said that the two sections 91 and 92 are not mutually exclusive, that their provisions may

[1] *Parsons' Case*, 7 App. Cas. 96; 51 L. J. P. C. 11. See extract *ante*, p. 419.

overlap.[2] The means adopted in the Act to prevent a real conflict and the rules of interpretation which have been applied to reconcile apparent inconsistencies must be left for discussion later. Here the class-enumerations may well be studied with a view to seeing how far they do apparently overlap or interlace.

A complete enumeration of the subjects upon which legislation is possible is practically unattainable, so infinite in number are they.[3] Upon a view taken of possible legislative products—to use Mr. Justice Idington's expression[4]—the British North America Act divides them into classes described in more or less large and comprehensive phrase, assigning some to federal, some to provincial jurisdiction. The question here is as to the method of classification; and while over-refinement and rule-of-thumb methods are to be avoided in dealing with an organic instrument of government, it may prove not entirely unprofitable to attempt to place these classes in still larger sub-divisions. It must be borne in mind, however, that, as lately said by Lord Moulton, in the *Deere Plow Co. Case*,[4a] these sections cannot be taken as embodying "the exact disjunctions of a perfectly logical scheme."

As justifying this attempt to group the class-enumerations of sections 91 and 92 of the Act, though not supporting in their entirety the views hereafter expressed, the following passage may be quoted:

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[2] *Montreal* v. *Montreal Street Ry.* (1912), A. C. 333; 81 L. J. P. C. 145—the *Through Traffic Case*. *See* extract *ante*, p. 440. However, in the *References Case* (1912), A. C. 571; 81 L. J. P. C. 210, the jurisdictions are again described as "mutually exclusive."

[3] *Re References* (1912), A. C. 571; 81 L. J. P. C. 210.

[4] *Re Alberta Railway Act* (1913), 48 S. C. R. at p. 25.

[4a] See extract *ante*, p. 444.

"The division of powers under the general scheme of the Act is according to the subject matter of the legislation, not according to the persons to be affected by the legislation. Care was taken to specify those cases in which it was thought necessary that the rights of a particular class of persons as such or a particular class of institutions as such should be exclusively committed to the control of one legislature or of the other."[5]

Government property and finance.—There are, first, certain classes in both sections 91 and 92 which cover what may be called the proprietary and financial business of the respective governments; and these, it is conceived, may be largely eliminated from the region of controversy as between federal and provincial jurisdiction. For example, section 91 places in the Dominion field for exclusive control by the federal parliament:

1. The public debt and property.

3. The raising of money by any mode or system of taxation.

4. The borrowing of money on the public credit;

while section 92 gives exclusive control to the provincial legislatures over:

2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.

3. The borrowing of money on the sole credit of the province.

5. The management and sale of the public lands belonging to the province and the timber and wood thereon.

The "literal conflict" between these powers is referred to in *Parsons' Case;*[6] but, though there is an apparent overlapping, these powers do not in fact come into conflict at all. As their Lordships

[5] *Re Companies* (1913), 48 S. C. R. at p. 410, *per* Duff, J.
[6] 7 App. Cas. 96; 51 L. J. P. C. 11. See extract *ante*, p. 419.

put it, this is obviously so. They are the necessary powers of mutually independent governments. The wider choice of method allowed to the Dominion in taxation does not touch the question; no one would suggest that its power of indirect taxation could be used to raise a revenue for provincial purposes. There is of course room for controversy as to certain public assets, whether they are Crown property in right of the Dominion or in right of a province; but, that controversy settled, there remains no question as to legislative control. This however is a matter already sufficiently discussed.[1]

Government business: public services.—There are classes of this description in both sections 91 and 92. For example, section 91 assigns to *federal jurisdiction:*

5. The postal service.

6. The census and statistics.

7. Militia, military and naval service, and defence.

8. The fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada.

9. Beacons, buoys, lighthouses, and Sable Island.

11. Quarantine and the establishment and maintenance of marine hospitals.

12. Sea coast and inland fisheries.

13. Ferries between a province and any British or foreign country or between two provinces.

14. Currency and coinage.

17. Weights and measures.

28. The establishment, maintenance and management of penitentiaries;

while section 92 assigns to *provincial jurisdiction*:

4. The establishment and tenure of provincial offices and the appointment and payment of provincial officers.

[1] *Ante*, p. 386, *et seq.*

6. The establishment, maintenance, and management of public and reformatory prisons in and for the province.

7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals.

8. Municipal institutions.

9. Shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes.

Some of these classes will call for further notice; but there is not now much room for serious controversy as between federal and provincial jurisdiction in regard to most of them.

Many other classes suggest some measure of state control and regulation, but the above classes have particular regard to the relations between the state, federal or provincial as the case may be, and the citizen; while the other classes referred to, *e.g.* navigation and shipping (sec. 91, No. 10), banking (sec. 91, No. 15), marriage and divorce (sec. 91, No. 26), the incorporation of companies with provincial objects (sec. 92, No. 11), and the solemnization of marriage in the province (sec. 92, No. 12), have regard more particularly to the rights and obligations of citizens as between each other. The administration of justice, both civil and criminal, including punishment for breach of provincial law, is a large subject presenting aspects both of state service and intervention on the one hand and private rights as between citizens on the other.

Persons and things.—Speaking broadly, laws are passed to regulate and govern the actions of men. An Act of parliament may be in the nature of special or "private bills" legislation regarding one person, natural or artificial. If power to make laws in relation to such a person is exclusively vested

in a particular legislature such power would *primâ facie* cover all his possible legal relations. The same remark would apply if the power were exclusive to make laws in relation to a particular class of persons; all the legal relations of all persons coming within the class would *primâ facie* be within the exclusive control of such legislature. And so as to the exclusive power to legislate in relation to a particular thing or institution or to a particular class of either. There is no instance of specific allotment of a particular person to federal or provincial jurisdiction; but there are two classes of persons who, for all purposes apparently, may be made subject to federal law, namely *Indians* (sec. 91, No. 24), and *aliens* (sec. 91, No. 25). If, however, the Dominion parliament does not see fit to legislate for them as to all their possible legal relations, then provincial laws may govern Indians and aliens, not as Indians or aliens but as inhabitants of the provinces in those matters which lie within provincial competences.[8]

The general jurisdiction over physical things is with the provinces under "property and civil rights in the province," but there are three marked exceptions in the class-enumerations of section 91, namely, Sable Island (No. 9), lands reserved for Indians (No. 24), and federal undertakings. Works and undertakings are classified according to the potential scope of their operations geographically. This appears in section 92, No. 10, the exceptions there mentioned, which may be conveniently described as federal undertakings, being carried over to section 91 by force of No. 29 of its class-enumerations. These undertakings, both federal and pro-

[8] *R.* v. *Hill* (1907), 15 Ont. L. R. 406 (Indians); *Tomey Homma's Case* (1903), A. C. 151; 72 L. J. P. C. 23, and *Quong Wing* v. *R.* (1914), 49 S. C. R. 440 (aliens).

vincial, are as the Privy Council has said " physical things, not services "; and as will be seen later this is a consideration which has to be borne in mind and which aids materially in determining the scope of the two classes, federal and provincial, not only in reference to each other but also in reference to other classes of sections 91 and 92 respectively.

Private rights.—Of the remaining classes which regard mainly private rights and obligations as between individuals it may be said that they present two marked differences in the principle of classification. First, there is a classification based upon the principle of segregation into classes covering more or less distinct fields of human activity. In two classes only of section 91 is this the dominating principle, but they cover a large and important field, namely,

10. Navigation and shipping.

15. Banking, incorporation of banks, and the issue of paper money.

Secondly, what may be called a classification according to divisions of jurisprudence is adopted, and the far-reaching effect is that these classes practically cross-section the whole field of possible legislation. There are notably two classes of this description in section 92:

13. Property and civil rights in the province.

14. The administration of justice in the province, etc.

The range of these two classes if not modified by the operation of other class-enumerations would manifestly be very wide. And in a lesser degree the same is true of such classes in section 91 as

18. Bills of exchange and promissory notes.

19. Interest.

20. Legal tender.
21. Bankruptcy and insolvency.
22. Patents of invention and discovery.
23. Copyright.
26. Marriage and divorce.
27. The Criminal Law, etc.

Whole branches of jurisprudence are wrapped up in some of these classes; and all, more or less, interlace with and cross-section other classes in both sections 91 and 92.

CHAPTER XXIV.

Overlapping Areas: Concurrent Powers: Federal Authority Paramount.

The foregoing examination of the class-enumerations of sections 91 and 92, cursory and somewhat superficial though it may have been, has brought out clearly that if each class is allowed the full scope to which upon the natural import of the language used it is entitled, the jurisdictions must inevitably overlap, or, to use Lord Watson's expression, interlace. And even after turning upon these class-enumerations the search-light of the great underlying principle of allotment, that the federal classes are to be viewed as confined to matters of common Canadian concern and the provincial as covering matters of local provincial concern,[1] and after applying further the great cardinal rule of interpretation laid down by the Privy Council in *Parsons' Case,* that the two sections 91 and 92 must be read together and the language of the one interpreted *and, where necessary, modified* by that of the other,[2] it will still appear that there are domains in which *intra vires* federal legislation will meet *intra vires* provincial legislation. The perplexing problem is to reconcile this possible situation with the essentially sound principle, declared indeed by the Act, that the two jurisdictions, federal and provincial, are mutually exclusive.

Conflict of laws: concurrent powers.—In order to deal intelligently with this question one must endeavour to get a clear idea of the meaning of the phrases ' conflict of laws ' and ' concurrent powers.'

[1] See *ante,* p. 448, *et seq.*
[2] See *post,* p. 480, *et seq.*

Any case which comes up for judicial decision involves the application of law to facts. The law applicable may be unquestioned and the dispute be as to the facts, or, the facts being determined, the dispute may be as to the law applicable thereto. This latter aspect is the one with which we have to deal. As Von Savigny puts it, out of any given state of facts arise legal relations, one or more, capable presumably of a definite, absolutely correct determination. As to any one of these legal relations there cannot be a conflict of law. Of any number of laws put forward as determining the legal relation, one only is the law which governs. The views of advocates, and even judges, may conflict, but the law, though it may be from time to time varied at the will of the law-making body in the state, is at any given moment of time theoretically a thing certain. It follows that there cannot be two statutes determining, in different ways, any one of the legal relations which is to arise from any given state of facts. If there be two statutes purporting so to do, one of them must be of no legal effect, either because repealed by the other, or by some rule of law made subordinate thereto as to the particular legal relation. It follows, too, that, unless chaos is come again, there cannot be in two legislative bodies concurrent powers of legislation in reference to the same legal relation, in the sense that at the same moment of time the enactment of each is law. This is recognized in the British North America Act, for in section 95, where powers of legislation are given over the same subject matter to both the Dominion and the Provincial legislatures, there is the express provision that the legislation is not to be concurrent; that the enactment of a provincial legislature is to be law only in the absence of Dominion legislation upon the subject matter.

The question will be found to turn upon the fact as put by the Privy Council in *Hodge's Case*,[3] that subjects which in one aspect and for one purpose fall within provincial jurisdiction may in another aspect and for another purpose fall within the jurisdiction of the parliament of Canada. A particular legal relation viewed as a subject matter for legislative treatment may in its general aspect be within provincial jurisdiction, while in its particular setting or environment it may be a proper subject for federal legislation; and *vice versâ*. It must ever be borne in mind that

> "the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."[3a]

Some concrete examples drawn from decided cases, may help to make the position clearer:

The law of master and servant falls in its general aspect within provincial jurisdiction as relating to 'civil rights in the province' (sec. 92, No. 13). Federal railways are within federal jurisdiction. A provincial law, not aimed specially at the relations between federal railways and their employees, would nevertheless govern those relations.[4] But legislation aimed specially at those relations is within federal competence.[5]

Again, the operation and effect of mercantile documents (other than bills of exchange and promissory notes) such as bills of lading and ware-

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[3] 9 App. Cas. 117; 53 L. J. P. C. 1. See extract *ante*, p. 426.

[3a] *Per* Marshall, C.J., in *Gibbons* v. *Ogden*, 9 Wheat. 204: quoted with approval by Fournier, J., in *Parsons' Case*, 4 S. C. R. 276, and by Boyd, C., in *Kerley* v. *London & L. E. Ry.*, 26 Ont. L. R. 588.

[4] *Can. Southern Ry.* v. *Jackson*, 17 S. C. R. 316.

[5] *Grand Trunk Ry* v. *Atty.-Gen. of Canada*—the *Contracting Out Case* (1907), A. C. 65; 76 L. J. P. C. 23. See extract *ante*, p. 437.

house receipts is in its general aspect within the jurisdiction of provincial legislatures as a matter relating to 'property and civil rights in the province' (sec. 92, No. 13). 'Banking' is exclusively within federal jurisdiction (sec. 91, No. 15). A provincial Act, not aimed specially at the use of such mercantile documents in banking transactions, would nevertheless govern such use of them.[6] But legislation aimed specially at their use in banking transactions is within federal competence[7] and only within federal competence.

Again, the evils of the drink traffic as they affect the body politic of the Dominion may be combatted by federal legislation under the general power over subjects of quasi-national concern conferred by the opening clause of section 91.[8] But in their local provincial aspect, that is to say, as a matter of a 'merely local or private nature in the province,' they may be met in each province by provincial legislation under No. 16 of section 92.[9]

In each of the above instances if the enactments, federal and provincial, are the same in general tenor and effect no practical question would arise. But if they differ, which is to govern? It is essential to the avoidance of a deadlock that in such cases the legislation of one of the two bodies should be of paramount authority.

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[6] *Beard* v. *Steele*, 34 U. C. Q. B. 43, as more fully explained in *R.* v. *Taylor*, 36 U. C. Q. B. 212; *Smith* v. *Merchants Bank*, 8 S. C. R. 512.

[7] *Tennant* v. *Union Bank* (1894), A. C. 31; 63 L. J. P. C. 25. See extract *ante*, p. 429.

[8] *Russell's Case*, 7 App. Cas. 829; 51 L. J. P. C. 77. See extract *ante*, p. 424.

[9] *Local Prohibition Case* (1896), A. C. 348; 65 L. J. P. C. 26. See extract *ante*, p. 432.

Federal Laws of Paramount Authority.

Intra vires federal legislation will override inconsistent *intra vires* provincial legislation. Upon a careful analysis of the provisions of sections 91 and 92 the Privy Council has finally enunciated the above proposition, assigning paramount authority to federal legislation in all cases of conflict between *intra vires* enactments.

Dealing first with *the enumerated classes;* the position is this: The exclusive legislative authority of the parliament of Canada over the 29 enumerated classes of section 91 is guarded and plenary operation assured by the *non-obstante* clause with which the class enumeration opens.[10] 'Notwithstanding anything in this Act' the parliament of Canada may exclusively make laws in relation to all matters which really fall within those classes.

On the other hand, the exclusive authority of the provincial legislatures over the 16 enumerated classes of section 92 is weakened and, in a sense, invasion is made possible by the concluding clause of section 91. That clause, as already noticed,[1] is really a limiting proviso or exception[2] to section 92. Provincial legislation, therefore, though plenary is only so "subject to the provisions of section 91"; [3] that is to say, subject to the right of the parliament of Canada to legislate fully upon all matters which strictly, that is to say, really, fall within the 29 enumerated classes of section 91. In relation to the subjects specified in section 92 and not falling within any of those specified in section 91

[10] *Tennant's Case* (1894), A. C. 31; 63 L. J. P. C. 25; extract *ante*, p. 429; *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90; extract *ante*, p. 436.

[1] *Ante*, p. 451.

[2] *Local Prohibition Case;* passage *ante*, p. 433.

[3] *Re Prohibition Liquor Laws*, 24 S. C. R. at p. 258, *per* King, J.

the exclusive power of the provincial legislatures may be said to be absolute.[4]

With regard to the two *residuary areas* of sections 91 and 92 respectively, that is to say, the opening clause of section 91 and No. 16 of section 92, the same rule of federal paramountcy obtains. In so far as a provincial enactment based solely upon No. 16 of section 92 comes into collision with a federal enactment based solely upon the opening clause of section 91, the provincial legislation must yield to the Dominion law and must remain in abeyance unless and until the Dominion law is repealed.[5]

Finally, with regard to possible conflict between federal legislation under the opening clause of section 91 and provincial legislation under one of the fifteen specific heads of section 92, the question is one of difficulty. As pointed out by the Privy Council, the exception to section 92 enacted by the concluding clause of section 91 refers only to the enumerated classes of section 91 and has no application to its opening clause.[6] Upon this ground, the Board held that federal legislation based solely upon the opening, peace-order-and-good-government clause of section 91 ought not to trench upon any provincial enumerated class; and the reason given is this:

"If it were once conceded that the parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that those matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in section 92 upon which it might not legislate to the exclusion of the provincial legislatures."

[4] *Brophy's Case* (1895), A. C. 202; 64 L. J. P. C. 70.
[5] *Local Prohibition Case*, extract *ante*, p. 432.
[6] *Local Prohibition Case*. See passage *ante*, p. 433.

Does not this mean that such federal legislation would be really *ultra vires* as being upon a matter which had not in fact become a matter of national concern; which had not, in other words, really attained such dimensions as to affect the body politic of the Dominion? The word "assumption" in the above passage, read in connection with the preceding words, appears to mean "false assumption." A mere desire for uniformity is not enough to warrant federal legislation; otherwise, as often pointed out, the uniformity section (94) of the British North America Act would have been unnecessary. Real community of interest in a large Canadian sense, as distinguished from mere similarity of conditions in the different provinces, must exist. But, the line once really passed, the matter is no longer a matter, for example, of "property and civil rights in the province," but has become a matter affecting the peace, order, and good government of Canada as one body politic. In this view, it seems difficult to deny to the parliament of Canada plenary power of legislation affecting, if need be, rights of property and civil rights in every or any province. The position is thus accurately put in a recent case:

> "When a matter primarily of civil rights has attained such dimensions that it 'affects the body politic of the Dominion' and has become 'of national concern,' it has in that aspect of it not only ceased to be 'local and provincial,' but has also lost its character as a matter of 'civil rights *in the province*' and has thus so far ceased to be subject to provincial jurisdiction that Dominion legislation upon it under the 'peace, order, and good government' provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount."[7]

And, in the same reference, Sir Charles Fitzpatrick, C.J., treats as clearly established law:

[7] *Re Insurance Act, 1910*, 48 S. C. R. at p. 310, *per* Anglin, J.

"That the parliament of Canada may legislate with respect to matters which affect property and civil rights when they have attained such dimensions as to affect the body politic of the Dominion."[8]

It is worthy of note in this connection that the doctrine of the paramountcy of federal legislation based solely upon the opening clause of section 91 over provincial legislation based solely upon the residuary class, No. 16, of section 92, is not propounded upon anything to be found in their language respectively. It must be taken as founded upon the broad, general principle that in matters really affecting the well-being of the whole people of Canada as one body politic and as such covered by federal legislation, local laws must give way. And, if so, it would seem in principle immaterial whether the local law were founded upon one of the more specific class enumerations of section 92 or upon the residuary, No. 16. The opening clause of section 91 draws no such distinction.

The duty of the Courts to determine whether the line which separates matters of common concern from matters of local provincial concern has or has not, as matter of fact, been passed has already been discussed, and is not here in question. Nor are the principles of interpretation which are to be borne in mind in determining the scope of the various classes now under consideration, nor the method of enquiry to be adopted in the case of any impugned Act in order to determine as to its validity. These subjects have still to be considered. This chapter purports to deal only with the possible conflict of *intra vires* enactments.

[8] At p. 265.

CHAPTER XXV.

Rules of Interpretation for Determining Scope of the Various Classes.

Although, as laid down by the Privy Council, Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes,[1] it is nevertheless true that in the many years which have now elapsed since the passage of the Act certain principles and rules of interpretation have become established as peculiarly to be borne in mind in determining the scope of the various class-enumerations.

Regard must be had to the Character of the Act.

This principle of interpretation has already been sufficiently dealt with. The British North America Act is a great constitutional charter.[2] It establishes a system of government upon essentially federal principles.[3] And it must be construed as intended to cover the whole area of self-government within the whole area of Canada; in other words, its scheme is exhaustive and was intended to cover the whole field of colonial self-government in its widest range.[4] That these principles are to be applied to the interpretation of the language used to designate the various classes of subjects assigned to the Dominion and to the provinces respectively, is thus laid down:

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[1] *Lambe's Case*, 12 App. Cas. 575, 56 L. J. P. C. 87.
[2] See *ante*, p. 347, *et seq.*
[3] See *ante*, p. 370, *et seq.*
[4] See *ante*, p. 453, *et seq.*

"Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation), general terms are necessarily used in describing what either is to have; and with the use of general terms comes the risk of some confusion, whenever a case arises in which it can be said that the power claimed falls within the description of what the Dominion is to have, and also within the description of what the province is to have. Such apparent overlapping is unavoidable, and the duty of a Court of law is to decide in each particular case on which side of the line it falls *in view of the whole statute.* . . .

"In the interpretation of a completely self-governing constitution founded upon a written organic instrument such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. *When the text is ambiguous—as, for example, when the words establishing two naturally exclusive jurisdictions are wide enough to bring a particular power within either—recourse must be had to the context and scheme of the Act.*"[5]

The Large Underlying Principle of Allotment must be Kept in View.

If it be true, as affirmed in a previous chapter,[6] that the policy of the British North America Act was to assign to federal jurisdiction matters only of common concern to the whole Union, leaving or allotting to each province the control of all matters substantially of local concern in such province, it is accurate to say that any class of subjects specifically assigned to the parliament of Canada was so assigned because recognized by the federating provinces as covering subjects in regard to which there was a community of interest calling for unity of action and control. In this view, it would appear

[5] *Re References* (1912), A. C. 571; 81 L. J. P. C. 210.
[6] Chap. XXII., *ante*, p. 448.

to be proper to have regard to this underlying principle of allotment in interpreting the language of the class-enumerations of section 91. By parity of reasoning, the principle underlying the allotment of a particular class of subjects to a provincial legislature should be taken to be this, that the subjects falling within the class were recognized as in each province of substantially local concern, calling for local provincial treatment and control; and the language employed should be interpreted with that principle in view. These propositions, it is conceived, are well warranted by the authorities.

There are very many *dicta* of individual judges emphasizing the large and quasi-national scope of many of the class-enumerations of section 91.[7] These were not always uttered as indicating an opinion in favour of a restrictive interpretation; frequently either quite the reverse or as emphasizing the necessity for giving paramount authority to Dominion powers. The view, however, now being supported is that, restrictively, those powers should not be taken to cover, or as intended to cover, matters which in each province are there substantially of local provincial concern and range of influence. Mere similarity of conditions, even in important matters, is not to be taken as establishing community of interest.[8] Diversity of treatment, if thought desirable, is of the essence of local provincial autonomy.[9] As instances of the application of the large principle of allotment above referred to in a restrictive way, so as to cut down the range

[8] *Re Insurance Act, 1910*, 48 S. C. R. at p. 304, *per* Duff, J.

[9] *Re Nakane*, 13 B. C. at p. 376. See *ante*, p. 402.

[7] For example, *R.* v. *Mohr*, 7 Que. L. R. at p. 187, *per* Dorion, C.J.; *Thrasher Case*, 1 B. C. at p. 183, *per* Begbie, C.J.; *R.* v. *Robertsan*, 6 S. C. R. at p. 66, *per* Gwynne, J.; *R.* v. *Wason*, 17 Ont. App. R. at p. 236, *per* Burton, J.A.; *Re Prohibitory Liquor Laws*, 24 S. C. R. at p. 233, *per* Sedgewick, J. In fact, examples might be multiplied indefinitely.

of the class-enumerations of section 91, some authoritative decisions may be cited.

The federal power to exclusively make laws as to all matters coming within the class "*the public debt and property*" (*sec. 91, No.* 1) would carry with it, upon the bare language used, control of provincial finances and provincial public property. Obviously such an interpretation would be subversive of the whole scheme of the Act, as described in the classic language of Lord Watson in the *Liquidator's Case*.[10] What is covered by the item is clearly the public debt of Canada as a whole, assumed at Confederation or since incurred, and the property of the Crown held in right of the Dominion and for purposes of Dominion government.[1] Provincial public debts incurred in carrying on provincial government and the public Crown assets assigned to the provinces are in each province matters of provincial concern only and as such under provincial control. And, in like manner, other classes of section 91 dealing with matters of government business and finance are, as intimated on a previous page,[2] to be confined to the public business and finances of the federal government.

"*The regulation of trade and commerce*" (*sec. 91, No. 2*), which upon the bare words would cover a very wide field, was held in *Parsons' Case*[3] to cover—

> "Political arrangements in regard to trade requiring the sanction of parliament, regulations of trade in matters of inter-provincial concern, and it may be they would include general regulations of trade affecting the whole Dominion. . . . The regulation of trade and commerce does not

[10] See the passage, *ante*, p. 304.
[1] *Burrard Power Co.* v. *R.*, 43 S. C. R. 27, *per* Duff, J., at p. 51.
[2] *Ante*, p. 458.
[3] 7 App. Cas. 96; 51 L. J. P. C. 11.

comprehend the power to regulate by legislation the contracts of a particular business or trade . . . in a single province."

So far, indeed, has the Privy Council gone in limiting the scope of this class that in the *Through Traffic Case*[4] it was practically relegated to the unenumerated *residuum* of federal jurisdiction; in other words, as that judgment has been construed by Mr. Justice Anglin:

"The regulation of trade and commerce in clause 2 of section 91 should be given a construction which will preclude its being invoked to justify Dominion legislation trenching upon the provincial field."[5]

In the most recent case in which the range of this class has been considered by the Privy Council, it was held that the incorporation of a trading or commercial company under Dominion legislation with capacity to carry on its business throughout the Dominion was, in effect, an interprovincial or general Dominion regulation of trade and commerce, which could not be made futile by a provincial Act prescribing, as a condition precedent to the exercise in such province of the company's power to do business there, that the company must take out a provincial license.[6] Apart from this decision, there is no case, since *Parsons' Case* was decided, in which provincial legislation regulating particular trades and commercial transactions has been successfully attacked as an invasion of the federal jurisdiction under this item, No. 2 of section 91.

"*Sea coast and inland fisheries*" (*sec. 91, No. 12*) has been held to cover—

[4] *Montreal* v. *Montreal Street Ry.* (1912), A. C. 333; 81 L. J. P. C. 145. See extract *ante*, p. 440.

[5] *Re Insurance Act, 1910*, 48 S. C. R. at p. 309.

[6] *John Deere Plow Co.* v. *Wharton* (1915), A. C. 330; 84 L. J. P. C. 64.

"subjects affecting the fisheries generally, tending to their regulation, protection, and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and the increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth:"[7]

And this view has been substantially upheld in the Privy Council.[8] The Dominion parliament cannot interfere with the rights of property vested in riparian proprietors, whether a province or an individual, further than laws within the above limits may curtail their exercise. The carrying on of a fisherman's business in a particular province may be a matter of local concern and a provincial object within the meaning of section 92, No. 11, "the incorporation of companies with provincial objects," so as to justify the incorporation of a provincial company to carry it on.[9]

Again, "bankruptcy and insolvency" (*sec. 91, No. 21*) has been held to contemplate only the enactment of a general code or system for the compulsory administration and distribution of the assets of persons who may become bankrupt or insolvent "according to rules and definitions prescribed by law."[10] In the absence of such a Dominion system, so prescribed by federal law, the whole field is practically within provincial jurisdiction, as a matter of substantially local concern in each province.[1]

[7] *R.* v. *Robertson*, 6 S. C. R. 52, *per* Ritchie, C.J., at p. 120.

[8] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90.

[9] *Re Lake Winnipeg Transp. Co.*, 7 Man. L. R. 255.

[10] *L'Union St. Jacques* v. *Belisle*, L. R. 6 P. C. 31. See extract *ante*, p. 414.

[1] *Voluntary Assignments Case* (1894), A. C. 189; 63 L. J. P. C. 59.

Upon this view the various Creditors' Relief Acts in force in the different provinces under provincial legislation are valid enactments as relating to "property and civil rights in the province" (*sec. 92, No. 13*);[2] and a provincial Act which, in view of the embarrassed state of a company's finances, forced commutation upon certain annuitants was upheld as relating to a matter of a "merely local or private nature in the province," even though at the time there was a federal Insolvency Act in force.[3]

In order to determine the meaning of the terms employed in describing any particular class, other parts of the British North America Act and of other Imperial Acts in pari materiâ may be looked at.[4]

It was pointed out in an earlier chapter that the other Imperial Acts which have been found helpful in interpreting the British North America Act have been as a rule constitutional statutes.[5] For example, the meaning of the words "*the regulation of trade and commerce*" (*sec. 91, No. 2*) was to a certain extent determined by the meaning given to a somewhat similar phrase in the Act of Union between England and Scotland.[6] That a restricted scope was intended was, in the opinion of the Privy Council, further evidenced (1) by the collocation of this class with others of national and general concern, indicating that regulations relating to general trade and commerce were in the mind of the framers of the Act; and (2) by the particular enumeration in section 91 of such classes as banking, weights and measures, bills of exchange and promissory notes,

[2] *Voluntary Assignments Case, ubi supra.*
[3] *L'Union St. Jacques* v. *Belisle, ubi supra.*
[4] *Parsons' Case*, 7 App. Cas. 96; 51 L. J. P. C. 11.
[5] See *ante*, p. 355, *et seq.*
[6] *Parsons' Case, ubi supra.*

etc., which enumeration would have been meaningless if the larger scope had been intended for No. 2.

In the same case, the meaning of the phrase "*property and civil rights*" (*sec. 92, No. 13*) was elucidated by reference to the same phrase in section 94 of the British North America Act and in section 8 of the Quebec Act, 1774.

The scope of the class "*interest*" (*sec. 91, No. 19*) was determined by its collocation with classes clearly relating to mercantile transactions, and a percentage added by provincial legislation to taxes in arrear was held *intra vires* as not conflicting with the authority of the Dominion parliament to legislate as to interest.[7]

In an opinion given by the Law Officers of the Crown in England as to the scope of the words "*the solemnization of marriage in the province*" (*sec. 92, No. 12*), the same meaning was attributed to those words as they had been held to bear in an English statute.[8]

The reconciliation of one class of section 91 with other classes of the same section, though not in itself of great importance, falls within the rule now under discussion. Logically, of course, they should not overlap.[9] But the necessity for reconciling the respective class-enumerations of sections 91 and 92 is imperative. The jurisdictions were intended to be and indeed are expressly stated by the Act itself to be mutually exclusive; and in the most recent pronouncement of the Privy Council they are so described.[10] The next rule deals with this feature

[7] *Lynch* v. *Can. N. W. Land Co.*, 19 S. C. R. 204. See *post*, p. 802.

[8] Quoted by Davies, J., in *Re Marriage Laws*, 46 S. C. R. at p. 342.

[9] See *ante*, p. 449.

[10] *Re References* (1912), A. C. 571; 81 L. J. P. C. 210. See extract *ante* p. 442.

and, though, strictly speaking, it is only one branch of the present rule, it is of cardinal importance and, therefore, deserves separate treatment.

Sections 91 and 92 must be read together and the language of the one interpreted, and, where necessary, modified by that of the other.[1]

Very few cases arise which do not call for the application of this rule and to multiply instances here would be but anticipating much of what must be said hereafter in dealing with specific classes. The emphasis is to be laid on the phrase "where necessary, modified." That phrase, which applies reciprocally, indicates most strongly the dissent of the Privy Council from the formula of Mr. Justice Gwynne as set out on a previous page,[2] which would have allowed play to provincial legislation under section 92, only after full scope had been given to federal legislation under section 91 upon the widest possible interpretation of the language of its class enumerations; and which, if upheld, would have made of the Union not a confederation, but, in effect, a legislative union under the control of the parliament of Canada. As will appear more fully hereafter, the rule now under discussion largely forbids the growth of any doctrine of implied powers to swell federal jurisdiction at the expense of the provinces.[3] Out of its application has grown a sub-rule of marked importance:

From any large general class in either section must be excepted any particular class in the other

[1] *Parsons' Case.* See extract *ante*, p. 419, where some examples are given.

[2] *Ante*, p. 412.

[3] See *post*, p. 493, *et seq.*

which forms a branch or sub-division of the larger general class.[4]

For example: From the general class "*criminal law* (*sec. 91, No. 27*) must be excepted the particular class, *provincial penal law* (*sec. 92, No. 15*).[5]

From "*the regulation of trade and commerce*" (*sec. 91, No. 2*) must be excepted trade "*licenses*" (*sec. 92, No. 9*).[6]

From "*property and civil rights*" (*sec. 92, No. 13*) must be excepted many items of section 91.[7]

From "*the administration of justice in the province*" must be excepted certain branches of jurisprudence which are to be found wrapped up in some of the items of section 91.[8]

It has, indeed, been suggested that all the items of section 92 are in the nature of exceptions to section 91;[9] but, while there is a sense in which the proposition is certainly true, it is equally certain that in the sense of the rule under discussion some of the items in section 91 are particular classes to be excepted out of larger general classes enumerated in section 92.[10]

If, on the due construction of the Act, a power be found to fall within either section, it would be quite wrong to deny its existence because by some possi-

[4] *Parsons' Case*, extract *ante*, p. 419. Some examples are there given.

[5] *Reg.* v. *Boardman*, 30 U. C. R. at p. 556. See *post*, p. 564, *et seq.*

[6] *Frederickton* v. *Reg.*, 3 S. C. R. at p. 551.

[7] In the Quebec Resolutions, 43 (15), the exception is expressly made.

[8] See *post*, p. 554, *et seq.*

[9] *Reg.* v. *Severn*, 2 S. C. R. 106, 110; *Thrasher Case*, 1 B. C. (pt. 1) 170.

[10] See *per* Burton, J.A., in *Hodge* v. *Reg.*, 7 O. A. R. at p. 274.

bility it may be abused or may limit the range which otherwise would be open to the other legislature.[1]

In the case from which the rule is taken, the right of the provinces to tax objects and institutions over which the federal parliament has legislative jurisdiction was affirmed.[2] Provincial legislatures may pass Mortmain Acts and thus prevent federal corporations from carrying on the business for which they are incorporated.[3] Dominion excise laws may be rendered nugatory by provincial prohibition.[4] A province may sell its timber on terms prohibiting export.[5] Fisheries regulations may prejudicially affect the owners of fishing grounds, provincial or private.[6] Railway legislation by the federal parliament may affect private rights and limit and regulate appeals to the Courts for their protection; and, on the other hand, federal railways are in many matters subject to provincial laws.[7] As has been said, lawful legislation does not become unlawful because it cannot be separated from its inevitable consequences.[8]

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[1] *Lambe's Case*, extract *ante*, p. 427.

[2] The rule is to the contrary in the United States, as is intimated in *Lambe's Case*. "The states have no power, by taxation or otherwise, to impede, burden, or in any manner control any means or measures adopted by the federal government for the execution of its powers."—Mich. Univ. Law Lectures, 1889, p. 94. See *ante*, p. 401.

[3] *Parsons' Case*, 7 App. Cas. 96; 51 L. J. P. C. 11. See, however, *John Deere Plow Co.* v. *Wharton* (1915), A. C. 330; 84 L. J. P. C. 64.

[4] *Man. Liquor Act Case* (1902), A. C. 73; 71 L. J. P. C. 28.

[5] *Smylie* v. *Reg.*, 27 O. A. R. 172.

[6] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90.

[7] See *post*, p. 759.

[8] *Per* Wilson, C.J., in *Reg.* v. *Taylor*, 36 U. C. Q. B. 206.

CHAPTER XXVI.

The Method of Enquiry: Aspect and Purpose: Presumption in Favor of Validity.

The method of enquiry here discussed has primary reference to the legislation impugned. Side by side with it must proceed the enquiry as to the scope of the various enumerated classes. As from time to time the dividing lines of these classes become more clearly marked by authority, the task of assigning an enactment to the class to which it truly belongs will, perhaps, be less difficult.

The general rule laid down in *Parsons' Case*,[1] still stands good. The first question in reference to any impugned Act is whether it deals with a matter *prima facie* within section 92. If it does not, no further question remains; if the legislation be federal, infringing no imperial limitation, it is valid; if provincial, it is *ultra vires*. If the legislation be *prima facie* within section 92, the further questions arise, (1) whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and (2) whether the power of the provincial legislature is, or is not, thereby overborne.[1a]

It should be noted, however, that in *Parsons' Case* the Board was dealing only with the enumerated classes. To cover the case of an Act based solely upon the opening clause of section 91, that is to say, supported only as within the *residuum*

[1] See extract, *ante*, p. 419.

[1a] In the *Deere Plow Co. Case* (extract, *ante*, p. 444), this method of enquiry is again indicated, but with a variation in the language which should be noted. The mutually exclusive character of the class-enumerations seems to be emphasized.

of federal matters,[2] the two last enquiries should be put thus: if the legislation be *prima facie* within section 92, either as coming within the 15 more specific heads of that section or as legislation regarding a matter of local concern merely within the residuary class, No. 16, these further questions arise (1) whether the subject matter of the enactment does not also fall within the opening clause of section 91 as a matter which is of, or which has attained, such dimensions as to affect the body politic of the Dominion and (2) whether the power of the provincial legislature is or is not thereby overborne. And the question in such cases is or may be more peculiarly one of fact, as has been already noticed,[3] while the question in other cases is rather one of law to be determined upon a consideration of legislative aspect and purpose as disclosed by the impugned Act itself. The matter, however, is one of much difficulty upon which it is not advisable to express a too decided opinion in the absence of authority.

Legislative Aspect and Purpose:—The one great cause of difficulty in all these cases is the fact that subjects which in one aspect and for one purpose fall within section 92 may in another aspect and for another purpose fall within section 91,[4] and, therefore, at the threshold of every case[5] this test question of aspect and purpose confronts one. Various phrases have been used by the Privy Council to frame the issue in a clear, practical shape. Collecting these, the test to be applied may be thus stated:

[2] See *ante* p. 452.
[3] See *ante*, p. 376, *et seq.*
[4] *Hodge's Case*, extract, *ante*, p. 426.
[5] *Per* Osler, J.A., in *Reg.* v. *Wason*, 17 O. A. R. 221.

In order to ascertain the class to which a particular enactment really belongs, the primary matter dealt with by it,[6] *its subject matter and legislative character,*[7] *the true nature and character of the legislation,*[8] *its leading feature, its pith and substance,*[9] *must be determined.*

If, upon such consideration, a provincial enactment be found to fall within a federal class it will be held void; and if, upon like considerations, a federal enactment should be catalogued as within a provincial class it will be denied operation.

And in this connection it may be added that a particular provision in a federal Act, which though *prima facie* within a provincial class, is upheld as a provision necessarily incidental to federal legislation upon a subject clearly federal, is no exception. The particular subject or legal relation dealt with could not in that aspect of it, that is to say, with that setting and in that environment, be said to fall within any provincial class.[10]

Some Examples:—To attempt at this stage an exhaustive examination of the cases in which the above considerations have been discussed and applied would manifestly be to duplicate much of what must be said later in dealing with specific topics; for as already intimated this test question of aspect and purpose is ever to the front. A few examples, some of them showing sharp contrasts, will help perhaps to make clearer the line of enquiry which should be followed in all cases.

[6] *Russell* v. *Reg.*, 7 App. Cas. 829; 51 L. J. P. C. 77; 2 Cart. 12.
[7] *Hodge* v. *Reg.*, 9 App. Cas. 117; 53 L. J. P. C. 1; 3 Cart. 144.
[8] *Russell* v. *Reg.*, *ubi supra.*
[9] *Union Colliery Co.* v. *Bryden* (1899), A. C. 580; 68 L. J. P. C. 118.
[10] See *post*, p. 497, *et seq.*

In a provincial Act (British Columbia) dealing with the working of coal mines a clause prohibiting the employment of Chinamen in such mines underground was considered by the Privy Council not to be aimed at the regulation of coal mines at all but to be in its pith and substance a law to prevent a certain class of aliens or naturalized persons from earning their living in the province. In other words the enactment was not really in relation to local works or undertakings (sec. 92, No. 10) or to property and civil rights in the province (sec. 92, No. 13) or to a matter of a local or private nature in the province (sec. 92, No. 16); but was in fact an enactment in relation to aliens and naturalization (sec. 91, No. 25), and therefore *ultra vires* of a provincial legislature.[1] In a later case, on the other hand, an enactment of the same legislature denying the franchise to Japanese was held to be legislation in relation to the provincial constitution (sec. 92, No. 1), and as having no necessary relation to alienage; the discrimination, in other words, being based upon racial not national grounds.[2] As will appear later, it is difficult to reconcile these two decisions; and in a recent case in the Supreme Court of Canada a provision in a provincial Act (Saskatchewan) forbidding the employment of any white woman or girl in any restaurant, laundry, or other place of business or amusement owned, kept, or managed by any Chinaman, was upheld as within provincial competence as a law for the suppression or prevention of a local evil (sec. 92, No. 16), or as touching civil rights in the province (sec. 92, No. 13). It did not in the opinion of the majority of the Court present any aspect particularly affecting Chinamen as aliens; for a natural born British subject of the Chinese race (and there

[1] *Union Colliery Co.* v. *Bryden* (1899), A. C. 580; 68 L. J. P. C. 118.

[2] *Tomey Homma's Case* (1903), A. C. 151; 72 L. J. P. C. 23.

are many such in Canada) would be under the ban of the Act.[3]

An Act of the Quebec legislature entitled "An Act to compel assurers to take out a license," provided that the price of the license should consist in the payment, by means of stamps duly affixed and cancelled, at the time of the issue of any policy or of any premium or renewal receipt of a sum computed upon a percentage basis on the amount paid as premium or for renewal. There was no penalty prescribed for failure to take out a license, but default in affixing the required stamps was visited with a money penalty and the policy could not be sued on. The Privy Council held the Act to be not a license Act at all but an attempt to raise a provincial revenue by indirect taxation contrary to the restriction contained in section 92, No. 2, "direct taxation within the province, etc."[4]

Again, a provincial "Cattle Protection" Act (British Columbia) provided that federal railways which failed to fence should be liable for damage to cattle which should get upon their lines owing to such failure. At that time such fencing was not prescribed by any federal enactment. The Privy Council held the provincial Act *ultra vires* as plainly intended to force the creation of certain structural works in connection with federal railways which the federal parliament alone had power to do.[5] On the other hand, a provincial Act requiring the cleaning out of ditches was held to apply to federal railways equally with other land owners

[3] *Quong Wing* v. *R.*, 49 S. C. R. 440. The Privy Council refused leave to appeal. See *post*, p. 671. In *Re Insurance Act, 1910*, 48 S. C. R. 260, the question of legislative aspect and purpose also appears; see particularly *per* Brodeur, J., at p. 313.

[4] *Atty.-Gen. of Quebec* v. *Queen Ins. Co.*, 3 App. Cas. 1090.

[5] *Madden* v. *Nelson & F. S. Ry.* (1899), A. C. 626; 68 L. J. P. C. 148.

in a province; in other words, as to its real legislative character it should be catalogued as a law relating to property and civil rights in the province (sec. 92, No. 13), or to a matter of a local or private nature in the province (sec. 92, No. 16) and not as a law relating to federal railways.[6]

The most noteworthy cases, perhaps, in this connection are those in which the question has been whether a particular enactment should be classed as falling within the criminal law (sec. 91, No. 27), or as within provincial penal law, that is to say, "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province, etc." (sec. 92, No. 15). The subject is a large one and must be fully dealt with later;[7] but it may be said here that the question will be found to be this: Is the Act designed to protect the interest of the Canadian public and to ensure the well-being of all? or, is it intended as the necessary sanction merely of provincial law in the interest of the province or some locality therein or of those entitled to the benefit of that law, individually considered? In the former aspect the matter is exclusively within the jurisdiction of the parliament of Canada; in the latter, of the provincial legislatures in each province.[8]

The cases as to the liquor traffic also merit special notice. What is popularly known as the Scott Act, or, more accurately, the Canada Temperance Act, providing for prohibition throughout Canada on a local option basis, was upheld in *Rus-*

[6] *Can. Pac. Ry.* v. *Notre Dame de B. S.*, *ib.*, 367, 54. See *post*, p. 759.

[7] See *post*, p. 563, *et seq.*

[8] Compare *R.* v. *Wason*, 17 Ont. R. 58; 17 Ont. App. R. 221, with *R.* v. *Stone*, 23 O. R. 46 (cheese factories); and *Hodge's Case*, 9 App. Cas. 117; 53 L. J. P. C. 1, with *Atty.-Gen. of Ontario* v. *Hamilton Street Ry.* (1903), A. C. 524; 72 L. J. P. C. 105, and *Ouimet* v. *Bazin*, 46 S. C. R. 502 (Lord's Day legislation).

sell's Case [8a] as dealing with the traffic in its large Canadian aspect as affecting the body politic of the Dominion; while provincial regulation and even prohibition of the traffic in its provincial aspect has been upheld by the Privy Council.[9] On the other hand, the Dominion Liquor License Act, commonly known at the time as the McCarthy Act, was held to be a dealing with the traffic in what was really its provincial aspect, and was for that reason, presumably, held to be *ultra vires*.[10]

Colourable Legislation:—The principle of the omnipotence of parliament forbids that any Court should enquire into the motives that may have led to the passage of any Act, federal or provincial.[1] Jurisdiction may be questioned but not the good faith of the legislature. What is said in the following passage concerning provincial legislation applies equally to any federal Act:

"If a province professing to legislate in exercise of the powers conferred by section 92 shews by its legislation that it is in reality attempting to exercise some power conferred upon the Dominion, exclusively, then the legislation may be *ultra vires*. . . . But it has never been held and manifestly it would be impossible to hold that the Court has any power to effect the nullification of a provincial statute because of the motives with which the legislation was enacted."[2]

There is always the possibility of an abuse of power, but the only remedy, apart from

[8a] 7 App. Cas. 829; 51 L. J. P. C. 77. Extract *ante*, p. 424.

[9] *Hodge's Case*, 9 App. Cas. 117; 53 L. J. P. C. 1: the *Local Prohibition Case* (1896), A. C. 348; 65 L. J. P. C. 26: and the *Manitoba Liquor Act Case* (1902), A. C. 73; 71 L. J. P. C. 28.

[10] *Re Dom. License Acts Case*, 4 Cart. 342, n. 2; Dom. Sess. Papers, 1885, No. 85. See *ante*, p. 467. Another instance of a federal enactment being held void as dealing with a provincial phase of a subject which in other aspects was within federal jurisdiction is the *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90. See *post*, p. 713.

[1] See *ante*, p. 87 *et seq.*

[2] *Re Companies* (1913), 48 S. C. R. at p. 423, *per* Duff, J.

ultimate action by the electorate, is that which for a time lies in the power of disallowance conferred by the British North America Act. For the Court, the only question is "whether the one body or the other has power to make a given law."[3] When, therefore, it is said that it is for the courts to restrain colourable encroachment by one body upon the field reserved for the other, the meaning simply is that the method of enquiry above indicated will be followed in order to determine the true character of the legislation, its pith and substance, and that in reaching a conclusion as to how a given enactment is to be constitutionally classified the Courts will determine its real intent, its legislative aspect and purpose, and to that end will, if necessary, disregard title or preamble[4] or misused words.[5] But if when all is done the Act is within the powers of the enacting legislature it must be given effect according to its tenour; for, jurisdiction conceded, the will of parliament is omnipotent and knows no superior.

An Act may be ULTRA VIRES *in part only.* The question in such case is whether the good and the bad are so separable that each should be taken to be a distinct declaration of the legislative will. In such case the good will stand;[6] but if the invalid

[3] *Lambe's Case*, 12 App. Cas. 575; 56 L. J. P. C. 87. Extract *ante*, p. 427.

[4] See *Fredericton* v. *Reg.*, 3 S. C. R. 505; *Reg.* v. *Wason*, 17 O. A. R. at p. 223.

[5] *Atty.-Gen. (Que.)* v. *Queen Ins. Co.*, 3 App. Cas. 1090; *Lynch* v. *Can. N. W. Land Co.*, 19 S. C. R. 204; *Pillow* v. *Montreal*, Mont. L. R. 1 Q. B. 401; *Reg.* v. *Ronan*, 23 N. S. 433; *Tai Sing* v. *Maguire*, 1 B. C. (pt. 1) 101.

[6] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90; *Blouin* v. *Quebec*, 7 Que. L. R. 18; *Morden* v. *South Dufferin*, 6 Man. L. R. 515 (but see *Lynch* v. *Can. N. W. Land Co.*, 19 S. C. R. 204); *Ex p. Renaud*, 1 Pugs. 273; *Reg.* v. *McMillan*, 2 Pugs. 112; *Cooley* on Const. Limitations, 6th ed., 209, *et seq.* See also *Fielding* v. *Thomas* (1896), A. C. 600; 65 L. J. P. C. 103.

clause or clauses are a necessary part of the scheme of the Act the whole Act must fall.[7] And conversely if the Act as a whole is invalid, individual clauses which, if separately enacted, would be *intra vires* must fall unless clearly to be taken as independent substantive enactments.[8]

It has been said that an enactment may be *intra vires* in some of its applications while *ultra vires* in others.[9] If the application of an Act to a subject to which the enacting legislature has no power to apply it is express, it is, of course, a question of legislative competence; but if, as in most of the cases, the application of an Act is a question of interpretation, the rule of interpretation is to limit the application to such subjects only as are within the jurisdiction of the enacting legislature. In other words:

The presumption in any given case is in favor of the validity of an impugned Act.

"It is not to be presumed that the legislature of the Dominion has exceeded its powers unless upon grounds really of a serious character."[10]

In numerous subsequent cases the principle has been invoked in reference to both federal and provincial Acts.[1] One of the strongest expressions of

[7] *Per* Ramsay, J., in *Dobie* v. *Temp. Board*, 3 Leg. News, at p. 251; *Clarkson* v. *Ont. Bank*, 15 O. R. 179, 189, 193.

[8] *Re Dom. Liquor License Acts*, 4 Cart. 342, n. 2; Cassels' Sup. Ct. Dig. 509; *Stephens* v. *McArthur*, 6 Man. L. R. 508; *Three Rivers* v. *Sulte*, 5 Leg. News. 332; 2 Cart. 283.

[9] See *Re Insurance Act, 1910*, 48 S. C. R. at p. 285, *per* Idington, J.

[10] *Valin* v. *Langlois*, 5 App. Cas. 115;; 49 L. J. P. C. 37; *Severn* v. *R.*, 2 S. C. R. at p. 103, *per* Strong, J.

[1] See cases as to the application of provincial Acts to federal railways, noted *post*, p. 759 *et seq.* See also *Allen* v. *Hanson*, 18 S. C. R. 667; *Merchants Bank* v. *Gillespie*, 10 S. C. R. 312; *McKilligan* v. *Machar*, 3 Man. L. R. 418; *Re C. P. R.*, 7 Man. L. R. 389; *Scott* v. *Scott*, 4 B. C. 316.

the rule is that "in cases of doubt every possible presumption and intendment will be made in favor of the constitutionality of the Act."[2] It does not apply to an Act the language of which is unambiguous, and the effect (if the Act be held valid) clearly beyond the competence of the legislature by which the Act was passed. It indicates, rather, a principle of interpretation, and may be put thus: If possible such a meaning will be given to a statute as to uphold its validity, for a legislative body must be held to intend to keep within its powers.[3]

In support of all that is said above the following may be quoted:[4]

"Any legislative enactment under our federal system, which partitions the entire legislative authority, ought to be approached in the spirit of assuming that the legislature did not intend to exceed its powers; and if an interpretation can reasonably be reached which will bring it within the power assigned the legislature in question, and given operative effect, then that meaning ought to be given it. Of course, if the plain language is such that to give it operative effect must necessarily involve doing that which is beyond the power assigned the legislature, then the Act must be declared null.

Again, the language used is sometimes capable of a double meaning according to the respective surrounding circumstances to which it may be sought to be applied. In such cases the Court, on the one hand, must refuse to give such effect to the language as will maintain anything *ultra vires* the legislature, and on the other hand give such effect to it as will, within the purpose and power of the legislature, render it effective."

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[2] *Reg.* v. *Wason* 17 O. A. R. at p. 235—*per* Burton, J.A.

[3] No stronger instance of restrictive interpretation to save jurisdiction could be cited than *Macleod* v. *Atty.-Gen. N.S.W.* (1891), A. C. 455; 60 L. J. P. C. 55. See *ante*, p. 101.

[4] From the judgment of Idington, J., in *Re Alberta Ry. Act*, 48 S. C. R. at p. 24.

CHAPTER XXVII.

The Doctrine of Implied Powers.

Referring again to the scheme of distribution of legislative powers as exhibited in sections 91 and 92 of the British North America Act: the decisions of the Privy Council from which extracts have been collected in a previous chapter[1] establish these propositions:

1. Dominion legislation may be said to fall within two main divisions,[2] being either (a) upon matters falling within the 29 enumerated classes of section 91, or (b) under the opening clause of that section, upon matters which are or have become unquestionably of Canadian interest and importance, and which in that aspect of them call for legislative action.

2. Provincial legislation also falls within two main divisions, being either (a) upon matters coming within the first 15 enumerated classes of section 92, or (b) under No. 16 of that section upon matters which, either in their entirety or in some local provincial aspect of them, are substantially of a merely local or private nature in each province.[3]

3. Dominion legislation upon matters within the enumerated classes of section 91 is given most marked predominancy, being guarded by a *non-obstante* and by the concluding clause which in effect provides that legislation in relation to any

[1] Chap. XXI., *ante*, p. 412.

[2] *Local Prohibition Case* (1896), A. C. 348; 65 L. J. P C. 26. Extract *ante*, p. 432.

[3] *Manitoba Liquor Act Case* (1902), A. C. 73; 71 L. J. P. C. 28, applying the principle stated in the *Local Prohibition Case*. Extract *ante*, p. 432.

matter falling within any one of the enumerated classes of section 91 is not an encroachment upon provincial authority, or, in other words, is not to be deemed legislation upon a matter of local provincial concern.[4] But distinctions have been drawn between substantive and ancillary or incidental provisions in federal Acts. Any legislation falling strictly within any of the classes specially enumerated in section 91 is not within the legislative competence of a provincial legislature;[5] and the abstinence of the Dominion parliament from legislating to the full limits of its powers cannot effect a transference to provincial legislatures of any power which the Act has assigned to federal jurisdiction exclusively.[6] The word substantive, as distinguished from ancillary or incidental, must be construed in this connection as indicating that the provisions so styled are provisions which fall strictly within a federal class and therefore in no aspect could be enacted by a provincial legislature. In their essence they are federal, and this is what is meant by saying that a province cannot, for example, pass a bankruptcy law, a copyright law, or enact fishery regulations or, in short, pass any Act which, upon consideration of its real pith and substance, must be catalogued as within one of the federal classes. On the other hand, a Dominion Act may contain ancillary or incidental provisions designed to make the Act more effective or to prevent its substantive or strictly federal scheme from being defeated.[7] Such provisions, standing alone or in another setting, would not be of the

[4] See *ante*, p. 451.

[5] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90. Extract *ante* p. 436.

[6] *Bryden's Case* (1899), A. C. 580; 68 L. J. P. C. 118. Extract *ante*, p. 437.

[7] *Voluntary Assignments Case* (1894), A. C. 189; 63 L. J. P. C. 69. Extract *ante*, p. 430.

essence, for example, of copyright legislation or bankruptcy legislation or divorce legislation, and might properly be within provincial competence. But in the aspect which they present in the federal enactment, that is to say, in that environment and with reference to the legal relations therein dealt with, they are really not within provincial competence. In this view there is no departure from the essentially sound principle, expressly stated indeed in the British North America Act, that the jurisdictions, federal and provincial, are mutually exclusive.[8] The other principle, now authoritatively established, of federal paramountcy must be here recognized and a federal enactment of a merely ancillary or incidental character when properly forming part of federal legislation upon any of the classes of section 91 will override repugnant provincial legislation which would otherwise be operative.[9]

4. To the *residuum* of federal matters allotted to the parliament of Canada by the opening clause of section 91 as well as to the *residuum* of provincial matters covered by No. 16 of section 92 the same principles apply. The jurisdictions are mutually exclusive in the proper sense, but if the Dominion legislating upon a subject in its quasi-national aspect enacts provisions which clash with those enacted by a provincial legislature legislating in

[8] See *ante*, p. 456.

[9] See *ante*, p. 468. Various verbs have been used to describe this operation; *active*—to override, to supervene, etc.; *passive*—to be overborne, to yield to, to remain in abeyance, etc. But the only noun so far used is the noun active "supervention"—per Meredith, J., in *G. T. R.* v. *Toronto*, 32 O. R. 120 (1900). A word is much wanted which will adequately convey the passive idea of an eclipse, possibly of temporary duration only; the provincial enactment being in abeyance and inoperative only while the supervening federal enactment remains in force. See the *Local Prohibition Case*, extract *ante*, p. 432.

relation to the same subject in its purely local provincial aspect, the provincial law must remain in abeyance unless and until the federal law be repealed.[10] In this sense only federal legislation within this residuary area may encroach upon the provincial field and, as already intimated,[1] upon the field covered by the 15 more specific classes of section 92 as well as upon that covered by No. 16 of that section.

5. The legislative power conferred by the British North America Act upon Canadian legislatures, both provincial and federal, is a plenary power of legislation conveyed in terms "apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to."[2] The proper application of this principle to a federal system with mutually exclusive jurisdictions is a matter of much difficulty. It has to be recognized that the exercise of its power by one legislature may lessen the range which otherwise would be open to the other[3] and that there are many subjects upon which complete and effectual legislation cannot be had except by the co-operation of both legislatures, federal and provincial.[4]

As put in a recent case:

"The subject dealt with may be of that complex character that concurrent legislation on the part of a provincial legislature and Parliament is absolutely needed to effectuate satisfactorily the purpose had in view. To the man accustomed to deal only with the legal product of a single legislature possessing paramount legislative authority over all matters that can be legislatively dealt with, this latter

[10] *Local Prohibition Case*, extract *ante*, p. 432.
[1] *Ante*, p. 469.
[2] *Ante*, p. 349, *et seq.*
[3] *Lambe's Case*, extract *ante*, p. 427.
[4] See *ante*, p. 394, *et seq.*

situation seems almost incomprehensible. The situation often exists, must be reckoned with and dealt with accordingly."[5]

Manifestly, therefore, what was said by an eminent judge[6] in an early case stands good as a *prima facie* proposition only, namely, that it is

"a proper rule of interpretation in all these cases, that when a power is given, either to the Dominion or to the provincial legislatures to legislate on certain subjects coming clearly within the class of subjects which either legislature has a right to deal with, such power includes all the incidental subjects of legislation which are necessary to carry out the object which the British North America Act declared should be carried out by that legislature."

This is but a statement of the principle that legislative power in Canada, federal and provincial, is a plenary power, and it really does not materially assist in the reconciliation of the respective class-enumerations. The cardinal principle is that each of the two sections, 91 and 92, must be given, where necessary, a modifying effect upon the other, thus limiting in each the wide scope which upon the bare words the individual class-enumerations would have.[7]

Federal Ancillary Legislation:—Bearing in mind that *intra vires* federal legislation will override all inconsistent provincial law, the rule to be deduced from the cases seems to be this: that the widest

[5] *Re Alberta Railway Act* (1913), 48 S. C. R., *per* Idington, J., at p. 24.

[6] Dorion, C.J., in *Bennett* v. *Pharm. Ass. of Quebec*, 1 Dor. 336; 2 Cart. 250.

[7] In *B. C. Elec. Ry.* v. *V. V. & E. Ry.* (1913), 48 S. C. R. at p. 123, Mr. Justice Duff cites several cases as illustrating "the necessity of attending to the provisions of section 92 in ascertaining the limits of the enumerated powers conferred by section 91." In other words, proper interpretation requires to some extent reciprocal modification. See *ante*, p. 480.

discretion must be allowed to the federal parliament in the moulding of full-rounded legislation upon all matters assigned to it by the British North America Act,[8] but that the courts have power to prevent and will prevent usurpation under the guise of so-called ancillary legislation.[9] The concluding clause of section 91, from which has been largely drawn the doctrine of federal paramountcy, was not meant to derogate from the powers of provincial legislatures "save to the extent of enabling the parliament of Canada to deal with matters local or private in cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of section 91." [10]

The words "necessarily incidental to the exercise of the powers conferred" must be taken to mean necessarily involved in the plenary exercise of the powers conferred; and whether any impugned provision of a federal Act is or is not legislation in regard to a matter necessarily involved in the due exercise of federal power over a particular class is the difficult question which the Courts must decide.[1]

This was formerly much discussed, particularly in regard to federal jurisdiction, as a question of

[8] *Tenant* v. *Union Bank* (banking laws), 1894, A. C. 31; 63 L. J. P. C. 25; *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90; *Doyle* v. *Bell* (election laws), 32 U. C. C. P. 632; 11 O. A. R. 326; *Re C. P. R. & York*, 27 O. R. 559; 25 O. A. R. 65; *In re De Veber*, 21 N. B. 425; *Phair* v. *Venning*, 22 N. B. 371; *Atty.-Gen.* v. *Foster*, 31 N. B. 164; *Toronto* v. *Can. Pac. Ry.* (1908), A. C. 54; 77 L. J. P. C. 29 (federal railway legislation); *Toronto* v. *Bell Telephone Co.* (1905), A. C. 52; 74 L. J. P. C. 22 (federal works and undertakings).

[9] *Montreal* v. *Montreal Street Ry.* (1912), A. C. 333; 81 L. J. P. C. 145—the *Through Traffic Case; B. C. Elec. Ry.* v. *V. V. & E. Ry.*, 48 S. C. R. 98.

[10] *Local Prohibition Case*, extract *ante*, p. 432; repeated in the *Through Traffic Case*, extract *ante*, p. 440.

[1] See *ante*, p. 374 *et seq.*

implied powers or powers by necessary implication, and United States authorities in support of the doctrine in its application to the legislative powers of Congress were frequently quoted.[2] But in *Lambe's Case* the Privy Council strongly deprecated any attempt to reason from the powers of Congress to the powers of the parliament of Canada.[3] As already pointed out,[4] there are in the federal system of the United States no competing class-enumerations to be reconciled. The powers of Congress are alone enumerated, the entire *residuum* of legislative power being reserved to the States or to the people of the respective States.[5]

The absence, too, of any power in the federal government of the United States to disallow State legislation may have influenced the courts there in giving as full play as possible to federal legislative powers. Moreover, following upon the class-enumeration, power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" is expressly conferred upon Congress by the U. S. Constitution (Art. I., section 8), and that Constitution and the laws passed by Congress under it are expressly declared (Art. VI.) to be "the supreme law of the land." United States courts hold that Congress has an unfettered choice of means, let the aim be legitimate; and they have uniformly declined to tread upon legislative ground by any enquiry in the case of a federal law "into the degree of its necessity."[6]

The British North America Act, on the other hand, confers power to make laws in relation to

[2] See, for example, *Leprohon* v. *Ottawa*, 2 Ont. App. R. 522.
[3] See extract *ante*, p. 400.
[4] *Ante*, p. 401.
[5] See *ante*, p. 399.
[6] *U. S.* v. *Fisher*, 2 Cranch. 358; *McCulloch* v. *Maryland*, 4 Wheat. 421; *Juillard* v. *Greenman*, 110 U. S. Rep. 421; *Story* on the Const., 5th ed., Vol. II., 153.

all matters coming within certain classes which, as between the Dominion and the provincial enumerations, are distinctly competing classes to be read together and the language of the one to be interpreted, and where necessary modified, by that of the other.[7]

The first question therefore in every case is whether the federal enactment in controversy is strictly in relation to a matter coming within a particular class of section 91. If it is, no question can arise as to possible competing provincial legislation.[8] But it is often difficult to determine just what provisions are of the essence of a federal class so as to preclude under all circumstances the enactment of similar provisions in provincial legislation, and what are ancillary provisions merely covering matters which in themselves if they stood alone or in other environments would be within provincial competence. The cases as to insolvency legislation bring out this distinction most clearly. "Bankruptcy and Insolvency" (sec. 91, No. 21), as those words have been construed, is a purely statutory creation[9] and procedure must necessarily form an essential part of any law dealing with insolvency;[10] and provincial jurisdiction over procedure in civil cases (sec. 92, No. 14), can in no sense be considered a competing power. On the other hand, while insolvency legislation must necessarily involve some modification of the law in regard to property and civil rights in a province (sec. 92, No. 13) the extent of its interference will depend upon the scheme adopted, and bankruptcy legislation may frequently require various ancillary provisions for

[7] See *ante*, p. 480.

[8] *Re Alberta Ry. Act* (1913), 48 S. C. R. 9, particularly at p. 28, *per* Duff, J.

[9] *L'Union St. Jacques* v. *Belisle*, L. R. 6 P. C. 31.

[10] *Cushing* v. *Dupuy*, extract *ante*, p. 418.

the purpose of preventing the scheme of the Act from being defeated. Such ancillary provisions standing alone or in relation to other matters, that is to say, in other aspects, might well be within provincial competence.[1] And the principle now under discussion lays it down that if such ancillary provisions in a federal insolvency law are to override provincial law they must be necessarily incidental to the exercise of federal jurisdiction over the class "bankruptcy and insolvency."

In this connection reference may usefully be had to the cases in which the scope of a company's powers is discussed;[1a] and particularly to Lord Macnaghten's criticism of the terms 'ancillary' and 'incidental' as rather loose expressions.[1b] At the same time, too, it is to be remembered that, in the case of an Act or other instrument of incorporation, there is no competing class-enumeration to cut down the meaning of the language used to define the company's powers.

In a previous chapter it was pointed out that two of the provincial classes, namely, "property and civil rights in the province" (sec. 92, No. 13) and "the administration of justice in the province, including . . . proceedings in civil matters in those courts" (sec. 92, No. 15), notably cross-section the whole field of possible legislation. In a sense, the provincial residuary class (No. 16) might be added. Subject to the suggestion that procedure may not be an essential part of federal law in relation, for example, to patents, copyright, divorce, navigation and shipping, and other possible branches of jurisprudence which may be wrapped up in some of the class-enumerations of section 91,

[1] *Voluntary Assignments Case*, extract *ante*, p. 430.

[1a] See Chap. XXXV., *post*, p. 718 *et seq.*

[1b] *Amal. Soc. of Ry. Servants* v. *Osborne* (1910), A. C. 87; 79 L. J. P. C. 87. Extract, *post*, p. 719.

but may be merely a possible ancillary feature of such legislation, the following statement may be taken as correctly indicating the present position:

"Up to the present time the only cases in which the courts have sustained the attempt on the part of the Dominion to exercise an ancillary overriding power have been cases in which the legislation regarded from the provincial point of view would be considered to be legislation dealing with a subject-matter falling within the classes of subjects included in No. 13 or No. 16 of section 92; and to suggest that when it is proposed to exercise such a paramount subsidiary power in matters clearly falling within other classes specially mentioned in that section great care ought to be observed in order to ascertain whether the Dominion has really been invested with the authority it claims to possess."[2]

The question has been much debated of late in reference to federal railway legislation. In the *Through Traffic Case* the Privy Council held that it was not necessarily incidental to the due exercise of federal jurisdiction over federal railways that the federal parliament should have authority to compel a provincial railway to enter into agreement with a federal railway in reference to the rates to be charged by the provincial railway for carrying "through traffic" over its line. Provincial railways are exclusively within provincial jurisdiction, and it was the view of the Board that if any evil had grown up in the way of unjust discrimination or otherwise it could be met only by the co-operation of the two legislatures.[3] On the other hand, it has recently been held by the Privy Council that a provincial railway cannot, by virtue

[2] *Per* Duff, J., in *B. C. Elec. Ry.* v. *V. V. & E. Ry.* (1913), 48 S. C. R. at p. 122. In the *Through Traffic Case*, 43 S. C. R. at pp. 239 *et seq.*, Anglin, J., collects and discusses nearly all the cases in which the doctrine of 'necessarily incidental powers' appears.

[3] *Montreal* v. *Montreal Street Ry.* (1912), A. C. 333; 81 L. J. P. C. 145. See *ante*, p. 394.

of provincial legislation alone, force a crossing over a federal railway; but this is put upon the ground that legislation touching the structural arrangements of a federal railway is strictly within the federal class.[4] Whether a federal railway, by virtue of Dominion legislation alone, can force a crossing over a provincial railway, is not touched in the judgment of the Board, but in the Supreme Court. Mr. Justice Duff expressly left the question open. In another recent case[5] the question was as to the right of the Board of Railway Commissioners acting under federal legislation to exact from a provincial street railway company contribution toward the cost of building a viaduct designed to afford an overhead crossing along the streets of Vancouver over a Dominion railway in lieu of the previously existing level crossings. The Privy Council held that the federal Railway Act conferred no such jurisdiction upon the Board of Railway Commissioners and it was therefore unnecessary to determine whether the Dominion Parliament could have conferred it. In the Supreme Court of Canada the order of the Railway Board had been upheld by a majority, but three of the judges were of opinion that federal legislation in such case would be unwarranted, not being necessarily incidental to the due exercise of federal authority over federal railways. One of the three, however—Mr. Justice Idington—thought the matter precluded by an earlier decision of the Privy Council and therefore concurred in upholding the order of the Railway Board. The reasons advanced by Mr. Justice Duff and concurred in by Mr. Justice Brodeur were characterized by the

[4] *Re Alberta Ry. Act* (1915), A. C. 363; 84 L. J. P. C. 58; affirming 48 S. C. R. 9.

[5] *B. C. Elec. Ry.* v. *V. V. & E. Ry.* (1914), A. C. 1067; 83 L. J. P. C. 374, reversing 48 S. C. R. 98.

Privy Council as "weighty reasons," which, however, their Lordships, for the reason above given, did not find it necessary to pass upon. The following extract, therefore, may be taken as containing an authoritative definition of the phrase 'necessarily incidental':

"When such a conflict arises it rests with the courts in each case to determine whether the particular enactment in so far as it relates to the provincial railway or the provincial railway company is one that is so essential to the effective exercise of Dominion legislative authority relating to Dominion railways that power to pass it must be taken to have been conferred by the grant of that authority. I assume for the purpose of deciding the question before us that in some degree some such power is comprehended within that authority; limited by the necessity above indicated, of the existence of which, when it is disputed, the courts must in the last resort be the judges.

In this view then in every case in which a conflict does arise the point for determination must be whether there exists such a necessity for the power to pass the particular enactment in question as essential to the effective exercise of the Dominion authority as to justify the inference that the power has been conferred. . . .

It is necessary, in determining the scope of the ancillary power and whether in any particular instance the circumstances have arisen which justify the exercise of it, to decide that question in the light of the facts that plenary legislative jurisdiction respecting the provincial railway has been specifically conferred upon the province; and that from the provincial point of view it is the province which was intended to be the final judge as to the desirability of any proposed legislation relating to the provincial railway."

In other words, the grant to the provinces of exclusive jurisdiction over provincial railways forbids the inference that federal jurisdiction over them is to be implied as necessarily incidental to the due exercise of federal jurisdiction over federal

railways. Can this proposition be stated more broadly so as to give it general application, thus: the grant to the provinces of exclusive jurisdiction over the enumerated classes of section 92 forbids the inference that federal jurisdiction over them is to be in any case implied as necessarily incidental to the exercise of federal jurisdiction over the enumerated classes of section 91? An affirmative answer would appear to run counter to the many decisions in which so-called ancillary provisions in federal Acts have been upheld; while a negative answer would appear to deny the essentially sound principle, expressly declared indeed by the British North America Act itself, that the jurisdictions, federal and provincial, are mutually exclusive, as stated in one of the most recent decisions of the Privy Council.[6] The true reconciliation, it is conceived, lies in the proper appreciation and application of the oft-quoted principle laid down in *Hodge's Case* that subjects which in one aspect and for one purpose fall within a provincial class may in another aspect and for another purpose fall within a federal class, a proposition which also involves this, that if the subject calls for legislation in both of the supposed aspects, the co-operation of the two legislatures is necessary.

The relations existing between two such classes as federal railways and provincial railways are obviously different from those which exist between two such classes as federal railways and property and civil rights. In the first case physical things, each a distinct and separate entity, are concerned; in the second, a physical thing on the one hand and a large branch of jurisprudence on the other. In regard to rights of property and civil rights as well as in regard to all other matters relating to federal

[6] *References Case*, extract *ante*, p. 442.

railways as physical things they are put in a class by themselves. The legal relations between those who handle them, whether as employers or workmen are, *quoad* them, matter for federal legislation only. On the other hand, *quoad* a province and the people of a province, a general law of the province might govern the relations between a federal railway company and its workmen in the absence of such special federal law.[7] In the absence of direct authority it can only be suggested that the various cases in which so called ancillary legislation has been upheld are cases in which the enactment in controversy dealt with an aspect of the subject upon which provincial legislation would have been incompetent; in other words the subject in the aspect dealt with fell strictly within one of the enumerated classes of section 91.

Provincial Ancillary Legislation:—In the view just put forward, provincial ancillary legislation is quite possible. The powers of a provincial legislature, however, are not protected by any *non-obstante* clause or by any clause like that with which section 91 concludes. The true position would appear to be that if a power

"exists in the provinces it must be found either in the enumerations of section 92 or in what is reasonably and practically necessary for the efficient exercise of such enumerated powers, *subject to the provisions of section 91;* otherwise it can in no aspect be within the sphere of provincial legislation."[8]

And the same view is thus expressed in a recent case:

"As to the parallel drawn between the incidental or necessarily implied powers which have been held to be part and

[7] See *ante*, p. 466.

[8] *Per* King, J., in *Re Prohibitory Liquor Laws*, 24 S. C. R. at p. 258.

parcel of the power conferred by the powers given the Dominion over the enumerated subjects of section 91 and the supposed need to give vitality to the power of the provinces . . . by means of implying similar incidental and necessarily implied powers in anything to be enacted in order to the carrying into execution of any such provincial powers, I have just this to say: I agree the analogy holds good until the attempt to give operative effect to it runs against the exclusive precedent power and its products."[9]

In conclusion, reference should be directed to the recent judgment of the Privy Council in the *John Deere Plow Co. Case*.[10] Two things are there emphasized: First, that the class-enumerations of sections 91 and 92 must not be taken as "the exact disjunctions of a perfectly logical scheme," but must be reciprocally modified in interpretation if the real intent of the Act is to be carried out; and, secondly, that

"It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and reality."

All of which brings to mind what was said by Chief Justice Marshall:[1]

"All experience shews that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."

[9] *Per* Idington, J., in *Re Alberta Ry. Act* (1913), 48 S. C. R. at p. 27.

[10] See extract *ante*, p. 444.

[1] *Gibbons* v. *Ogden* (1824), 9 Wheat. 1, 204, quoted with approval by Boyd, C., in *Kerley* v. *London, &c., Ry.*, 26 Ont. L. R. 588.

CHAPTER XXVIII.

The Administration of Justice.

The following are the sections of the British North America Act which deal directly with the administration of justice in Canada and its provinces:

VI. Distribution of Legislative Powers.

Powers of the Parliament.

91. . . . 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:— . . .

27. The Criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.

28. The establishment, maintenance, and management of penitentiaries. . . .

Exclusive powers of Provincial Legislatures.

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say:— . . .

6. The establishment, maintenance, and management of public and reformatory prisons in and for the province. . . .

14. The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province

made in relation to any matter coming within any of the classes of subjects enumerated in this section. . . .

VII. Judicature.

96. The Governor-General shall appoint the judges of the superior, district, and county courts in each province, except those of the courts of probate in Nova Scotia and New Brunswick.

97. Until the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and the procedure of the courts in those provinces, are made uniform, the judges of the courts of those provinces appointed by the Governor-General shall be selected from the respective bars of those provinces.

98. The judges of the courts of Quebec shall be selected from the bar of that province.

99. The judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the senate and house of commons.

100. The salaries, allowances, and pensions of the judges of the superior, district, and county courts (except the courts of probate in Nova Scotia and New Brunswick), and of the admiralty courts in cases where the judges thereof are for the time being paid by salary, shall be fixed and provided by the parliament of Canada.

101. The parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a general Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada. . . .

IX. Miscellaneous Provisions.

129. Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick, at the Union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all offices,

judicial, administrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick, respectively,[1] as if the Union had not been made, subject nevertheless (except with respect to such as are enacted by, or exist under, Acts of the parliament of Great Britain, or of the parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished or altered by the parliament of Canada, or by the legislature of the respective province, according to the authority of the parliament or of that legislature under this Act.

CANADIAN JUDICIAL SYSTEM.

The subject naturally divides into three branches: (1) the constitution, maintenance and organization of courts; (2) their jurisdiction; and (3) their procedure.

I. THE CONSTITUTION, MAINTENANCE AND ORGANIZATION OF COURTS:

(*a*) *Provincial Powers.*

At the date of confederation there were in existence in the different provinces a large number of Courts of law; and for some years thereafter the administration of justice throughout Canada was entirely, and still is largely, in the hands of these provincial Courts. Section 129 of the British North America Act expressly provides that all laws and all Courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing in the different provinces at the union, should continue as if the union had not been made; subject of course to future legislation by the proper legislature, federal or provincial, under the Act. It was evidently intended that in the main the

[1] This section of course now applies to Prince Edward Island and British Columbia. See *ante*, pp. 23, 24.

administration of justice throughout Canada should be through the medium of these provincial Courts, thus continued.[2] This is clearly evidenced by the assignment to the provinces of the power to exclusively make laws in relation to "the administration of justice in the province, including the constitution, maintenance and organization of provincial Courts, both of civil and criminal jurisdiction."

The judges of certain of these Courts are now appointed and paid by the Dominion Government; and for certain, perhaps obvious, reasons the parliament of Canada is empowered by section 101 to establish a general Court of Appeal for Canada and any additional Courts for the better administration of the laws of Canada. The phraseology of this last clause of section 101 is a clear recognition of the fact that the provincial Courts would necessarily be called upon to administer the laws of Canada[3] as distinguished from the laws of the various provinces, and the provision was inserted with a view to the better administration of those Dominion laws through the medium of additional Courts established by the Dominion government, should occasion arise.

Subject, therefore, to the appointing power, and to the reserve power to create additional Courts as above indicated, the right to regulate and provide for the whole machinery for the proper administration of justice in its widest sense, including the appointment of all the judges and officers requisite therefor, is with the provincial legislatures. The position is well put by Mr. Justice Street, who, referring to the language of section 92, No. 14, said:[4]

[2] Ritchie, C.J., in *Valin* v. *Langlois*, 3 S. C. R. at p. 22.

[3] See Quebec Resolutions, Nos. 31 and 32, in Appendix.

[4] *R.* v. *Bush*, 15 O. R. 398. See also *Reg.* v. *Levinger*, 22 O. R. 690, and *Re Small Debts Courts*, 5 B. C. 246, *per* Walkem, J., at p. 260:—"Where, therefore, the legislature constitutes a court,

"Now, these words, standing alone and without any interpretation or context, appear to be sufficient, had no other clause in the Act limited them, to confer upon the provincial legislatures the right to regulate and provide for the whole machinery connected with the administration of justice in the provinces, including the appointment of all the judges and officers requisite for the proper administration of justice in its widest sense, reserving only the procedure in criminal matters."

And he refers to sections 96, 100, and 101, quoted above, as the only sections in any way limiting the scope to be given to this class No. 14, and then proceeds:

"Everything coming within the ordinary meaning of the expression, 'the administration of justice,' not covered by the sections which I have referred to, therefore remains, in my opinion, to be dealt with by the provincial legislatures, in pursuance of the powers conferred upon them by paragraph 14 of section 92." . . . The words, 'constitution, maintenance, and organization of provincial courts,' do not, as I read the clause, in any way limit the scope of the general words preceding them, by which the whole matter of the administration of justice is included."

The right of the provincial legislatures to create new Courts and, subject to section 96, to appoint the judges who shall preside over them has been frequently exercised and has been affirmed in a number of cases. Courts of Appeal, for example, have been created in Manitoba and British Columbia, and the Dominion Government has made the requisite appointment of the judges of those Courts and has provided for their salaries and allowances under section 100 of the Act, without any question being raised as to the validity of the provincial legislation. Nova Scotia has likewise established a

whether of superior or inferior jurisdiction, the power to appoint the judge rests exclusively (if s. 96 does not interfere with it) with the Lieutenant-Governor."

County Court system and no question has been raised as to the validity of the legislation; and the Dominion government duly appoints and pays the judges of the various County Courts in that province.[5] The same remark applies to British Columbia.[6] The exercise of this power by the provinces has been viewed with some jealousy by federal Ministers of Justice, particularly where Courts have been established with jurisdiction akin to that of County or District Courts, but under other names so as to leave the power to appoint the judges of such Courts in the hands of the provincial government.[7]

The decisions of the courts have been almost without exception in affirmance of provincial power to create courts[8] for the administration of justice as well under federal as under provincial law; and may be briefly indicated:

Quebec:—In an early case the Privy Council held *intra vires* a Quebec Act creating Fire Marshals' Courts;[9] and the establishment in that province of District Magistrates' Courts, including the

[5] See *Johnson* v. *Poyntz*, 2 R. & G. 193, and *Crowe* v. *McCurdy*, 18 N. S. 301.

[6] See *Re County Courts of B. C.*, 21 S. C. R. 446.

[7] See the report of Sir John Thompson, Minister of Justice, upon the disallowance of an Act of the Quebec assembly respecting District Magistrates' Courts: Can. Sess. Papers, 1889, 47c. It recites the action of previous ministers in similar cases and criticizes many of the cases noted in the text. In one passage it even seems to suggest that the creation of *new* courts with jurisdiction to administer Dominion law is within the exclusive power of the Dominion parliament, referring evidently to s. 101 in which the word is not "new" but "additional." See note (1), *post*, p. 514.

[8] As to courts of appellate jurisdiction, see *post*, p. 538.

[9] *R.* v. *Coote* (1873), L. R. 4 P. C. 599; 42 L. J. P. C. 45; and see *Ex p. Dixon*, 2 Rev. Crit. 231, cited by Sir John Thompson in his report referred to in the note below.

appointment of the presiding officers, was held to be within the power of the assembly by the Quebec Court of Queen's Bench.[10] In this case Ramsay, J., speaks of the Privy Council decision in the *Coote Case* as directly recognizing the right of the local legislature to create new Courts for the execution of criminal law as also the power to nominate magistrates to sit in such Courts.[1]

New Brunswick:—The creation by the New Brunswick assembly of Parish Courts presided over by commissioners appointed by the provincial government, was held to be within its powers.[2] The power of the local legislature to establish Courts seems to have been treated as beyond question, the point more fully discussed being as to the validity of the Act in so far as it conferred on the Lieutenant-Governor of the province power to appoint the judges who should preside in such Courts. The case, therefore, should perhaps be noted rather as affirming that an Act of provincial legislation in reference to the exercise of the prerogatives of the Crown in relation to matters falling within the

[10] *R.* v. *Horner* (1876), 2 Steph. Dig. 450; 2 Cart. 317.

[1] Sir John Thompson strongly criticizes this passage in the report above referred to (see note p. 513). Speaking of *Reg.* v. *Coote* he says, that "there was no contention at the argument and no decision by the court as supposed by Mr. Justice Ramsay, that the 'power to nominate magistrates to sit in such courts is within the power of the local executives.'" This criticism is hard to appreciate; it seems clear that the objection to the jurisdiction of the Fire Marshal's Court would include the question as to the validity of the appointment of its presiding officer. Sir John Thompson's criticism of the passage in Mr. Justice Ramsay's judgment relating to the creation of new courts of criminal jurisdiction seems equally unsatisfactory. *R.* v. *Coote*, it is submitted, does decide just what Ramsay, J., said it decided. Against the argument of Sir John Thompson, Minister of Justice, in 1889, may be cited the judgment of Mr. Justice Thompson in *Crowe* v. *McCurdy*, 18 N. S. 301 (1885), noted *post*, p. 528.

[2] *Ganong* v. *Bayley* (1877), 1 P. & B. 324.

legislative competence of such legislature, is a proper exercise of its legislative power.[3]

Ontario:—The power of the provincial legislature and the provincial executive in reference to the appointment of justices of the peace and police magistrates to administer justice in criminal cases has been often upheld.[4] As remarked by Armour, C.J., "the appointment of justices of the peace is a primary requisite to the administration of justice."[5] The same view prevails in other provinces[6] and may be said to represent the view taken in all the provinces.

The complete jurisdiction of the Ontario assembly over the Division Courts of that province, including the power to appoint the presiding officers, has been affirmed by the Court of Queen's Bench.[7] County Court judges in that province are appointed by the Dominion government. Division Courts existed in the various counties prior to Confederation, and had always been presided over by the judge of the County Court of the particular

[3] The opinions of Chief Justice Allen and Mr. Justice Duff, who dissented from the judgment of the majority of the court, are placed upon the ground that the exercise of this prerogative is, by the British North America Act, vested exclusively in the Governor-General as Her Majesty's only representative in Canada; a view now clearly untenable. See *ante*, p. 359.

[4] *R.* v. *Reno* (1868), 4 P. R. (Ont.) 281 (Draper, C.J.); *R.* v. *Bennett* (1882), 1 O. R. 445 (Q.B.); *Richardson* v. *Ransom* (1886), 10 Ont. R. 387 (Wilson, C.J.); *R.* v. *Bush* (1888), 15 O. R. 398 (Q.B.)

[5] In *R.* v. *Bush*, *supra*.

[6] *Ex p. Williamson* (1884), 24 N. B. 64; *Ex p. Perkins*, *ib.* 66; *Ex p. Porter* (1889), 28 N. B. 587; *Ex p. Flanagan* (1899), 34 N. B. 577. In the New Brunswick cases (except *Ex p. Williamson*) no question was raised as to the provincial power; the question was as to the power of the Dominion parliament to give them jurisdiction to hear cases under the Canada Temperance Act, as to which see *post* p. 534. See also *Gower* v. *Joyner*, 2 N. W. Terr. Rep. 43.

[7] *Wilson* v. *McGuire* (1883), 2 Ont. R. 118.

county. By the impugned Act it was provided, in effect, that two or more counties might be grouped together for the purpose of facilitating the conduct of business in the Division Courts of the grouped counties, and that the judges of the County Courts of those counties might arrange for taking the work in rotation throughout the entire group. This Act was upheld by the Court.[8]

The establishment of a Mining Recorder's Court for the settlement of mining disputes was held to be clearly within provincial competence.[9] It may be here noted that such tribunals have always been a marked feature of provincial legislation in British Columbia;[10] and the same is true as to "Water Rights" litigation.[1]

Nova Scotia:—The power of the provincial legislature to appoint Stipendiary Magistrates with jurisdiction to try cases under federal law has been recently affirmed without hesitation by the Full Court after exhaustive argument to the contrary.[2]

British Columbia:—The establishment by provincial legislation of a system of Small Debts Courts including the appointment of the judges of those Courts by the provincial executive was upheld;

[8] In *Gibson* v. *McDonald*, 7 Ont. R. 401, a somewhat similar arrangement as to General Sessions of the Peace was held invalid, but this case must be considered overruled by the decision of the Supreme Court of Canada in *Re County Courts of B. C.*, 21 S. C. R. 446. These cases, however, deal rather with the question of the territorial jurisdiction of County Courts, discussed later; see *post*, p. 525.

[9] *Re Munro & Downey* (1909), 19 Ont. L. R. 249; *per* Riddell, J., who gave no reasons, evidently deeming the matter too clear for argument.

[10] See R. S. B. C. (1911), c. 157 and c. 165.

[1] *Ib.* c. 239.

[2] *R.* v. *Sweeney* (1912), 45 N. S. 494.

the only serious question raised being as to the exercise of the power of appointment.[3]

Miscellaneous Cases:—The following cases, relating to the assignment of certain classes of litigation to particular judicial officers of the provincial Courts, may also be noted here as affirming the power to constitute and organize judicial tribunals. The trial of controverted municipal elections in Ontario by the Master in Chambers under the authority of a provincial Act has been upheld;[4] and in Quebec a provincial Act limiting the right of appeal in such cases was held valid.[5] Similarly, Armour, C.J., held that an Act of the Ontario legislature assigning winding-up proceedings (in the case of provincial companies) to the Master in Ordinary, was a proper exercise of its power.[6] And in more recent cases those clauses of the Ontario Liquor License Act, 1902, which provided for the trial of petitions to question the regularity of the voting under the Act as to "local option" and which designated the particular judge who should try them were held *intra vires*.[7]

[3] *Re Small Debts Courts*, 5 B. C. 246. The cases on this part of the subject have been complicated by the introduction of this question as to the prerogatives of the Crown in this connection. See *Burk* v. *Tunstall*, 2 B. C. 12. Where a provincial Act provides for the appointment this question cannot arise; indeed, it is submitted, it should not arise at all. See *ante*, p. 360.

[4] *R. ex rel. McGuire* v. *Birkett* (1891), 21 O. R. 162.

[5] *Clarke* v. *Jacques*, Q. R. 9 Q. B. 238. In *Valin* v. *Langlois*, 5 App. Cas. 115; 49 L. J. P. C. 37, the Privy Council doubted whether election trials fall within "the administration of justice" and these cases, therefore, fall more properly perhaps under "municipal institutions" (No. 8 of s. 92).

[6] *Re Dom. Provident B. & S. Assn.*, 25 O. R. 619. The judgment, however, is based more particularly upon the power of the provinces under "the incorporation of companies with provincial objects" (No. 11 of s. 92).

[7] *R.* v. *Carlisle*, 6 Ont. L. R. 718 (C.A.) See also *R.* v. *Walsh*, 5 Ont. L. R. 527.

Organization or Procedure?—It is often difficult to draw a clear line between the constitution or organization of a Court and procedure. In civil cases no inconvenience arises as along both lines provincial legislatures have full power; but in criminal cases the exclusive power to regulate procedure is with the parliament of Canada,[8] while the Courts are organized under provincial law.

Difficulties have particularly arisen in reference to trial by jury. The federal Criminal Code adopts provincial laws as to the selection of jurors; as it may validly do.[9] In an early case[10] in Ontario it was held that trial with or without jury is a question of procedure and is not a matter relating to the organization of Courts; while a jury empanelled and sworn is part of the organization of the Court.[1] On the broad ground that trial is matter of procedure, MacMahon, J., held void a provincial Act empowering a police magistrate to try certain offences under the Criminal Code;[2] but this decision is opposed to all the cases above noted and must be taken to be overruled as to Ontario by the subsequent decision of a Divisional Court upholding the same Act in so far as it conferred like jurisdiction upon the Court of General Sessions.[3]

[8] *Per* Ritchie, J., in *R.* v. *Cox* (1898), 31 N. S. 311.

[9] *R.* v. *O'Rourke*, 32 U. C. C. P. 388; 1 O. R. 465; *R.* v. *Provost*, 29 L. C. Jur. 253. See also *R.* v. *Plante*, 7 Man. L. R. 537.

[10] *R.* v. *Bradshaw*, 38 U. C. Q. B. 564; and see *R.* v. *Plante*, *ubi supra*.

[1] *R.* v. *Plante*, *ubi supra*.

[2] *R.* v. *Toland*, 22 O. R. 505. See *Re Boucher* quoted in that case.

[3] *R.* v. *Levinger*, 22 O. R. 690: Armour, C.J., Street and Falconbridge, JJ. It should be noted, however, that express reference is made to the fact that the impugned Act did not assume to deal with the procedure in the Court of General Sessions on such trial; while before a Police Magistrate there would be no jury possible. On this ground only can *R.* v. *Toland* and *R.* v. *Levinger* be distinguished; but the question as to trial by jury does not appear in *R.* v. *Toland*, the judgment being based upon the broad untenable ground indicated in the text.

The Supreme Court of Nova Scotia has held that while a provincial legislature may fix the number of grand jurors who shall compose the panel, it cannot fix the number necessary to find a true bill;[4] and this decision has been recently followed in Ontario.[5] The former is matter of organization, the latter of criminal procedure. The provision in the Criminal Code that on appeals from summary convictions the appellate Court shall try the appeal without a jury has been held *intra vires* as relating to procedure and not to the organization of the Court.[6]

The Constitution, Maintenance and Organization of Courts (*Continued*).

(*b*) *Dominion Powers.*

As already intimated, the only limitations upon the power of the provinces in relation to the constitution, maintenance, and organization of Courts are: (1) the power vested in the Dominion government by section 96 to appoint the judges of the Superior, County, and District Courts,[7] and (2) the possible establishment by the parliament of Canada of "additional Courts for the better administration

[4] *R.* v. *Cox* (1898), 31 N. S. 311.

[5] *R.* v. *Walton* (1906), 12 Ont. L. R. 1.

[6] *R.* v. *Malloy* (1900), 4 Can. Crim. Cas. 116. The judgment of the late Judge Macdougall (County Court of York) contains a very interesting historical statement as to the Courts of General Sessions in Ontario. He arrived at the conclusion that a jury was not an essential feature.

[7] The absence of logical method in thus divorcing legislative and executive functions is not matter for discussion in this book; see *ante*, p. 314, and also the speech of Mr. C. Dunkin (afterwards Mr. Justice Dunkin) on the Quebec Resolutions, Confed. Deb., p. 508, *et seq.* The idea of course was to avoid the expense and inconvenience of two groups of courts, as under the United States system, but nevertheless to give the Dominion some voice in connection with the organization of the courts which would necessarily have to enforce Dominion laws.

of the laws of Canada," under section 101. Of these in their order.

To what extent does the appointing power lodged with the Dominion government affect provincial power under No. 14 of section 92?

In this connection the language of the Privy Council in reference to the power of the Dominion government to appoint the Lieutenant-Governors is apposite:[8]

"There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body *who have no power and no functions except as representatives of the Crown.*"

The power to remove Superior Court judges is limited by section 99 even more stringently than the power to remove a Lieutenant-Governor;[9] and this limitation and the other limitations provided in sections 97 and 98 as to the area of choice open to the Dominion government are as much beyond power of alteration by the parliament of Canada as by a provincial legislature. It has been intimated that the power to appoint County and District Court judges carries with it the power to dismiss, and provincial legislation upon the subject has been held to be incompetent.[10] The validity of a commission of enquiry issued by the Governor-General purporting to be under the Imperial Act (22 Geo. III. c. 75) relating to the removal of colonial officers, was in question. It seems to have been admitted on the argument and held by the Court that the legislative assembly of Ontario had no power to abolish the old Court of Impeachment established before Confederation by the parliament of (old) Canada for

[8] *Liquidator's Case* (1892), A. C. 437; 61 L. J. P. C. 75.
[9] Compare s. 59 and s. 99.
[10] *Re Squier*, 46 U. C. Q. B. 474.

trying complaints against County Court judges—C. S. U. C. c. 14. The precise ground is not stated, but as a proceeding under the Consolidated Statute is enumerated as one of the methods of attack then open, the decision could not have been based on the ground of the repugnancy of such provincial legislation to Imperial enactment, as such ground would equally affirm the invalidity of the original Act. The decision therefore must be taken to be that legislation in reference to the removal of those judges mentioned in s. 96, other than the Superior Court judges, must come from the Dominion parliament.

The question has been much canvassed as to the validity of provincial Acts prescribing the qualifications to be possessed by the judges mentioned in section 96, their place of residence, etc. Dominion ministers of justice have refused to be bound by such legislation,[1] but there is no judicial decision on the point. The question, it is conceived, is not between Dominion and provincial legislation; it is a question of repugnancy to an Imperial statute, to wit, the British North America Act. The argument for the Dominion has been that no further limitations upon the range of choice than are imposed by that Act can be imposed by provincial law. It would seem to follow that Dominion legislation limiting the Governor-General's range of choice would be equally repugnant and invalid.[2] If and so far as such legislation is not repugnant to the British North America Act, it would seem to fall clearly within No. 14 of s. 92, as a matter relating to the administration of justice in the province or, more specifically, to the organization of provincial Courts.

[1] See report of Sir John Thompson, Minister of Justice, in Can. Sess. Papers, 1889, No. 47*c*.

[2] See the judgment of O'Connor, J., in *Gibson* v. *McDonald*, 7 Ont. R. 401.

Federal Courts: their Constitution, Maintenance, and Organization.

The power conferred upon the parliament of Canada by section 101 to constitute a general Court of Appeal for Canada and also additional Courts for the better administration of the laws of Canada is coupled with a *non obstante* clause, "notwithstanding anything in this Act." The legislation therefore of the parliament of Canada in this connection is of paramount authority, and, to the extent to which the provincial judicial system is repugnant to it, provincial arrangements must give way.[3]

Under the power conferred by this section have been established the Supreme Court of Canada,[4] the Exchequer Court of Canada,[5] Maritime Courts,[6] Revising Officers' Courts,[7] the Railway Committee of the Privy Council,[8] (so far as relates to its judicial functions), the Court of the Minister or Deputy Minister of Agriculture "empowered to decide *in rem* upon the *status* of a patent;"[9] Dominion Police Commissioners' Courts,[10] and there are doubtless

[3] See *ante*, p. 468.

[4] By 38 Vict. c. 11 (Dom.) It became a Court on January 11th, 1876. See now R. S. C. (1906), c. 139.

[5] By 38 Vict. c. 11 (Dom.) at the same time as the Supreme Court of Canada. See now R. S. C. (1906), c. 140. Its Admiralty jurisdiction is provided for in the Admiralty Act, c. 141.

[6] See *The Picton*, 4 S. C. R. 648. These no longer exist; the Exchequer Court (in Admiralty) has taken their place. See *ante*, p. 238 *et seq.*

[7] See *Re North Perth*, 21 Ont. R. 538. They no longer exist under federal legislation, as the provincial voters' lists prepared under provincial law are now taken as the basis of the federal franchise. See R. S. C. (1906), c. 6, sec. 6 *et seq.*

[8] See *Re Can. Pac. Ry. & York*, 27 Ont. R. 559; 25 Ont. App. R. 65 (1896-8). The Board of Railway Commissioners for Canada has largely taken its place.

[9] See *Re Bell Tel. Co.*, 7 O. R. 605.

[10] *Geller* v. *Loughrin* (1911), 24 Ont. L. R. 18; *R.* v. *Le Bell* (1910), 39 N. B. 469. And see next note.

other instances in which judicial powers have been conferred upon Dominion officials.[1]

Control by Superior Courts:—The jurisdiction of these federal Courts is a matter to be discussed later. The question here is merely as to their creation. But before passing to the subject of the jurisdiction of Canadian Courts, reference may be made to the question as to the control, if any, which the Superior Courts in the provinces may exercise by way of prohibition to stay proceedings in federal Courts of original jurisdiction when such jurisdiction is exceeded, or by way of *certiorari* to quash their proceedings when illegal.

In reference to Revising Officers' Courts for the settlement of voters' lists for Dominion elections it was held by the Chancery Division in Ontario that the provincial Superior Courts could not interfere by prohibition with the working of such federal Courts; and Chancellor Boyd went so far as to say:

"The Chancery Division has, in common with the other divisions of the High Court of Justice, plenary jurisdiction to deal with matters of prohibition *which concern the administration of justice within Ontario as a provincial unit.* This inherent power is circumscribed by the requirements of the province, and operates, I think, only as to *laws enacted by or in force in Ontario pertaining to matters of provincial cognizance under the British North America Act.*"[2]

Reference is made to the peculiar nature of the jurisdiction conferred upon the Courts in election

[1] See *Keefer* v. *Todd* (1885), 2 B. C. 249, upholding arrangements made under Dominion Acts for the better preservation of peace in the vicinity of public works. Wilson, C.J., in Ontario, considered that such Acts might be grounded on the "peace, order, and good government" clause of s. 91, and that under them Dominion justices of the peace might properly be appointed: see *Richardson* v. *Ransom* (1886), 10 O. R. 387.

[2] *Re North Perth*, 21 O. R. 538, overruling *Re Simmons and Dalton*, 12 O. R. 505.

matters,[3] and in that particular class of cases interference by the ordinary Courts might be impliedly excluded.[4] The language of Boyd, C., however, (above quoted) would exclude jurisdiction to prohibit any federal Court; contrary to the view expressed in other cases.

For example, Osler, J.A., was of opinion that prohibition would lie to restrain the Minister of Agriculture or his deputy from the exercise of the judicial functions conferred by the Dominion Patent Act, if it were decided that the jurisdiction had not been validly conferred or that it was being exceeded.[5] Similarly, the Supreme Court of Nova Scotia prohibited proceedings authorized by Dominion statute to be taken in the Vice-Admiralty Court at Halifax (an Imperial Court) on the ground that the Dominion parliament could not validly confer jurisdiction on such a Court; and although this decision was reversed by the Supreme Court of Canada, it was upon the ground that the jurisdiction had been validly conferred.[6] No intimation that prohibition would not lie if the jurisdiction were wanting appears in the judgments.

The correct view would appear to be that federal Courts of original jurisdiction created by statute of the parliament of Canada are in the same position as inferior Courts created by a legislature having full control over all matters or by a provincial legislature in Canada legislating in regard to matters within its competence. Unless by the statutes creating such inferior Courts the superintend-

[3] *Valin* v. *Langlois*, 5 App. Cas. 115; 49 L. J. P. C. 68; *Theberge* v. *Landry*, 2 App. Cas. 102; 46 L. J. P. C. 1.

[4] See *Re North Perth*, *supra*, *per* Meredith, J., at p. 546; *McLeod* v. *Noble* (1897), 28 Ont. R. 528, and cases there cited, particularly the judgment of Fournier, J., in *Ellis* v. *R.*, 22 S. C. R. 7.

[5] *Re Bell Telephone Co.*, 7 Ont. R. 605; 9 Ont. R. 339.

[6] *Atty.-Gen. of Canada* v. *Flint*, 16 S. C. R. 707; 3 R. & G. 453.

ing jurisdiction of the Superior Courts is taken away, such jurisdiction clearly exists to prevent the unwarranted assumption of authority or the illegal exercise of authority by any inferior Court over the person or property or civil rights of any one. The power, for example, of the Superior Courts of a province to quash convictions made by federal magistrates under the Canada Temperance Act has never been denied and is freely exercised without question.[7]

As intimated by the Privy Council,[8] the distinction between creating a new Court and conferring jurisdiction upon an existing Court, provincial or other, is "but a nominal, a verbal, and an unsubstantial distinction." The subject now in hand is closely connected, therefore, with the question of the jurisdiction of Courts now to be dealt with.

II. The Jurisdiction of Canadian Courts: by What Authority Conferred?

At the date of confederation there were in all the provinces Courts modelled upon the principle of the Superior Courts of law in England, whose jurisdiction territorially was limited only by the boundaries of the respective provinces in which they were established. Under these, and as a rule subordinate to them, were various other Courts[9] whose jurisdiction was limited as to the class of matters which might be entertained by them, without territorial limitation,[10] or was subject to limitations along both lines.[1] It is almost unnecessary to say there was no limitation of jurisdiction in any

[7] See cases noted *post*, p. 534. As to Courts Martial and Naval Courts, see *ante*, p. 209.

[8] *Valin* v. *Langlois*, 5 App. Cas. 115; 49 L. J. P. C. 68.

[9] See *Ganong* v. *Bayley*, 1 P. & B. at p. 326; 2 Cart. at p. 512.

[10] For example, County Courts in Upper Canada.

[1] For example, Division Courts in Upper Canada.

provincial Court along any line identical with, or in any sense analogous to, the line of division now existing between matters within the legislative competence of the Dominion parliament and of the provincial legislative assemblies respectively.

However the jurisdiction of Courts may be limited territorially or otherwise, the law to be applied in any given case may not be law laid down by the power to which they owe their creation. The decision of any case which may come before a Court of law involves the application of law to the facts as they may be admitted or judicially determined. Out of every fact, or set of facts, there arise various legal relations, and there can be no conflict of law in reference to any given legal relation, for the law applicable to any stated facts is presumably capable of definite exposition. It may happen, therefore, that in a case arising in a Canadian Court, the law which governs the legal relations which arise out of the facts of the case may be, not the law laid down in either Dominion or provincial statutes; not strictly speaking the law of Canada at all; not even Imperial law; but the law of a foreign country. In accordance with that comity between nations, which is now recognized by the tribunals of all civilized countries, those tribunals do not, where the facts out of which the litigation arose occurred in a foreign country, limit the enquiry to what is the law which would govern in case those facts had occurred within its own territory. Indeed, in criminal matters, that is to say, where a person is being prosecuted for an act committed abroad, British Courts have laid down the rule that the trial of such a charge can only be had in the country where the crime was committed. The administration of international justice, if one may use the expression, is secured in such a case by handing over the alleged offender to the officers of

the country in which the offence is alleged to have been committed; and the jurisdiction of British tribunals has been limited to a preliminary enquiry as to the existence of a *prima facie* case. With regard to civil matters, the tribunals of most civilized states do not recognize any such local venue for their trial. It is beyond the scope of this work to enumerate the various conditions precedent to jurisdiction laid down in the jurisprudence of the different civilized states.[2] But, in all such actions as the Courts do entertain, they give effect to legal rights and obligations which may arise out of transactions occurring abroad; and it may happen, therefore, that any modern tribunal may be called upon, at times, to determine, and practically to administer, the law of a foreign country.

The jurisdiction of provincial Courts is necessarily limited to the administration of justice "in the province." Subject to this limitation[3] the provincial legislatures may confer such jurisdiction, territorial and as to subject matter, civil or criminal, as they may respectively deem proper, subject always to the paramount authority of the parliament of Canada should that legislature choose to legislate in reference to the judicial determination of disputes relating to matters assigned to it by the British North America Act.

"A court is a place where justice is judicially administered: Coke on Littleton, 58a; and the constitution of a court therefore necessarily includes its jurisdiction; and the granting by the British North America Act to the provincial legislatures of the power to constitute courts of civil and criminal jurisdiction necessarily included the power of giving

[2] *Dicey*, "Conflict of Laws," deals with the subject.

[3] The application of the doctrine of exterritoriality to provincial legislation is a question of such moment as to call for special notice in this Part, in addition to what was said in Chap. VII., *ante*, upon the general subject.

jurisdiction to those courts, and impliedly included the power of enlarging, altering, amending and diminishing the jurisdiction of those courts."[4]

"The constitution, maintenance and organization of provincial courts plainly includes the power to define the jurisdiction of such courts territorially as well as in other respects."[5]

"I think the legislature which had power to constitute and organize the court had likewise power to change the constitution of the court both as to subject matter of jurisdiction and as to the area over which jurisdiction should be exercised. . . . The expressions cited from the commissions are to be taken . . . as being merely descriptive of the tribunal over which the judge is appointed to preside."[6]

Jurisdiction of Federal Courts:—The authority of the parliament of Canada, on the other hand, is limited by section 101 to the establishment of a general Court of Appeal for Canada and of additional Courts for the better administration of the laws of Canada. While, therefore, the appellate jurisdiction of the Supreme Court of Canada, is, or may be made, practically unlimited, both territorially and as to the subject matter in litigation,[7] its original jurisdiction is as an "additional" Court; and the jurisdiction of all these "additional" Courts is limited as to subject matter. They may only be established for the better administration of the laws of Canada, that is to say, of federal law;[8] although of course, as already intimated,[9] it may

[4] *R.* v. *Levinger* (1892), 22 Ont. R. 690, *per* Armour, C.J.

[5] *Re County Courts of British Columbia* (1892), 21 S. C. R. 446, *per* Strong, J.

[6] *Crowe* v. *McCurdy*, 18 N. S. 301, *per* Thompson, J., afterwards Sir John Thompson, Minister of Justice. See note (1) *ante*, p. 514. And see *Guay* v. *Blanchet*, 5 Que. L. R. 43, at p. 51, *per* Casault, J.

[7] *L'Ass'n. de St. J.-B.* v. *Brault* (1901), 31 S. C. R. 172.

[8] *Ib.*; see also *Re References* (1910), 43 S. C. R. at p. 575, *per* Idington, J.

[9] *Ante*, p. 526.

happen that the law to be applied in determining a case in a Dominion Court is the law laid down in provincial enactment. The jurisdiction of a federal court may or may not be territorially limited.[10]

The original jurisdiction of the Supreme Court in *habeas corpus* has been from the beginning limited to an enquiry into the cause of commitment "in any criminal case under an Act of the parliament of Canada"; a form of expression narrower than that of section 101, "the laws of Canada." There is no authoritative pronouncement that the latter expression covers more than the laws enacted by the parliament of Canada;[1] but having regard to section 129 the better view would appear to be that it includes all subjects within federal jurisdiction and that it is in principle immaterial whether there has or has not been post-confederation legislation by the parliament of Canada in regard to them. The whole body of laws, common law as well as statutory enactments, was continued by section 129 but with a clear line of division drawn through it by that section. Any repeal or amendment of a pre-confederation law, common law or statutory law, can now be enacted by that legislature only which, if the law which it is desired to repeal or amend were non-existent, could now enact it.[2] It seems proper therefore to consider the laws of Canada, as distinguished from provincial law, as the whole body of law within

[10] *The Picton*, 4 S. C. R. 648, affirming the validity of an Act establishing a Maritime Court for Ontario only.

[1] The language of Mr. Justice Idington in *Re References*, 43 S. C. R. at p. 575, points to the narrower construction: "What are the laws of Canada? Is it not obvious that they are the laws enacted by the parliament of Canada?"

[2] *Dobie* v. *Temp. Board*, 7 App. Cas. 136; 51 L. J. P. C. 26; *Local Prohibition Case* (1896), A. C. 343; 65 L. J. P. C. 26: see extract *ante*, p. 432.

federal jurisdiction; and to so interpret the phrase in section 101.

Referring again to the original jurisdiction in *habeas corpus* of the Supreme Court of Canada:[3] the codification of the criminal law of Canada has had the effect of enormously increasing that jurisdiction. Prior to the Criminal Code of 1892 it was held that there was no jurisdiction in a murder case as the crime of murder was a common law crime only.[4] Now, of course, under the Criminal Code it is a crime "under an Act of the parliament of Canada"; and the same remark applies to a multitude of crimes now covered by the Code. That code, however, does not purport to be absolutely exhaustive. The common law of England on the subject of crimes is to some extent untouched by statute; and there are crimes made such by British enactment and, as part of the law of England, introduced into Ontario, British Columbia, and Manitoba, which the Criminal Code of Canada does not cover.[4a] It has been recently held[5] that offences covered in this way by British statutes only are not offences "under any Act of the parliament of Canada" within the meaning of the section of the Supreme Court Act which confers an original *habeas corpus* jurisdiction; and an application for the writ with a view to an enquiry into the validity of a commitment in British Columbia on a charge of house-breaking was refused, that offence being an offence under an old British Act which had become part of the law of British Columbia under the English Law Introduction Ordinance of that colony passed in 1858, and not being

[3] The appellate jurisdiction in *habeas corpus* is a matter to be dealt with later; see *post*, p. 547.

[4] *Re Sproule*, 12 S. C. R. 140.

[4a] See secs. 10, 11, and 12; R. S. C. (1906), c. 146.

[5] *Re Dean* (1913), 48 S. C. R. 235 (Duff, J.)

covered by any express section of the Criminal Code of Canada other than the saving clause above quoted:

"The jurisdiction extends only, I think, to those cases in which the 'commitment' has followed upon a charge of a criminal offence which is a criminal offence by virtue of some statutory enactment of the parliament of Canada; it does not, in my opinion, extend to cases in which the commitment is for an offence which was an offence at common law or under a statute which was passed prior to Confederation and is still in force."

The Dominion parliament may confer jurisdiction upon a provincial tribunal; and, conversely, a provincial legislature may confer jurisdiction upon a federal Court sitting in the province.

The parliament of Canada may give jurisdiction to a provincial Court, whether superior or inferior, or to a provincial judicial officer to perform judicial functions in the adjudication of matters over which the parliament of Canada has exclusive jurisdiction; and no provincial legislation is necessary in order to enable effect to be given to such federal enactments.[6]

The decision of the Supreme Court of Canada to the above effect was avowedly based upon the principle of *Valin* v. *Langlois*[7] decided by the Privy Council, and may be taken therefore as affirming with final authority that the Dominion parliament legislating upon matters falling within its competence, may confer jurisdiction upon a provincial

[6] *Re Vancini* (1904), 34 S. C. R. 621. Sedgewick, J., delivered the unanimous judgment of the court. The Supreme Court of New Brunswick had rested its judgment upon the validity of a provincial Act implementing, and thus in effect enacting, the provisions of the federal Act, which in itself the Court considered *ultra vires*.

[7] 5 App. Cas. 115; 49 L. J. P. C. 37. See *infra*, p. 533.

Court; and it seems equally clear that the converse proposition is sound law. Indeed, the law may be stated still more broadly, that any government may take advantage of the actual existence within its territorial limits of an organized Court of law to impose on the judges and administrative staff of such Court duties in relation to matters within its sphere of authority other than those imposed upon them by the power which created the Court, and whether this action is to be considered as the creation of a new Court with the machinery of the old, or as the conferring of a new jurisdiction upon the old, was considered by the Privy Council a matter of indifference. For example, it was held by the Supreme Court of Canada that it was competent for the Dominion parliament to confer upon the Vice-Admiralty Court, existing in Nova Scotia under Imperial authority, jurisdiction to entertain proceedings for enforcing payment of penalties for breaches of the Inland Revenue Act.[8] In the opinion of some at least of the judges of the Supreme Court a judge of a Vice-Admiralty Court might decline to take upon himself the burden of such cases, but the jurisdiction so to do they held to be beyond question. If the Imperial parliament, in the exercise of its legislative supremacy, were expressly to prohibit such Court from entertaining other than matters arising under Imperial legislation, such prohibition would be operative; but, in the absence of such prohibition, it is difficult to see how the judges and staff of the Court could, as Canadian citizens, lawfully decline to perform the duties imposed upon them by Canadian law; for

[8] *Atty.-Genl. (Can.)* v. *Flint*, 16 S. C. R. 707; followed in *R.* v. *Annie Allen*, 5 Exch. Ct. R. 144, in which the Imperial Colonial Courts of Admiralty Act, 1890, was held not to have disturbed the jurisdiction conferred by the Dominion Inland Revenue Act.

"Judges as citizens are bound to perform all the duties which are imposed upon them by either the Dominion or local legislature."[9]

And, again, it has been held that the Dominion parliament can confer upon Vice-Admiralty Courts jurisdiction in any matter relating to navigation and shipping within the territorial limits of the Dominion, and that any such Act is to be given full effect so far as its provisions are not repugnant to Imperial legislation.[9a]

The right of the Dominion parliament to adopt for its purposes a provincial Court and for such purposes to increase the jurisdiction (for example, as to amount) of such provincial Court has been affirmed by the Supreme Court of Nova Scotia as clearly established doctrine.[10]

As instances of jurisdiction conferred upon provincial Courts or provincial officers by Dominion Acts the following may be referred to:

The Act empowering the provincial Courts to try Dominion controverted election petitions was held *intra vires* by the Privy Council:[1]

"There is therefore nothing here to raise a doubt about the power of the Dominion parliament to impose new duties upon the existing provincial courts, or to give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces."

The validity of the Dominion Act which provided for utilizing the machinery of the provincial

[9] *Per* Dorion, C.J., in *Bruneau* v. *Massue*, 23 L. C. Jur. 60; quoted with approval by Meredith, C.J., in *Valin* v. *Langlois*, 5 Q. L. R. at p. 16.

[9a] *The Farewell*, 7 Q. L. R. 380; 2 Cart. 378.

[10] *Atty.-Genl. of Canada* v. *Sam Chak* (1909), 44 N. S. 19.

[1] *Valin* v. *Langlois*, *supra*, affirming 3 S. C. R. 1. Ritchie, C.J., in his judgment, gives several instances of such legislation.

Courts for the taking of evidence for use before foreign tribunals, has been affirmed by the Courts of both Ontario and Quebec.[2]

The power of the Dominion parliament to confer jurisdiction upon provincial Courts and judicial officers to try cases under the Canada Temperance Acts has been often affirmed,[3] as well as to try cases under the Criminal Code.[4]

That provincial legislatures may impose duties upon County Court judges to be performed beyond the limits named in their commissions is clear,[5] but as County Courts are Provincial Courts these cases cannot strictly be held to sustain the converse proposition that provincial legislation may confer

[2] *Re Wetherell & Jones* (1884), 4 Ont. R. 713; *Ex p. Smith*, 16 L. C. Jur. 140; 2 Cart. 330. But see *Re Alberta, &c., Ry. Co.* (1910), 20 Man. L. R. 697, referred to, *ante*, p. 262.

[3] *Ex p. Williamson*, 24 N. B. 64 (Parish Courts); *Ex p. Perkins*, 24 N. B. 66 (Police Magistrates); *Ex p. Porter*, 28 N. B. 587 (Magistrates); *R.* v. *Wipper* (1901), 34 N. S. 202 (provincial J. P.); *R.* v. *Kennedy*, 35 N. S. 266; *R.* v. *Bennett*, 1 O. R. 445; *R.* v. *Bush* 15 O. R. 398. See also *Gower* v. *Joyner*, 2 N. W. Terr. R. 43. The New Brunswick cases above cited were, however, all overruled in *Ex p. Flanagan* (1899), 34 N. B. 577 (see also *Ex p. Wright*, *ib.* 127); but this decision was avowedly based upon what appears to be a mistaken view of the meaning of a passage in the judgment of Strong, J., in *Re County Courts of B. C.*, 21 S. C. R. at p. 453:—"The jurisdiction of parliament to legislate as regards the jurisdiction of provincial courts is, I consider, excluded by s.-s. 14 of s. 92 before referred to, inasmuch as the constitution, maintenance and organization of provincial courts plainly includes the power to define the jurisdiction of such courts territorially as well as in other respects." This passage is properly explained in *R.* v. *Wipper* (*supra*); that Strong, J., had not in view s. 101 at all, and did not intend to impugn *Atty.-Gen.* v. *Flint*, *Valin* v. *Langlois*, and that class of cases. He was speaking of the general jurisdiction of the provincial courts. The decision of the Supreme Court of Canada in *Re Vancini*, 34 S. C. R. 621, settles the matter. It has been followed in New Brunswick: *R.* v. *Le Bell* (1910), 39 N. B. 469.

[4] *R.* v. *Vancini*, *supra*.

[5] *Re Wilson* v. *McGuire*, 2 O. R. 118, cited *ante*, p. 515; *Crowe* v. *McCurdy*, 18 N. S. 301, cited *ante*, p. 528; *R.* v. *Brown* (1907), 41 N. S. 293.

jurisdiction on Federal Courts. But the principle of the cases cited above is equally applicable to uphold such provincial legislation in relation to subjects within its competence.

May federal legislation take away or curtail the jurisdiction of provincial Courts to try cases involving federal law?

The power of the parliament of Canada to create Courts of original jurisdiction under section 101 of the British North America Act is limited to the establishment of additional Courts for the better administration of the laws of Canada. The word "additional" has been construed by one learned judge at least to mean "in addition to the ordinary provincial Courts" and not "in addition to the general Court of Appeal" referred to in the earlier part of the section,[8] but there is no authoritative decision upon the point. It is a question of great importance, for if the construction suggested is correct, it is open to argument that interference to the extent of diminishing the jurisdiction of the ordinary provincial Courts is impliedly forbidden; an argument which would not be open if the section is to be read as providing in the first place for a general Court of Appeal for Canada and then in addition thereto for the establishment, if thought advisable, of Courts for the better administration of the laws of Canada. The *non-obstante* clause affords no assistance here, nor, it is conceived, does the word "better." In the absence of authority it would be rash to express a decided view. There are *dicta* both ways. It may be argued that apart from section 101 the power to constitute Courts having exclusive jurisdiction, for example, in patent cases, divorce cases, cases regarding navi-

[8] *Per* Idington, J., in *Re References*, 43 S. C. R. at p. 569.

gation and shipping, etc., is with the parliament of Canada under the enumerated classes of section 91, if it choose to exercise the power; in which view section 101, in spite of the *non-obstante*, might be held to be a clause of limitation, cutting down this wide implied or necessarily incidental power wrapped up in some at least of the class-enumerations. A solution of the problem involves consideration of many of the principles discussed in earlier chapters; amongst others, the principle of federal paramountcy in regard to all matters really within federal jurisdiction,[7] and the still larger principle that the sanction of a law rests in executive action, which would properly include the enforcement of the law through judicial tribunals,[8] a principle which should not lightly be taken to be departed from even under a federal system.

In *Valin* v. *Langlois* in the Supreme Court of Canada[9] Mr. Justice Taschereau refers to the argument advanced that "the Dominion parliament cannot in any way increase or decrease, give or take away from, or in any manner interfere with the jurisdiction of the provincial Courts" as a radically and entirely false and erroneous interpretation of section 92, No. 14, and altogether opposed to the other parts as well as to the spirit of the British North America Act. Speaking of the criminal law he says:

> "Cannot parliament in virtue of section 101 of the Act create new courts of criminal jurisdiction and enact that all crimes, all offences, shall be tried exclusively before these new courts? I take this to be beyond controversy."

And later on the judgment proceeds:

[7] See *ante*, p. 468.
[8] See *ante*, p. 359.
[9] 3 S. C. R. at p. 74 *et seq.*

"I also think it clear that parliament can say, for instance, that all judicial proceedings on promissory notes and bills of exchange shall be taken before the Exchequer Court or before any other Federal Court. This would be certainly interfering with the jurisdiction of the provincial courts. But I hold it has the power to do so *quoad* all matters within its authority."

In an earlier case in Ontario it had been held that a provision in the Insolvent Act of 1869 that claims by and against assignees in insolvency might be brought before a County Court judge in a summary way upon petition and not by any suit, attachment, opposition, seizure, or other proceedings whatever, was within federal competence; but Wilson, C.J., in his judgment intimated his opinion that an enactment by the parliament of Canada that some of the matters covered by the class-enumerations of section 91—for example he mentions bills of exchange and promissory notes—should be litigated in a particular Court and not in any other Court would be *ultra vires;*[10] a view diametrically opposed to that of Taschereau, J., above quoted.

No question, of course, can arise as to the power to confer concurrent jurisdiction.[1] To that extent the scope and policy of section 101 is obvious. The moot point is as to the right to confer an exclusive jurisdiction; and upon that point, it is conceived, the view of Mr. Justice Taschereau is more in consonance with the scheme and policy of the Act than is that of Chief Justice Wilson.

In this view, the Dominion parliament may take from provincial Courts the cognizance of those matters within Dominion competence which it may

[10] *Crombie* v. *Jackson* (1874), 34 U. C. Q. B. 575; 1 Cart. 685; and see *Pineo* v. *Gavaza*, 6 R. & G. 489.

[1] See *R.* v. *Farwell*, 22 S. C. R. 553; *Brantford* v. *Grand Valley Ry.* (1913), 15 D. L. R. 88; *Shipman* v. *Phin*, 32 Ont. L. R. 329.

think fit to assign to Courts of its own creation, or it may take them from one provincial Court and assign them to another. The converse proposition, however, is not sustainable; at least not to its full extent. As the jurisdiction of Dominion Courts, so far as it is conferred by the parliament of Canada, is limited to matters within the legislative competence of that parliament, provincial legislatures are powerless to abridge it. But to the extent to which provincial legislatures might choose to confer a special jurisdiction upon a Dominion Court, it may again abridge that jurisdiction. On the other hand, the right of appeal to the Supreme Court of Canada conferred by the parliament of Canada under section 101 of the British North America Act covers litigation over all matters, provincial as well as federal, and cannot be limited or abridged by provincial legislation.[2] As put by Lord Robertson:

> "The argument necessarily goes so far as to justify the wholesale exclusion of appeals in suits relating to matters within the region of provincial legislation. As this region covers the larger part of the common subjects of litigation, the result would be the virtual defeat of the main purposes the Court of Appeal."[3]

Appellate Jurisdiction:—The right of appeal from one Court to another has been described by the highest authority as a substantive right, the creation of which requires legislative authority. It is

> "in effect a limitation of the jurisdiction of one court and an extension of the jurisdiction of another;"[4]

a remark which, of course, would equally apply in

[2] *Crown Grain Co.* v. *Day* (1908), A. C. 504; 78 L. J. P. C. 19; *Clarkson* v. *Ryan*, 17 S. C. R. 251; *L'Ass'n de St. J.-B.* v. *Brault*, 31 S. C. R. 172; *Halifax* v. *McLaughlin Carriage Co.*, 39 S. C. R. 174.

[3] *Crown Grain Co.* v. *Day*, *supra*.

[4] *Atty.-Gen.* v. *Sillem* (1864), 10 H. L. Cas. 704; 33 L. J. Ex. 212.

the case of the creation of a new appellate tribunal, with a newly created appellate jurisdiction. As already intimated,[5] the policy of the British North America Act was that justice should be administered throughout Canada in the main through the medium of Courts constituted, maintained, and organized under provincial legislation. It has been authoritatively affirmed that this provincial power includes the determination of the jurisdiction of such provincial Courts not only in regard to subject matters within provincial competence but in regard to all matters which may come into litigation.[6] No serious question has been raised as to the right of a provincial legislature to formulate a complete scheme for the administration of justice in the province, including the creation of new appellate tribunals, with a newly created appellate jurisdiction;[7] thus diminishing, as above intimated, the jurisdiction of the Court from which an appeal is given, by taking away the element of finality. The right of appeal, thus created, is in no sense an alteration of the right or rights concerning which litigation has arisen; it is an alteration of a right connected with the administration of justice; and such rights are subject to the law laid down in provincial enactment, subject always to the operation of federal law validly enacted in relation to matters within the ambit of federal authority.[8]

Criminal Appeals:—The administration of criminal justice has, however, been viewed in a somewhat different light. The assignment to the federal parliament of exclusive authority over "the criminal law . . . including the procedure

[5] *Ante*, p. 510.
[6] See *ante*, p. 527 *et seq.*
[7] See *ante*, p. 512.
[8] See *ante*, pp. 468, 536.

in criminal matters" has been held to preclude provincial legislatures from giving a right of appeal in particular instances; so that the creation of an appellate tribunal with a general criminal jurisdiction is futile unless the federal parliament confers the right of appeal in the particular instance. As a matter of fact, the Criminal Code covers negatively as well as affirmatively almost entirely the whole field of criminal appeals; and so far as such provisions extend they are of paramount authority. But the superintending jurisdiction exercisable by the Superior Courts over all inferior Courts, for example, in the quashing of convictions by magistrates and the release upon *habeas corpus* of persons imprisoned upon illegal convictions is a matter more or less left open; and question has been raised as to the validity of provincial legislation creating a further right of appeal. The following cases may be noted:

The Court of Appeal for Ontario held unanimously in 1886 that the provincial Act regarding that Court upon its true interpretation gave no right of appeal from a judgment of the High Court quashing a conviction under the federal Canada Temperance Act and the federal Summary Convictions Act then in force.[9] Mr. Justice Osler went further, however; he referred to the provincial Act as giving the Court of Appeal an appellate jurisdiction in both civil and criminal cases but as only giving a right of appeal in civil cases. Of this right in criminal cases he says:

"We must look elsewhere for the legislation which creates and regulates the right of appeal in such cases. It cannot, of course, be found in the statutes of Ontario. The 'judgments of the Superior Courts' mentioned in sec. 18 are unquestionably limited to judgments in causes or matters over which alone the provincial legislature has jurisdiction;"

[9] *R.* v. *Eli*, 13 Ont. App. R. 526.

(meaning, of course, civil matters as distinguished from criminal matters);[10] and later on he speaks of the judgment of Moss, C.J.O., in an earlier case,[1] as wholly adverse to the view that an appeal in a criminal case could be created or regulated by provincial legislation.

In the following year, 1887, the Divisional Court of the Common Pleas Division of the High Court for Ontario adopted the same view, holding that provincial legislation could not give a right of appeal in a criminal case "whether such right of appeal be or be not considered a new right or only procedure."[2]

Much to the same effect are certain decisions of the Supreme Court of Nova Scotia. Under the Canada Temperance Act an appeal lay in certain cases to the County Court, but no further appeal was provided for. Under provincial legislation, however, there was a wide right of appeal from the County Court to the Supreme Court of the province. The Full Court held that no appeal lay in cases under the Canada Temperance Act.[3] Thompson, J., said:

"During the argument I was strongly inclined to think that an appeal to this court would lie in consequence of the constitution and practice of the County Courts being such that every suitor where the amount in controversy exceeds a certain sum had the right of appeal. It would be carrying that view too far, however, to apply it to cases which go to

[10] See *post*, p. 550.

[1] *Re Boucher*, 4 Ont. App. R. 191; in which the view was expressed that a provision allowing a single judge to sit as and for the court was a procedure provision and therefore to be interpreted as applying only to civil matters.

[2] *R.* v. *McAuley*, 14 Ont. R. 643; doubt was expressed as to the right of a single judge to sit as and for the court in criminal cases. Thereafter applications to quash convictions in criminal cases were always taken in Ontario before the Full Court.

[3] *McDonald* v. *McCuish* (1883), 17 N. S. 1.

the County Courts by way of appeal under enactments creating statutory liabilities and giving an appeal to the court, but conferring no further right of appeal."

This judgment does not, perhaps, decide more than that the general right of appeal from the County Courts given by provincial legislation should not be construed as applying to such cases as that before the Court. In 1886 the decision was followed by the same Court upon the ground, as stated by the reporter, "that no appeal to this court was provided in the Act creating the offence, and no appeal could be taken under the local Act providing generally for appeals from the County Court;"[4] and the same view is open as to that decision. But in 1888 the question came again before the court.[5] A provincial Act gave certain jurisdiction to a County Court judge to quash convictions upon *certiorari*. A conviction under the Canada Temperance Act had been quashed by a County Court judge upon *certiorari* under the provincial statute; and an appeal was taken to the Supreme Court of the province. The full Court held that the whole proceedings were *coram non judice;* that neither Court had jurisdiction in the premises. Townshend, J., for the Court said:

"The local legislature has no power to confer jurisdiction or to legislate at all in reference to proceedings under the Canada Temperance Act. The authority conferred by the legislature on the County Courts to grant writs of *certiorari* must of necessity be limited to matters over which it has power to legislate. . . . The only right of appeal from the County Court to this Court which the local legislature could give would be in those matters within its competency to deal with and as already pointed out this particular statute is not one of them. An appeal can only be entertained where it

[4] *R.* v. *Wolfe* (1886), 19 N. S. 24.
[5] *R.* v. *De Coste* (1888), 21 N. S. 216.

is expressly given by statutory authority, and none has been authorized in such a case as the present."

The same view has been taken in British Columbia. The full Court of that province refused to entertain an appeal from the decision of a single judge quashing a conviction under the Criminal Code.[6] And in a later case the Court of Appeal held that it had no jurisdiction to hear an appeal from an order made by a judge of the Supreme Court of British Columbia discharging upon *habeas corpus* a person who had been committed for extradition. Such a proceeding was, in the opinion of the Court, in a criminal matter, in regard to which the provincial legislature could confer no right of appeal.[7] Macdonald, C.J., said:

"Now while there is no provision in our Court of Appeal Act that there should be no appeal in any criminal cause or matter, it is not necessary, in my opinion, that there should be such in order to exclude such an appeal, because the province has no jurisdiction in such a matter at all. Any Act of the province giving the right of appeal in a criminal matter in the sense in which jurisdiction is given to the Dominion in such matters would be *ultra vires* of the province."

And he referred to the language of Strong, C.J., in *Re County Courts of British Columbia*,[8] quoted on a previous page of this book, as relating to territorial jurisdiction merely or, at least, as otherwise *obiter* and not "intended to be taken literally and applied to a case like the present." The control of procedure in criminal matters assigned to the federal parliament covered in his opinion the right of appeal:

"The parliament of Canada was given exclusive jurisdiction over criminal law and over 'procedure' in criminal cases,

[6] *R. v. Carroll* (1909), 14 B. C. 116.
[7] *Re Tiderington* (1912), 17 B. C. 81.
[8] 24 S. C. R. 453 (1892); see *ante*, p. 528.

not in one court alone, but in all the courts of criminal jurisdiction. 'Procedure,' while it includes practice, is a much more comprehensive term. . . . That the province has the right to constitute a court or courts for the hearing of criminal causes or matters is one thing; that it may say that the Crown or an accused person shall have the right to go from court to court is another."

If the various authorities above discussed are to be taken, as they probably should be taken, as based upon the view that "procedure in criminal matters" covers provision for the right of appeal, the position is one of little difficulty. If, on the other hand, the right of appeal is essentially a question of jurisdiction, it seems questionable that provincial legislation, always, of course, in the absence of supervening federal legislation, should be held incompetent.

Divorce Jurisdiction in British Columbia:—A somewhat curious position has arisen in British Columbia with regard to appellate jurisdiction in divorce. There is no legislation of the colony prior to Confederation directly touching the matter, beyond the proclamation of Sir James Douglas in 1858 introducing English law as it existed at that date into the colony so far as it was not from local circumstances inapplicable. After Confederation it was held that the English "Divorce and Matrimonial Causes Act" of 1857 was part of the law of the province, and that the Supreme Court of British Columbia, or one judge thereof sitting as and for the Court, possessed the jurisdiction exercisable in England by the special tribunal designated in the Act;[9] and this view has recently been upheld by the Privy Council.[10] In 1891, however,

[9] *S.* v. *S.* (1877), 1 B. C. (pt. 1) 25.

[10] *Watts* v. *Watts* (1908), A. C. 573; 77 L. J. P. C. 121. See *ante*, p. 296.

the full Court had held that no appeal lay to that appellate tribunal from the decision of a single judge in a divorce case [1] and that view was re-affirmed and followed in a decision of the full Court in 1909.[2] It apparently follows that as the Supreme Court of the province is not the Court of last resort in the province within the meaning of the Supreme Court Act,[3] the only appeal from the judgment of a single judge in divorce cases is an appeal direct to the Privy Council—a most unsatisfactory state of affairs. The denial of the right to appeal in what are clearly "civil matters" to an appellant tribunal which under provincial legislation has jurisdiction to review "every judgment order or decree made by the Supreme Court or a judge thereof,"[4] seems opposed to the principles involved in the cases referred to on an earlier page of this book; and can be supported only on the peculiar nature of the jurisdiction in divorce, resting, as it does, on the English statute. The better view would appear to be that, given a law creating a right to divorce or judicial separation, the administration of that law would be part of the administration of justice in the province and would *prima facie* fall to provincial Courts, constituted under provincial legislation—subject always, of course, to the power of the Dominion parliament to constitute additional Courts, under s. 101, and to regulate procedure in divorce cases, if so disposed.[5]

[1] *Scott* v. *Scott*, 4 B. C. 316.

[2] *Brown* v. *Brown*, 14 B. C. 142.

[3] See *James Bay Ry.* v. *Armstrong* (1909), A. C. 624; 79 L. J. P. C. 11.

[4] Court of Appeal Act, R. S. B. C. (1911), c. 51, s. 6.

[5] This view, expressed in the second edition of this book, is referred to with approval by Martin, J., in *Sheppard* v. *Sheppard* (1908), 13 B. C. at p. 519.

III. Procedure.

By section 91, No. 27, "procedure in criminal matters" is assigned exclusively to the parliament of Canada as part of the criminal law; and, apart from the questions which, as already intimated,[6] sometimes arise as to whether a particular enactment is one relating to procedure or to the constitution (including jurisdiction)[7] or organization of the Court, no serious difficulty arises when once it has been settled that the matter dealt with by procedure provisions comes within "the criminal law" assigned to the Dominion. Jurisdiction over procedure in all such matters is with the parliament of Canada.

On the other hand, section 92, No. 14, assigns to the provincial legislatures exclusive jurisdiction over "procedure in civil matters" in the provincial Courts. And, until recently, it could be stated with confidence that the procedure for the enforcement of provincial penal law enacted by a provincial legislature under the authority of section 92, No. 15, is procedure in a civil matter within No. 14 and as such within the exclusive competence of the provinces. But the views expressed by some of the judges in a late case before the Supreme Court of Canada[8] tend to raise a doubt as to the correctness of this proposition; and it is thought advisable therefore, to discuss that case before attempting to indicate the position as determined by the earlier authorities in the different provinces. The exact point was not before the Court, but it is open to argument that it was really involved in the opinions expressed. By the Supreme Court Act,[9]

[6] *Ante* pp. 518 and 538.
[7] See *ante*, p. 527.
[8] *Re McNutt* (1912) 47 S. C. R. 259.
[9] R. S. C. (1906), c. 139, sec. 39 (*c*).

an appeal to that Court from provincial Courts is permitted in " proceedings for or upon a writ of *habeas corpus* . . not arising out of a criminal charge." The appellant had been convicted of keeping liquor for sale contrary to the provisions of a provincial Act and sentenced to imprisonment. A judge of the Supreme Court of Nova Scotia on an application for a writ of *habeas corpus,* instead of granting the writ, made an order under a provincial Act entitled " Liberty of the Subject Act " calling upon the gaoler to shew cause why the prisoner should not be discharged. Cause was shewn and the discharge refused; and this refusal was upheld by the full Court. From the judgment of the full Court an appeal was taken to the Supreme Court of Canada. The appeal was unanimously dismissed; but there was a difference of opinion as to the proper ground for dismissal. The Chief Justice (Sir Chas. Fitzpatrick) and Davies and Anglin, JJ., were of the opinion that the proceedings had arisen " out of a criminal charge." Idington and Brodeur, JJ., held that they had not been " for or upon a writ of *habeas corpus,*" expressing no opinion otherwise. Duff, J., dissented upon both points, but thought the appeal should be dismissed upon the merits. The ground taken by the Chief Justice, Davies and Anglin, JJ., is the matter of importance here. The Chief Justice placed his opinion squarely upon the ground that the Supreme Court Act intended to give a right of appeal only " when the petitioner for the writ is detained in custody on a process issued in a civil matter," which, in his opinion, the matter before the court was not. He concludes thus:

"If the subject comes within the powers of the province then the right to impose punishment by imprisonment to enforce its provisions undoubtedly exists: Sec. 92 (15). Such

legislation if enacted by the Imperial Government would be denominated criminal and fall within the category of criminal law; and I fail to understand how the element of criminality disappears merely because the Act is competent to the provincial legislature. At all events it cannot be said to be in any aspect legislation creating or regulating a civil remedy or process."

Mr. Justice Davies expressed the view that where a provincial Act deals "with public law and order from a provincial standpoint and not with private wrongs or civil rights," a charge of breaking that law is a criminal charge within the meaning of the Supreme Court Act:

I see no reason for reading any limitation into the general words of the exemption and to confine them either to criminal charges at common law or under Dominion legislation. It seems to me that the same reasons for withdrawing jurisdiction from this court in proceedings arising out of a criminal charge under Dominion temperance legislation must apply to proceedings under provincial temperance legislation."

Mr. Justice Anglin speaks of the Privy Council as having recognized by its decisions that provincial legislatures legislating upon provincial subjects "may include under the authority of section 92, No. 15, provisions of a criminal character" without offending against section 91, No. 27, which assigns "the criminal law" to the parliament of Canada; and upon this branch of his judgment concludes thus:

"The word 'criminal' is, I think, used in section 39 (c) in contradistinction to the word 'civil' and connotes a proceeding which is not civil in its character. The proceeding against the appellant was of this class."

The dissenting opinion of Mr. Justice Duff is based mainly upon the view that in Canadian juris-

prudence the word "criminal" is recognized as not of proper application to provincial penal law, and should be construed accordingly when used in Canadian Acts of parliament. He refers to the judgment of the Privy Council in the *Lord's Day Legislation Case*[10] as affirming that "the criminal law in its widest sense" is reserved to the Dominion. In view of the express power conferred upon the provinces by section 92, No. 15, to attach the sanctions of fine, penalty, or imprisonment to breaches of provincial law,

> "It seems to be clear that consistently with the views thus expressed by Lord Halsbury acts or omissions struck at by such penal enactments cannot with strict propriety be described as crimes nor can the proceedings taken with a view to enforce the sanctions attached to them be properly described as criminal proceedings. Under a constitutional system such as ours, that which the supreme legislative authority declares to be so is so in contemplation of law; and in face of this declaration in the British North America Act, construed as it has been construed in the passages quoted, it cannot be said that in the contemplation of the law of Canada an act which is an offence against a provincial statute is for that reason alone a crime; and no definition of the terms 'crime' and 'criminal proceedings' which fails to take this circumstance into account can be considered adequate with reference to the law of this country."[1]

The views expressed by the three judges as above indicated, though of great weight, do not, it is conceived, constitute a binding authority. If applied to the two phrases of the British North America Act, "procedure in criminal matters" on the one hand and "procedure in civil matters" on

[10] *Atty.-Gen. of Ontario* v. *Hamilton Street Ry.* (1903), A. C. 524; 72 L. J. P. C. 105.

[1] Mr. Justice Duff adheres to this opinion in *Quong Wing* v. *R.*, 39 S. C. R. 459; but the other judges do not notice the point though, as Mr. Justice Duff points out, it would have sufficed to dispose of the appeal in that case.

the other, they would not only overrule a long line of provincial cases which affirm that "procedure in civil matters" includes procedure for the enforcement of provincial penal law,[2] but would also establish a marked departure from the sound principle that legislative power and executive action should go hand in hand;[3] that the power, in other words, which provides the sanction should see to its enforcement. Subject, therefore, to the doubt created by the expression by eminent judges of the opinions above indicated, it is proposed to treat the earlier authorities as correct expositions of the law.

"*Matters.*"—It should be noted that the word "matters" is used in both sections 91 and 92 in two very different senses. It is used chiefly to denote subject matters for legislation; but in No. 27 of section 91 and in No. 14 of section 92 it has reference to proceedings in Court. "Civil matters," for example, is but another way of saying civil actions, suits, or other judicial proceedings: while "criminal matters" means simply criminal prosecutions.

Procedure in Criminal Matters:—What part of penal law is covered by the class "the criminal law" and what part falls within No. 15 of section 92, "the imposition of punishment . . . for enforcing any law of the province, etc.," is a difficult question to answer, as will appear later. But when once it is determined that a particular enactment is within "the criminal law" as that class-enumeration is to be properly construed, then legislation as to the procedure to be followed in judicial proceedings instituted for its enforcement is

[2] See *post*, p. 551 *et seq.*
[3] See *ante*, p. 536.

exclusively within Dominion competence. All federal penal legislation, that is to say, legislation imposing punishment as its sanction, is within this class, "the criminal law," whether such legislation is to be found in the Criminal Code or in separate enactment. For example, while the Canada Temperance Act passed by the parliament of Canada has been determined to be, as a whole, based upon the power conveyed by the opening clause of section 91 rather than upon this class, No. 27, its penal clauses are clearly part of the criminal law. It has been so held in several cases under that Act, provincial legislation as to procedure in such prosecutions being held *ultra vires*.[4]

Procedure to enforce provincial penal laws[5]— That provincial legislatures have exclusive authority to regulate the procedure in prosecutions for offences against provincial statutes is now recognized as the law in all the provinces.[6] The provisions of Dominion statutes regulating appeals from summary convictions do not apply to offences against provincial law; the provincial enactments

[4] *R.* v. *Prittie*, 42 U. C. Q. B. 612; *R.* v. *Lake*, 43 U. C. Q. B. 515; *R.* v. *Eli*, 13 O. A. R. 526 (appeals); *McDonald* v. *McGuish* (1883), 5 R. & G. 1 (appeals); *R.* v. *Wolfe* (1886), 7 R. & G. 24 (appeals); *R.* v. *De Coste* (1888), 21 N. S. 216.

[5] What follows must be read subject to what was said, *ante*, p. 546 *et seq.*

[6] *Pope* v. *Griffith*, 16 L. C. Jur. 169 (a proceeding under the Quebec License Act); *Ex parte Duncan*, *ib.*, 188 (provincial Act taking away the right to *certiorari* to remove proceedings under Quebec License Act); *Page* v. *Griffith*, 17 L. C. Jur. 302; *Coté* v. *Chavreau*, 7 Q. L. R. 258; *R.* v. *Robertson*, 3 Man. L. R. 613 (proceedings under provincial game laws); *R.* v. *Wason*, 17 O. A. R. 221; *R.* v. *Ronan*, 23 N. S. 421; *R.* v. *Bittle*, 21 O. R. 605 (competency of witnesses); *R. ex rel. Brown* v. *Simpson Co.*, 28 O. R. 231 (appeal by case stated); *Lecours* v. *Hurtubise*, 2 Can. Crim. Cas. 521 (appeals), *R.* v. *Miller* (1909), 19 Ont. L. R. 288 (*habeas corpus*); *R.* v. *McLeod*, 4 Terr. L. R. 513; *Cavanagh* v. *McIlmoyle* (1901), 5 Terr. L. R. 235.

alone govern.[7] A Dominion statute making the defendant a competent witness upon the trial of such cases has been held *ultra vires*.[8] And proceedings by way of *habeas corpus* to question the legality of imprisonment upon conviction under a provincial Act have lately been held to be proceedings in a civil matter and therefore governed by the provincial procedure law.[9]

It may well be that the views expressed by some of the judges in *Re McNutt* as to the meaning to be given to the word "criminal," or "crime" in a Canadian statute[10] were not intended to have nor do they have any bearing upon the question as to the meaning to be given to the two phrases in the British North America Act; "procedure in criminal matters," on the one hand, and "procedure in civil matters" on the other. Those two phrases are to be read together and the language of section 91, No. 27, modified if necessary by the language of section 92, No. 14; and they have been, as already shewn, consistently, and, it is conceived, properly interpreted as giving to the provinces full control over the procedure to be adopted for the enforcement of the penal law of the province legitimately enacted under section 92, No. 15. While, therefore, it seems desirable that in Canadian jurisprudence and legislation the words "crime" and "criminal" should be used in what may be called their constitutional meaning under the British North America Act, the fact remains that they are often used colloquially in the wider sense and may be so used in a Canadian statute, federal or provincial. That, of course, is a question of interpre-

[7] *Ex parte Duncan*, *R.* v. *Wason*, *R. ex rel. Brown* v. *Simpson Co.*, *Lecours* v. *Hurtubise*, all cited in the last note.

[8] *R.* v. *Bittle*, 21 O. R. 605.

[9] *R.* v. *Miller*, *supra*.

[10] See *ante*, pp. 547-8.

tation in each case. For example, where an Act of the Ontario legislature provided that the parties to legal proceedings in any matter "not being a crime" should be competent witnesses on their own behalf, the provision was held not to apply upon a prosecution for breach of a municipal by-law forbidding under penalty the erection of wooden buildings within certain limits; the widest meaning obviously being given to the word crime.[1] And in *R.* v. *Bittle*,[2] which is, properly, cited above as authority for the proposition that a provincial legislature has full right to control the procedure for the enforcement of provincial penal law, the same wide meaning was given to the word "crime" as used in the same provincial Act. The Canada Temperance Act contained a provision that in prosecutions under that Act *or under any provincial Liquor License Act*, the person accused might testify on his own behalf. The provincial Act above mentioned was held to govern and, the prosecution being for a "crime," the accused was not entitled to be a witness on his own behalf. And there are other cases in which the word "crime" in a Canadian statute has been given a wider meaning than the strict constitutional sense would warrant.[3]

It has been suggested that provincial legislation under No. 15 of section 92 can only be special legislation applying to particular offences;[4] but the authorities are all opposed to that view. The Supreme Court of Canada without any hint of such a limitation, upheld a general enactment by the

[1] *R.* v. *Hart*, 20 Ont. R. 611.

[2] 21 Ont. R. 605.

[3] *R.* v. *Roddy*, 41 U. C. Q. B. 291; *R.* v. *Becker*, 20 Ont. R. 676; *R.* v. *Rowe*, 12 Can. Law Times, 95.

[4] *R.* v. *Boardman*, 30 U. C. Q. B. 553; *Tarte* v. *Beique*, 6 Mont. L. R. 289.

Ontario legislature empowering the Lieutenant-Governor to remit fines, etc., imposed under provincial legislation.[5]

The power is conferred with perhaps somewhat too minute attention to details,[6] but it is a large general power of legislation and is not to be treated as if the class enumeration were itself criminal legislation.[7] The punishment may be by fine or imprisonment or both;[8] the imprisonment may be with or without hard labor;[9] and the penalty imposed may be forfeiture of goods.[10] The fine, in whole or in part, may go to private parties, informers or others.[1]

Procedure in Civil Matters; (a) Under Federal Laws.

The parliament of Canada may, when provision as to procedure is necessarily incidental to proper and comprehensive legislation upon any of the branches of jurisprudence wrapped up in the various classes of section 91, legislate to that extent as to procedure in civil matters. In other words, so far as procedure is a necessary and practically component part of legislation relative to any of the classes of matters within the competence of the Dominion parliament, it is an accessory which follows its principal.[2]

[5] *Pardoning Power Case*, 23 S. C. R. 458.

[6] See Mr. Edward Blake's argument in *R.* v. *Wason*, *ubi supra*.

[7] *Hodge* v. *R.*, 9 App. Cas. 117; 53 L. J. P. C. 1; *R.* v. *Frawley*, 7 O. A. R. 246. See *ante*, p. 356.

[8] *Aubrey* v. *Genest*, Q. L. R. 4 Q. B. 523, agreeing with *Paige* v. *Griffith*, 18 L. C. Jur. 119; 2 Cart. 324; and contrary to *Ex p. Papin*, 15 L. C. Jur. 334; 2 Cart. 320; 16 L. C. Jur. 319; 2 Cart. 322.

[9] *Hodge* v. *R.*, *ubi supra*. *Contra*, *Blouin* v. *Quebec*, 7 Q. L. R. 18; 2 Cart. 368.

[10] *King* v. *Gardner*, 25 N. S. 48.

[1] *Bennett* v. *Pharm. Assn.*, 1 Dorion 336; 2 Cart. 250. But see *Ex p. Armitage*, 5 Can. Crim. Cas. 343.

[2] See chap. XXVII., *ante*, p. 493 *et seq.*

No. 27 of section 91 is an express indication that procedure is an essential part of "criminal law." As to laws relating to matters other than crimes, a perusal of the various classes of section 91 discloses many matters any legislation on which must almost necessarily involve procedure. Maritime law is a branch of jurisprudence which falls within "navigation and shipping," and its peculiar peremptory *in rem* procedure is a distinguishing feature, practically creative of rights and obligations.[3] And so of divorce law, patent law, insolvency law, and election law; and other branches of jurisprudence may perhaps be found to be embraced in some of the other classes of section 91.

It is now authoritatively settled that Dominion legislation regulating procedure in any such cases is of paramount authority and will displace the provincial procedure which, in the absence of federal law, would otherwise govern.[4]

Patents of Invention and Discovery:—Dominion legislation under this head constitutes almost a distinct branch of jurisprudence—patent law. It necessarily interferes with and modifies some of the ordinary rights of property and other civil rights[5] and provides special procedure and to some extent a special tribunal for the trial of patent cases. It has been held, for example, that the provision in the Patent Act as to the place of trial of a patent action is legislation regarding a matter of procedure which the federal parliament has power to regulate in patent cases;[6] and, further, that by the Act the Minister of Agriculture or

[3] This topic is dealt with elsewhere.

[4] See *ante*, p. 468 *et seq.*, where the general principle of federal paramountcy is discussed.

[5] *Tennant's Case*, extract *ante*, p. 429.

[6] *Aitcheson* v. *Mann*, 9 Ont. Pract. R. 473; *Short* v. *Fed. Brand Co.*, 6 B. C. 385, 436.

his deputy is constituted a judicial tribunal for the trial of certain of such cases and that, therefore, prohibition will lie to restrain an illegal exercise of the power bestowed.[7]

The late Master in Chambers in Ontario (Mr. Dalton, Q.C.) was of opinion[8] that a provincial Attorney-General is the proper officer to grant a fiat for the issue of a writ of *Sci. Fa.* to set aside letters patent of invention. The judgment was, however, expressly limited to the case of a subject, domiciled in the province, seeking to avail himself of the peculiar privileges of the Crown in order to the assertion of his own private rights and was not intended to cover a case where the Crown itself seeks to avoid a patent. In such a case it has been held that the Attorney-General of Canada can alone institute proceedings.[9]

Copyright:—The power of the Dominion parliament to legislate upon this class is, or was until lately, circumscribed by Imperial Acts of colonial application.[10] So far as concerns the line of division between the parliament of Canada and the provincial legislatures it is clear[1] that Dominion legislation under this head must interfere with and modify some of the ordinary rights of property and other civil rights and may properly provide special procedure or special tribunals for the decision of copyright cases, if thought desirable.

Divorce:—To the parliament of Canada is committed the exclusive power to legislate as to "mar-

[7] *Re Bell Telephone Co.* 7 Ont. R. 605. See *ante*, p. 523 *et seq.*

[8] *R.* v. *Pattee*, 5 Ont. Pract. R. 292.

[9] *Mousseau* v. *Bate*, 27 L. C. Jour. 153; 3 Cart. 341. As to the Crown in the courts, see *post*, p. 589 *et seq.*

[10] See *ante*, p. 251, *et seq.* The situation when *Smiles* v. *Belford*, 10 Ont. App. R. 436, was decided is graphically described in the judgment of Moss, J.A.

[1] *Tennant's Case*, extract *ante*, p. 429.

riage and divorce" (section 91, No. 26) while the provincial legislatures may exclusively make laws in relation to "the solemnization of marriage in the province." It has recently been held by the Privy Council that provincial legislation may validly prescribe conditions as to the solemnization of marriage which may affect the validity of the marriage contract.[2] The whole field of validity, therefore, is not within federal control; but undoubtedly a large part of it is. It was the opinion of the law officers of the Crown in England in 1870 that "marriage and divorce" covered all matters relating to the *status* of marriage, between what persons and under what circumstances it shall be created and (if at all) destroyed, the procedure whereby that *status* is created or evidenced being a matter within the control of the individual provinces[3] even to the extent, as above intimated, of prescribing procedure or solemnization conditions the failure to obey which would or might render the contract void or voidable as the provincial law might determine. And this view would appear to be that held by the judges of the Supreme Court of Canada, on the reference above referred to. The question, however, as to the essentials to the valid creation of "marriage" manifestly does not touch at all closely the question of procedure in civil matters in the Courts; while "divorce" just as manifestly involves the enactment of provisions not only determining what shall constitute cause for dissolving the marriage tie but also creating the necessary Courts and prescribing the procedure to be followed in seeking such dissolution at the hands of those Courts. As is well known no general divorce law for Canada

[2] *Re Marriage Laws* (1912), A. C. 880; 81 L. J. P. C. 237, affirming 46 S. C. R. 132.

[3] This opinion is quoted in full in the judgment of Davies, J., 46 S. C. R. at p. 342.

has been enacted by the parliament of Canada, the exercise of its authority in this regard being confined to the passage of private divorce Acts.[4] In the absence of such a general law the question has arisen as to the jurisdiction of the ordinary Courts to adjudicate in what may be called matrimonial causes; and although the subject may appear somewhat apart from 'procedure in civil matters' it has this bearing, that, whatever the jurisdiction of the ordinary Courts may be, that jurisdiction is to be exercised in the mode and according to the procedure laid down in provincial enactment; always, of course, in the absence of overriding federal legislation validly passed.[5] Without legislation the ordinary Courts in existence in the various provinces which now form part of Canada were purely temporal Courts without spiritual jurisdiction such as that exercised by the Ecclesiastical Courts in England in matrimonial causes prior to 1857 and since then by the specially created Divorce Court. To what extent and in what way those temporal Courts could be called on to adjudicate as to the validity of a marriage is clearly set forth in a well known judgment of Sir J. P. Wilde:[6]

"The various restrictions on marriage, such as a prior existing marriage, insanity, illegality under the Royal Marriage Act, and, since Lord Lyndhurst's Act,[7] consanguinity or affinity; all these matters when they arise incidentally in the temporal courts have in modern times been there dealt with for the purposes of the suit in which they have arisen. In olden times all questions of marriage were relegated to the Ecclesiastical authorities. . . . The gradual declension of

[4] See *ante*, p. 414.

[5] The position of British Columbia as to divorce jurisdiction has been already referred to; see *ante*, p. 544 *et seq.*

[6] *A. v. B.*, L. R. 1 P. & D. 559; 37 L. J. P. & Mat. 80 (*sub nom. P. v. S.*). Sir James P. Wilde is better known, perhaps, by his later title, Lord Penzance.

[7] See *ante*, p. 263.

spiritual authority in matters temporal has brought it about that all questions as to the intrinsic validity of a marriage, if arising collaterally in a suit instituted for other objects, are determined in any of the temporal courts in which they may chance to arise; though, at the same time, a suit for the purpose of obtaining a definitive decree, declaring a marriage void, which should be universally binding and which should ascertain and determine the status of the parties once for all, has from all time up to the present been maintainable in the Ecclesiastical courts or Divorce Court alone."

Sir J. P. Wilde proceeded to point out that matters, such for example as impotence, which rendered a marriage voidable at the option of the injured spouse but not intrinsically void, could not become cognizable in any way in a temporal Court. To avoid such a marriage a definitive decree of an Ecclesiastical Court (or, after 1857, of the Divorce and Matrimonial Court) was necessary.

As already mentioned, failure to observe the conditions prescribed by a provincial Act for 'the solemnization of marriage in the province' (whatever the phase may be properly held to cover) may render a so-called marriage void; and a Canadian temporal Court would be bound so to hold it if the question arose collaterally in a suit over which the Court had jurisdiction. But, apart from legislation conferring jurisdiction to entertain an action at the suit of one of the spouses seeking merely "a definitive decree declaring a marriage void," no such action would lie in any of the ordinary Courts in Canada.

Such legislation, however, Chancellor Boyd held to have been passed in the Judicature Act of Ontario, which contains the well-known provision that "the Court may make binding declarations of right whether any consequential relief is or could be claimed or not;" and that, therefore, the High Court of Justice in Ontario could declare void the

marriage of a minor where the consent of parent or guardian as required by provincial legislation had not been first obtained, in an action instituted for the sole purpose of obtaining such a declaration.[8] But this view has not commended itself to other judges in later cases. The weight of authority in Ontario is in favour of the view that the clause in the Judicature Act above quoted does not confer jurisdiction to pronounce a declaratory judgment where the right in regard to which a declaration is sought is one upon which the Court could not have directly granted relief before the passage of the Act.[9]

Lord Lyndhurst's Act, referred to in the extract above quoted, had been held in an early case[10] not to apply to Upper Canada, and in 1910 a Divisional Court in Ontario held that there was no jurisdiction in any temporal Court in that province to declare void a marriage with the brother of a deceased husband, such a marriage being one which only an Ecclesiastical Court could annul and that only in the lifetime of both spouses.[1] In 1907, Chancellor Boyd had himself held that his earlier decision did not apply to an action claiming a declaration of nullity of a marriage on the ground of impotence, as such a marriage was voidable only and not void. It was good until decree, which only an Ecclesiastical Court (or parliament) could pronounce.[2] In 1911, Mr Justice Clute held that the Court could not declare void, in an action brought by the guardian *ad litem* of a minor, a marriage made by her

[8] *Lawless* v. *Chamberlain*, 18 Ont. R. 296.

[9] The latest pronouncement on the effect of this clause in the Judicature Act is *Dyson* v. *Atty.-Gen. of England* (1911), 1 K. B. 410; 80 L. J. K. B. 531.

[10] *Hodgins* v. *McNeil*, 9 Grant 309.

[1] *May* v. *May*, 22 Ont. L. R. 559; *coram* Sir Wm. Meredith, C.J., Teetzel and Sutherland, JJ.

[2] *T.* v. *B.*, 15 Ont. L. R. 224.

when of unsound mind;[3] and Mr. Justice Lennon has declined jurisdiction in several cases, the last being a case where relief was sought by the husband on the ground that the wife (at the date of trial incarcerated in a lunatic asylum) at the time of the marriage had fraudulently concealed the fact that she had previously been insane for a time.[4]

The legislature of Ontario, in a carefully guarded enactment, has purported to confer jurisdiction upon the High Court of Justice to declare void the marriage of a person under 18, where such marriage has been without consent or with consent obtained by duress or fraud. Of this enactment, Sir Wm. Meredith, C.J., delivering the judgment in *May* v. *May*[5] above referred to, says that the provincial legislature "went to the extreme limit of, if it did not overstep, its jurisdiction." No case has arisen under the Act, so far as the reports shew.

The true view would appear to be this: that a provincial legislature may confer jurisdiction upon a provincial Court to declare void a marriage made void by failure to observe those conditions "affecting the validity of the contract"[6] which may properly be prescribed by a law relating to "the solemnization of marriage in the province," whatever those conditions may be properly held to include; otherwise provincial legislation would be largely shorn of its proper executive sanction through the instrumentality of the Courts. On the other hand,

[3] *A. v. B.*, 22 Ont. L. R. 261.

[4] *Hallman* v. *Hallman* (1914), 26 Ont. W. R. 1. Other cases are *Menzies* v. *Farnon* (1909), 18 Ont. L. R. 174; *Hardie* v. *Hardie*, 7 Terr. L. R. 13; *Harris* v. *Harris*, 3 Terr. L. R. 289; *Leakim* v. *Leakim*, 2 D. L. R. 278; 6 D. L. R. 875; *Prowd* v. *Spence* (1913), 10 D. L. R. 215; *Reid* v. *Auld*, 32 Ont. L. R. 68.

[5] See *ante*, p. 560. The legislation is fully set out in the judgment.

[6] See *ante*, p. 557.

jurisdiction to declare a marriage void for any other reason affecting the validity of the contract or to dissolve it for any cause not based on intrinsic invalidity must come from federal legislation. The debateable ground would appear to be that touching invalidity at common law arising from the absence of consent; provincial legislation, it may be argued with some force, might confer jurisdiction to declare such invalidity. Would such legislation be " divorce " legislation?[7]

Procedure in Civil Matters; (b) Generally:—Subject to what has already been said, jurisdiction to legislate as to judicial procedure in all civil litigation, whether involving subjects within federal or within provincial jurisdiction, rests with the provincial legislatures. For example, the competency of witnesses is a matter of procedure and, subject as above indicated, properly falls to be regulated in civil cases by provincial enactment.[8] Whether giving jurisdiction in appeal is or is not matter of procedure is a question already dealt with.[9]

In a comparatively recent case before the Court of Appeal of Ontario, it was held that an order of sequestration for disobedience of an injunction was not (on the facts disclosed) an order made in a ' criminal matter ' but fell within ' procedure in civil matters ' and was therefore appealable.[10] Upon this aspect of the case the opinion of Meredith, J.A., was concurred in by all the judges. For this reason, the following extract may be taken as expressing the law as now recognized in Ontario:

[7] It is not thought advisable to attempt any statement as to the law of the province of Quebec. The matter, in some important features, is now before the Privy Council.

[8] *McKilligan* v. *Machar*, 3 Man. L. R. 418.

[9] See *ante*, p. 538 *et seq.*

[10] *Copeland-Chatterson Co.* v. *Business Systems Ltd.* (1908), 16 Ont. L. R. 481.

"Many things which are in reality crimes, however much one may struggle to apply some other appropriate word to them, are created by provincial legislation, though quite without the meaning of the criminal law and practice and procedure in criminal matters placed within the exclusive legislative authority of the parliament of Canada, and are not excluded from the Judicature Act or the Consolidated Rules."

And, later on, he speaks of the phrase 'criminal matters' in the Judicature Act and Rules as not used in the wide English sense but as meaning—

"only matters which are criminal in the strict sense of that word, criminal matters such as are under the British North America Act committed to the exclusive legislative authoritative of the parliament of Canada."

This agrees with what was stated on a previous page, that in Canadian enactments the word 'criminal' and the phrases 'criminal law' and 'criminal matters' should, at least presumably, be taken to be used in their strict constitutional sense.[1]

The Criminal Law: Provincial Penal Law.

(a) *What is Comprehended within "the Criminal Law" as that Phrase is Used in Section 91, No. 27?*

"Criminal law" in its widest sense would deal with offences against provincial laws;[2] but by section 92 (No. 15) exclusive jurisdiction is conferred upon the provincial legislatures to make laws relating to "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming

[1] See *ante*, p. 549.

[2] See *R.* v. *Wason*, 17 O. A. R. 221; *Re Lucas and McGlashan*, 27 U. C. Q. B. 81; *R.* v. *Roddy*, 41 U. C. Q. B. 291; *L'Ass'n de St. J.-B.* v. *Brault*, 30 S. C. R. 598.

within any of the classes of subjects enumerated in this section."

From the larger general class the smaller particular class must be excepted; and it is now authoritatively recognized that provincial penal law is not "criminal law" within the meaning of this class No. 27 of section 91, nor is the procedure for its enforcement "procedure in criminal matters."

The above was written before the decision of the Privy Council in the *Lord's Day Case*;[3] and, indeed, the views expressed by Lord Halsbury in delivering the judgment of the Board in that case have not been considered by Canadian Courts as weakening the authority of the earlier cases upon which the above propositions are founded. Nevertheless, if Lord Halsbury's language is to be taken literally, it would seem difficult to assign much, if any, of the field of penal legislation to the control of provincial legislatures. The question before their Lordships was as to the validity of certain Ontario legislation designed to enforce abstention from labour on Sunday and the actual decision was that all such legislation is clearly within 'the criminal law;' and to that extent the opinion of the Board has been followed by the Supreme Court of Canada; as will appear. But the reason given by Lord Halsbury was not based upon any statement as to the principles underlying that particular class of legislation but was based on this, that

"The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words, which must be construed according to their natural and ordinary signification. These words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. Section 91, sub-section 27, of the British

[3] *Atty.-Gen. of Ont.* v. *Hamilton Street Ry.* (1903), A. C. 524; 72 L. J. P. C. 105.

North America Act 1867, reserves for the exclusive legislative authority of the parliament of Canada 'the criminal law, except the constitution of Courts of criminal jurisdiction.' It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the protracted argument to which their Lordships have listened, to doubt that an infraction of the Act which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception—namely, 'the constitution of Courts of criminal jurisdiction'—renders it more clear, if anything were necessary to render it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law in its widest sense is reserved for the exclusive authority of the Dominion parliament."

There is no reference whatever to section 92, No. 15, as requiring a modified interpretation of, or as forming an exception to, item No. 27 of section 91. Nevertheless since this decision Canadian Courts have continued to treat provincial penal law as an exception carved out of 'the criminal law' in its widest sense. In a recent case[4] Sir Charles Fitzpatrick, C.J., says:

"It must be accepted as settled that 'criminal law' in the widest and fullest sense is reserved for the exclusive legislative authority of the Dominion parliament, *subject to an exception of the legislation which is necessary for the purpose of enforcing, whether by fine, penalty, or imprisonment, any of the laws validly made under the enumerative heads of section 92 of the British North America Act;*"[5]

[4] *Ouimet* v. *Bazan* (1912), 46 S. C. R. 502, at p. 505.

[5] The learned Chief Justice then proceeds to speak of the *Lord's Day Case* as decided by the Privy Council upon the view that the criminal law "would include every such law as purports to deal with public wrongs, that is to say, with offences against society rather than against the private citizen." No such view, with due respect, is to be found in the language of Lord Halsbury.

and this represents accurately, it is conceived, the attitude of Canadian Courts upon the question.

It seems obvious that item No. 27 of section 91 and item No. 15 of section 92 present one of those apparent conflicts referred to by the Privy Council in *Parsons' Case*[6] and there illustrated by reference to the items 'marriage and divorce' (Section 91, No. 26) on the one hand, and 'the solemnization of marriage in the province' (Section 92, No. 12) on the other; the mode of reconciliation being thus indicated:

> "With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces."

(*b*) *To What Extent does Dominion Legislation Bringing Particular Conduct within the "Criminal Law" Prevent Provincial Legislation in Reference to Such Conduct?*

It has been said that the parliament of Canada may validly declare anything, even the most innocent local or private matter, to be a crime,[7] and that such legislation would put an end to the jurisdiction of the provincial legislatures.[8]

On the other hand Armour, C.J., was of opinion[9] that the fact that the Dominion Adulteration Act (as he construed it) rendered criminal the acts forbidden by the Ontario Act respecting frauds in the

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[6] See extract *ante*, p. 419.

[7] *Per* Girouard, J., in *L'Ass'n de St. J.-B.* v. *Brault*, 30 S. C. R. 598 (1900).

[8] Taken with the context the learned judge's statement cannot be taken to mean more than this; that lotteries, having been brought within the purview of the "criminal law" by Dominion enactment, could not be authorized by provincial legislation. That would be an extreme example of repugnancy.

[9] *R.* v. *Wason*, 17 O. R. 58.

supplying of milk to cheese factories, would not affect the validity of the provincial Act if the latter "comes properly within the powers of that legislature." In this view he was supported by the judges of the Court of Appeal.[10] The Dominion further legislated along the line of the Ontario Act, and such legislation was held *intra vires*,[1] Rose, J., for the Court, saying:

"It was urged upon us that if the legislature had power to deal with the subject it followed that it was not within the jurisdiction of the parliament. I think this is not so. In my opinion Mr. Edward Blake in his argument in *R.* v. *Wason*, correctly stated the law as follows: 'The jurisdictions of the provinces and the Dominion overlap. The Dominion can declare anything a crime, but this only so as not to interfere with or exclude the powers of the province of dealing with the same thing in its civil aspect and of imposing sanctions for the observance of the law; so that though the result might be an inconvenient exposure to a double liability, that possibility is no argument against the right to exercise the power.'"[2]

The Privy Council, too, has held that the existence of Dominion criminal law on the subject of assault and criminal libel is no reason for denying to a provincial assembly the right to forbid and punish such acts and conduct when they threaten to disturb the orderly conduct of business and debate in the assembly.[3]

The problem calls at every turn for the application of the rule that the true nature and legislative

[10] 17 O. A. R. 221; but the view was expressed that the Adulteration Act did not reach the offence aimed at by the provincial statute.

[1] *R.* v. *Stone* (1892), 23 O. R. 46. See also *R.* v. *McGregor*, 4 O. L. R. 198.

[2] Compare the language of the Privy Council in the *Fisheries Case* (quoted *ante*, p. 436), in reference to double taxation.

[3] *Fielding* v. *Thomas* (1896), A. C. 600; 65 L. J. P. C. 103. See also the discussion in the court below on this feature of the case, 26 N. S. 55.

character, the pith and substance, of the enactment which may be in question must be determined in order to refer it to its proper class.[4] Certain propositions, too, formerly discussed, in reference to the scheme of legislative distribution effected by the British North America Act, must be borne in mind. Dominion legislation within its competency is of paramount authority and, to the extent that provincial enactments are repugnant to such Dominion legislation, they must give way.[5] But a provincial Act may deal with the same subject matter in any other aspect which would bring it within one of the classes of section 92; and, to the extent that such legislation is not repugnant to federal legislation falling within 'the criminal law' class, it is *intra vires* and operative.[6] It is here more especially, perhaps, that it is to be borne in mind that—

> "All experience shews that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical."[7]

There are many other *dicta* to the effect that the parliament of Canada can declare any act to be a crime and thus bring it within the purview of the "criminal law."[8] In this view no doubt can arise

[4] This rule is discussed, *ante*, p. 485.

[5] See *ante*, p. 468 *et seq.*

[6] See *ante*, p. 488.

[7] *Per* Marshall, C.J., in *Gibbons* v. *Ogden*, 9 Wheat. 1, 204, quoted with approval by Boyd, C., in *Kerley* v. *London, &c., Co.* (1912), 26 Ont. L. R. 588.

[8] *R.* v. *Wason*, 17 O. A. R. 221, *per* Burton and Osler, JJ.A.; *R.* v. *Stone*, 23 O. R. 46; *L'Ass'n de St. J.-B.* v. *Brault*, 30 S. C. R. 598, *per* Girouard, J.; *per* Bain, J., in *R.* v. *Shaw*, 7 Man. L. R. 518; *R.* v. *Robertson*, 3 Man. L. R. 613; *Ex p. Duncan*, *ubi supra*. See, however, *per* Wetmore, J., in *R.* v. *Fredericton* (1879), 3 P. & B. at p. 160. As to the place of confinement, and the expense of maintenance of prisoners confined under federal law, see *Re Goodspeed* (1903), 26 N. B. 91; *Re N. B. Penitentiary*, Coutlee's Supreme Ct. Cas. 24.

as to the validity of such an enactment even where there is similar provincial legislation.[9]. The parliament of Canada at one time attempted to cover the entire field by enacting that the infraction of a provincial law which is not otherwise made an offence shall be a misdemeanour and punishable as such;[10] an enactment of doubtful validity. For, if such an enactment is within 'the criminal law' confided to the Dominion, then any infraction of a provincial law might be, without qualification, made part of the federal criminal law and the exclusive jurisdiction of the provinces to prescribe and control the procedure to be followed in the enforcement of provincial law might thus be completely overborne. That there is some limit to the power of the federal parliament in this connection is indicated in the following extract from the judgment of Meredith, J.A., in a recent case:[1]

> "It may be, indeed it must be, that this legislative power is not as wide as that of the imperial parliament in the same field of legislation. In regard to such questions as are involved in this case, the rule may be that which is said to prevail in the Courts of the United States of America, which, as applied to Canada, may be thus stated: Parliament has power to prohibit and punish any act as a crime provided it does not violate any exclusive power of legislation conferred upon the legislatures of the provinces; and the Courts cannot consider the question further than to see whether there has been a violation of such exclusive powers."

There is, however, no reported case in which a federal penal law has been held invalid as an unauthorized encroachment upon the provincial field. In the case from which the above extract is taken, the Court of Appeal for Ontario was asked, in a

[9] *R.* v. *Stone*, *ubi supra*.
[10] But see now the Criminal Code, sec. 706.
[1] *R.* v. *Lee* (1911), 23 Ont. L. R. 490 (C.A.)

case stated, to pass upon the validity of a Dominion enactment[2] which provided that any dealer should be guilty of an indictable offence who "makes use of any written or printed matter or advertisement or applies any mark to any article of any kind" covered by the statute "or to any part of such article guaranteeing or purporting to guarantee by such matter, advertisement, or mark that the gold or silver on or in such article will wear or last for any specified time." This enactment was unanimously upheld as criminal legislation properly so called. The judgment of the late Sir Charles Moss, C.J.O., is a fitting introduction to a discussion of the distinction which should properly be drawn between the criminal law which is within the legislative ken of the federal parliament and the penal laws which a province may validly enact and enforce. Referring to the provisions above quoted, he says:

"They are the culmination of a series of provisions . . manifestly designed for the protection of purchasers, intending purchasers, and the public generally, against imposition or deception as to the quality, fineness, grade or description of the articles therein specified, . . . the governing purpose being the prevention of the use of false or misleading *indicia*. . . .

The objection made to sub-sec. (6) is, that it assumes to render penal what is nothing more than the mere warranting, in writing or by means of a mark, the lasting quality of the article—a matter of contract or representation not within the realm of criminal law. But assuming that to be the case it by no means concludes the matter. . . .

The exclusive legislative authority conferred by section 91 upon the parliament of Canada in relation to the criminal law, including the procedure in criminal matters, does not deprive the provincial legislatures of the right to legis-

[2] *The Gold and Silver Marking Act*, 7 & 8 Ed. VII., c. 30, s. 16*b* (Dom.)

late for the better protection of the rights of property by preventing fraud in relation to contracts or dealings in a particular business or trade: *Reg.* v. *Wason, supra.*[3]

But, on the other hand, the right of the provincial legislatures so to legislate does not deprive the parliament of its powers in relation to criminal law. In the case referred to, Osler, J.A., said (p. 241): 'I suppose it will not be denied that the latter'—*i.e.*, the parliament—may draw into the domain of criminal law an act which has hitherto been punishable only under a provincial statute.' *A fortiori*, where the field has not been already occupied by provincial legislation. . . .

Although in one way the sub-section may appear to interfere with the right and power to contract, yet in another way it is the exercise of the power to prevent and punish the adoption of methods whereby the public are or may be exposed to deception or imposition."

As this case clearly shows, no distinction can be drawn, as touching the question of jurisdiction, between acts *mala in se* and acts which are offences merely because prohibited.

In an earlier case,[4] referred to with approval in the judgment just mentioned, a federal statute covering much the same ground as that covered by the provincial legislation in question in *R.* v. *Wason*,[5] as to fraud in the delivery of milk to cheese factories, was upheld by a Divisional Court. Rose, J., delivering the judgment of the Court, said:

"Had there been no provincial statute, I do not think it could have been argued that the Act in question did not create a crime and was not within the powers of Parliament. . . . The passing of a provincial statute within the powers of the legislature cannot in any wise take away from Parliament the right to legislate respecting the same matters, and

[3] 17 Ont. App. R. 221. See *post*, p. 572.

[4] *R.* v. *Stone* (1892), 23 Ont. R. 46, *coram* Galt, C.J., Rose and MacMahon, JJ.

[5] 17 Ont. App. R. 221. See *post*, p. 572.

to prohibit them and to enforce the prohibition by such punishment by way of fine or imprisonment as may be deemed best."

Further expressions of judicial opinion as to the scope of the criminal law which is properly within federal jurisdiction will appear in the cases which have now to be considered dealing with the question of the range which provincial penal law may properly take. Most of the cases, in fact, approach the question from this point of view; in other words, the validity of provincial Acts has most frequently been in question.

(c). *What is the Test to be Applied to any Provincial Enactment Imposing Punishment?*

In what may be termed the leading case on the subject,[6] an Ontario Act directed to preventing fraud in the supplying of milk to cheese factories was impugned. All the judges agreed that the case turned upon the question as to the true character and nature of the legislation. In the Court below the judges "arrived at diametrically opposite conclusions, the chief justice[7] being of opinion that the primary object of the Act was to create new offences and to provide for their punishment, while my brother Street considers that its real object was the regulation of the rights and dealings of cheese-makers and their patrons." The Court of Appeal unanimously adopted the view taken by Street, J.

In deciding the question, regard is to be had to the prescribing rather than the punitive clauses of the Act.[8] Do the prescribing clauses fall properly within any class enumerated in section 92 other

[6] *R.* v. *Wason*, 17 O. A. R. 221; 17 O. R. 58.

[7] Armour, C.J., with whom Falconbridge, J., concurred. The quotation is from the judgment of Osler, J.A., in appeal.

[8] *Per* Osler, J.A.

than No. 15 itself? This is the test expressly supplied by No. 15. If they do so fall, "how can the fact that the legislature has . . . imposed a penalty convert that into a crime which was not so otherwise."[9]

The considerations which influenced the judges in determining the true nature and legislative character of the impugned Act will appear from the following extracts:

"Is it an Act constituting a new crime for the purpose of punishing that crime *in the interest of public morality?* Or is it an Act for the regulation of the dealings and rights of cheesemakers and their patrons, with punishments imposed for the protection of the former? If it is found to come under the former head, I think it is bad as dealing with criminal law; if under the latter, I think it is good as an exercise of the rights conferred on the province by the 92nd section of the British North America Act. An examination of the Act satisfies me that the latter is its true object, intention and character."—Street, J.

"If this be an Act merely to create offences in the interest of public morality it may be argued that it is trenching on the forbidden ground of 'criminal law.' If it be, as I think it is, an Act to regulate the business carried on at these cheese factories, . . . I consider it to be within the powers given by the constitution to the provincial legislature."—Hagarty, C.J.O.

"The regulation of their dealings between the persons supplying milk and the persons to whom it is supplied was not only the primary object but the sole object of the legislature."—Burton, J.A.

"The Act is to be regarded as one, the primary object of which is not the creation of new offences generally and the prevention of dishonesty among all classes in relation to the kind of dealings mentioned therein, but the regulation

[9] *Per* Burton, J.A. Mr. Justice Maclennan says: "The proper way to look at this case is to lay out of view for the moment the penalty and see whether the principal subject enacted is competent."

of the contracts and dealings between the parties in a particular business or transaction. . . . It is, I consider, designed more for the protection of civil rights than the promotion of public morals or the prevention of public wrongs." —Osler, J.A.

"The provisions of the Act in question seemed to have been designed to regulate the dealings between the manufacturers and their customers in such a way as to secure fairness and good faith. . . . That seems to me to be the object and purpose of the legislature, and not the creation of new offences and their punishment by fine and imprisonment."—Maclennan, J.A.

The principle of the above case has been recognized and adopted by the Supreme Court of Nova Scotia.[10] Referring to a provincial Act forbidding labor on the Lord's Day, Graham, E.J., says:

"Is it aimed at a public wrong or is it a 'shall not' in respect of civil rights?

and applies to it the language of the Privy Council, used in reference to the Canada Temperance Act:[1]

"Laws of this nature designed for the promotion of public order, safety and morals . . . belong to the subject of public wrongs rather than to that of civil rights."

Thus, while expressly approving of the test suggested by Street, J.,[2] the learned judge placed the Act in question before him in the "criminal law" class.

The same test was applied by the Supreme Court of the North-West Territories,[3] with the result that

[10] *R.* v. *Halifax Tram. Co.* (1898), 30 N. S. 469. Compare *Ex p. Green*, 35 N. B. 137.

[1] *Russell* v. *Reg.*, 7 App. Cas. 829; 51 L. J. P. C. 77. The passage is quoted, *ante*, p. 424.

[2] *R.* v. *Wason*, *ubi supra*.

[3] *R.* v. *Keefe*, 1 N. W. T. Rep. 88; 1 Terr. L. R. 282. Compare *Gower* v. *Joyner*, 2 N. W. T. Rep. 43, in which, on the authority of *R.* v. *Wason*, an Ordinance was upheld which provided that for

the ordinance against gambling there impugned was also held to be an encroachment upon "criminal law":

"There is no doubt in our minds that the real object and the true nature and character of this legislation . . . was in the interest of public morals to create an offence, and not for the protection of private rights."

Nature of Punishment:—The nature of the punishment to be inflicted has no bearing upon the question of constitutional validity. As put by Osler, J.A.:[4]

"The competency of the enactment cannot be tested by the severity of the sanction so long as the latter is limited to fine, penalty, or imprisonment; in other words, it cannot be argued that the thing prohibited is brought within the range of the criminal law merely by reason of the high nature of the punishment which may be inflicted upon the offender; and therefore those cases in which that has been made the test of an act not being a crime, and the proceeding for its punishment a 'criminal' as distinguished from a civil proceeding are of little or no assistance in construing this provision of the Constitutional Act."

"Of course, the imposition of a penalty means little. Both legislatures may impose penalties."[5]

Laws Merely Prohibitive:—And it is recognized that provincial legislation, particularly that permissible under item No. 16 of section 92, "Generally, all matters of a merely local or private nature in the province," may consist of prohibitive enactments merely, and that this of itself affords no test as to the validity of the enactment. For example,

ill-usage, non-payment of wages to, or improper dismissal of a servant by his master, a J. P. might order the master to pay a month's wages as a penalty in addition to arrears, etc.

[3] *R.* v. *Wason, supra.*

[4] *Per* Graham, E.J., in *R.* v. *Halifax Tram. Co.*, 30 N. S. 469.

provincial prohibition of the liquor traffic in its provincial aspect is within the power of the provincial legislatures; and in the judgment of the Privy Council in the Local Prohibition Case[6] this passage occurs:

"An Act restricting the right to carry weapons of offense, or their sale to young persons, within the province, would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign state, are matters which, their Lordships conceive, might be competently dealt with by the parliament of the Dominion."

Their Lordships, however, were discussing the line of division between the opening clause of s. 91, and "local and private matters" (No. 16 of s. 92), and evidently had not the subject of criminal law in view. The passage, nevertheless, recognizes a wide field as open to provincial legislation alongside the field of criminal law controlled by the parliament of Canada. Much provincial legislation, indeed, is of this simply prohibitive character. As put by Mr. Justice Osler, in *R.* v. *Wason*:[6a]

"The legislature when really dealing with property and civil rights must have power to say 'thou shalt' or 'thou shalt not,' and, as the breach of the legislative command is always, in one sense, an offence, the line between what may, and what may not be lawfully prescribed without touching upon 'criminal' law is sometimes difficult to ascertain, and may shift according to circumstances. . . . The criminal law, so far as regards human legislation, in its ultimate object, even when dealing with public order, safety, or morals, is chiefly concerned with preventing and punishing the violation of personal rights and rights respecting property, and

[6] (1896) A. C. 348; 65 L. J. P. C. 26. See also *Russell* v. *R.*, 51 L. J. P. C. at p. 81.

hence, in a very wide sense, with property and civil rights. But while in this sense, and in making provisions applicable to the community at large, whether we speak of all the confederated provinces or of one, the right to legislate rests with parliament, I do not see how the right can be denied to the provincial assemblies to legislate for the better protection of the rights of property by preventing fraud in relation to contracts or dealings in a particular business or trade, or upon other subjects coming within section 92, and to punish the infraction of the law in a suitable manner, so long, at all events, as parliament has not occupied the precise field."

The same view is thus expressed by Mr. Justice Duff in a recent case:[7]

"The enactment is not necessarily brought within the category of 'criminal law' as that phrase is used in section 91 of the British North America Act, 1867, by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions. . . . The provinces may under section 92 (16) suppress a provincial evil by prohibiting *simpliciter* the doing of the acts which constitute the evil or the maintaining of conditions affording a favourable *milieu* for it, under the sanction of penalties authorized by section 92 (15)."[8]

In the case from which the last extract has been taken an enactment of the Saskatchewan legislature was in question. It provided under penalty that no person should employ any white woman or girl, or permit any such to work, in any restaurant, laundry, or other place of business or amusement owned, kept, or managed by any Chinaman. It was attacked as an invasion of the jurisdiction of the parliament of Canada over "naturalization and aliens" rather than over "the criminal law;" and

[7] *Quong Wing* v. *R.* (1914), 49 S. C. R. at p. 462.

[8] *Hodge's Case*, 9 App. Cas. 117; 53 L. J. P. C. 1; *Local Prohibition Case, supra;* and the *Manitoba Liquor Act Case* (1902), A. C. 73; 71 L. J. P. C. 28, are cited as authorities for this last proposition.

none of the judges, other than Mr. Justice Duff, deals with this latter phase. As already intimated[9] the legislation was upheld.

In an Ontario Act concerning loan companies there was a clause penalizing the making of certain kinds of contracts, and in the judgment of Sir Wm. Meredith, C.J., speaking for a Divisional Court, upholding the validity of the enactment as a prohibition designed to prevent what were deemed from a provincial point of view questionable methods in contracting, the view is expressed that if in order to the validity of the legislation it was necessary to construe the penal clause as in effect prohibitive, it should be so construed. Apart, however, from this reason for such construction, he held upon the authorities that the simple imposition of a penalty upon the doing of an act is in legal effect a prohibition without express words.[10]

An Ontario Act prohibiting under penalty the entering a horse in a wrong class in any race at an agricultural association show was upheld as relating to "Agriculture" (section 95) and not in conflict with any federal legislation. Meredith, J.A., speaks of the prohibited act as "something short of a crime."[11]

Sabbath Observance Laws:—Provincial legislation as to Sabbath observance was held by the Privy Council, as already mentioned, to be invalid as relating to the criminal law, so far at all events as regards the general prohibition of labour upon that day.[2] Since that decision, the same question has been twice before the Supreme Court of Canada and in both instances the provincial legislation impugned

[9] See *ante*, p. 486; also *post*, p. 833.
[10] *R.* v. *Pierce* (1904), 9 Ont. L. R. 374.
[11] *R.* v. *Hornung* (1904), 8 Ont. L. R. 215.
[2] See *ante*, p. 564 *et seq.*

was pronounced invalid. In the first case,[3] upon a reference from the Governor-General in Council, the Court expressed itself as unable to distinguish the draft provincial bill which was submitted—and which was framed carefully as a labour abstention Act merely—from the Ontario Act which in the *Lord's Day Case* the Privy Council had held invalid; and deduced this principle from the decision of the Board:

> "The day commonly called Sunday or the Sabbath or the Lord's Day is recognized in all Christian countries as an existing institution and legislation having for its object the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day is legislation properly falling within the views expressed by the Judicial Committee and is within the jurisdiction of the Dominion parliament."

In the later case[4] an Act of the Quebec legislature was in question. It provided that no person should, on Sunday, for gain, do or cause to be done any industrial work or pursue any business or calling, or give or organize theatrical performances or certain excursions. The appellant had been convicted of giving theatrical performances on Sunday, contrary to the provisions of this provincial Act; and the sole question before the Supreme Court of Canada was as to the validity of the enactment. The decision of the Privy Council in the *Lord's Day Case* was held to cover such legislation and the provincial Act was therefore held *ultra vires*.

[3] *Re Sunday Legislation*, 35 S. C. R. 581.

[4] *Ouimet* v. *Bazan* (1912), 46 S. C. R. 502. Following the earlier case the Dominion parliament passed a Lord's Day Act (see R. S. C. 1906, cap. 153), which leaves, or purports to leave, the matter largely to the individual provinces. The validity of some of its provisions in this regard is open to serious doubt, as already intimated: see *ante*, p. 380 *et seq.* It was held not to affect the question before the Court in *Ouimet* v. *Bazan*.

The Chief Justice treated the judgment of the Board as holding that the phrase "the criminal law"—

> "would include every such law as purports to deal with public wrongs, that is to say, with offences against society rather than against the private citizen,"

and applying that test he concluded that the section impugned was not a local, municipal, or police regulation intended to regulate civil rights but "legislation designed to promote order, safety, and morals." Mr. Justice Idington expressed the view that the giving of theatrical performances or excursions of the kind described may well be prohibited by provincial legislation, such legislation not resting upon the licensing power but upon the power to "make such mere police regulations as the social habits and conditions existing in that province may require;" and later on he speaks of the right of a province to do something "to eradicate an evil which is not likely to be dealt with by Parliament." In this connection it may be noted, as Mr. Justice Davies intimated in another case,[5] that such provincial legislation under the residuary clause No. 16 of section 92 may properly deal "with public law and order from a provincial standpoint and not with private wrongs or civil rights;" and in *Quong Wing* v. *R.*,[6] above noted, the Chief Justice and Mr. Justice Duff both treated the provincial Act there upheld as one dealing with a local evil or apprehended local evil from the standpoint of public as well as private morality. All this tends to establish that there is practically very little limit to the possible range of provincial penal law so long as the substantive matter dealt

[5] *R.* v. *McNutt* (1912), 47 S. C. R. at pp. 265-6. This case is more fully discussed, *ante* p. 546 *et seq.*

[6] 49 S. C. R. 440.

with is approached and dealt with from the local or private standpoint, even in a wide provincial sense; in other words, so long as the substantive enactment, considered wholly apart from the sanction attached, is within provincial competence.

With reference to Sunday observance legislation, the question is undoubtedly clouded with uncertainty. Mr. Justice Duff considered that the Quebec Act in question in *Ouimet* v. *Bazan* treated the prohibited acts "as constituting a profanation of the Christian institution of the Lord's Day" and punished them as such; and he felt bound by the decision of the Privy Council in the *Lord's Day Case* to hold such legislation as within "the criminal law," and therefore *ultra vires*. He then proceeds:

"It is perhaps needless to say that it does not follow from this that the whole subject of the regulation of the conduct of people on the first day of the week is exclusively committed to the Dominion parliament. It is not at all necessary in this case to express any opinion on the question, and I wish to reserve the question in the fullest degree of how far regulations enacted by a provincial legislature affecting the conduct of people on Sunday, but enacted solely with a view to promote some object having no relation to the religious character of the day would constitute an invasion of the jurisdiction reserved to the Dominion parliament. But it may be noted that since the decision of the Judicial Committee in *Hodge* v. *R.*[1] it has never been doubted that the Sunday closing provisions in force in most of the provinces affecting what is commonly called the liquor trade were entirely within the competence of the provinces to enact; and it is of course undisputed that for the purpose of making such enactment

[1] 9 App. Cas. 117; 53 L. J. P. C. 1. Hodge was convicted on the charge of allowing billiards to be played in his hotel after seven o'clock on Saturday night, contrary to regulations of the Police Commissioners (held valid), which provided that billiard rooms should be kept closed from seven p.m. on Saturday to 6 a.m. on Monday. See also *Re Fisher & Carman*, 16 Man. 560.

effective when within their competence the legislatures may exercise all the powers conferred by sub-section 15 of section 92 of the British North America Act."

Later in the same year, 1912, the question came before Chancellor Boyd as to the validity of certain provisions of the Ontario Railway Act which purported to prohibit the running of Sunday trains (subject to certain exceptions here immaterial) on railways within provincial jurisdiction.[8] On consideration of the purely secular aspect of the legislation, designed to secure rest and recuperation for railway employees, and also of the right of a province to annex to the grant of corporate powers a condition limiting the right of exercise to six days in the week, the learned Chancellor upheld the provisions of the Act. In the Court of Appeal no opinion was expressed on this aspect of the case, the judgment of the Chancellor being reversed on the ground that the defendant railway was a federal railway and as such not touched by the provincial enactment.

Do any offences at common law fall within the class of provincial penal law?

Prior to Confederation there existed no necessity for distinguishing the various parts of the criminal code, whether as passed for the putting down of public wrongs or as directed towards the upholding of private rights. "Crime," in British jurisprudence, is a most comprehensive term. Any offence for which the law awards punishment is, according to high authority, a crime.[9]

[8] *Kerley* v. *London &c., Transp. Co.* (1912), 26 Ont. L. R. 588; 28 Ont. L. R. 606.

[9] *Mann* v. *Owen*, 9 B. & C. 595, quoted with approval by Anglin, J., in *Re McNutt*, 47 S. C. R. at p. 283. Duff, J., suggests a somewhat modified rule even in English, as distinguished from Canadian, jurisprudence: pp. 272-3. *Re McNutt* is discussed, *ante*,

The British North America Act (section 129) continued the whole body of existing law, both common law and statutory enactments, "subject, nevertheless, to be altered by the parliament of Canada or by the legislature of the respective provinces, *according to the authority of the parliament or of that legislature under this Act.*" Criminal law in its wide pre-confederation sense was thus divided, and there is no doubt that whatever enactments could now, were they non-existent, be passed by a provincial legislature, became upon the passage of the British North America Act a body of provincial penal law.[10]

Much may be advanced in favour of the view that even the common law of England upon this subject, so far as still extant in Canada, is capable of division along a similar line,[1] but judicial opinion favours the view that this is by the British North America Act assigned in its entirety to the parliament of Canada.

A provision in the Ontario Liquor License Act that any person who, in a prosecution under the Act, should tamper with a witness, should be guilty of an offence under the Act and liable to a penalty, was held *ultra vires* because the offence dealt with was an offence at common law.[2] On the same ground

p. 546, on the question of 'criminal' procedure. See also *Re Lucas & McGlashan*, 27 U. C. Q. B. 81; *R.* v. *Roddy*, 41 U. C. Q. B. 291.

[10] *Dobie* v. *Temp. Board*, 7 App. Cas. 136; 51 L. J. P. C. 26; *Local Prohibition Case* (1896), A. C. 348; 65 L. J. P. C. 26.

[1] See *per* Osler, J.A., in *R.* v. *Wason*, 17 Ont. App. R. 221.

[2] *R.* v. *Lawrence*, 44 U. C. Q. B. 164, affirming judgment of Gwynne, J. Compare with this case *R.* v. *Boardman*, 30 U. C. Q. B. 553, in which a provision in the same Act forbidding under penalty any compromise of a prosecution was upheld. Such a compromise would not be an offence at common law and the cases can be reconciled only on that ground.

provincial legislation in Quebec authorizing lotteries was held invalid,[3] and a Manitoba Act against the keeping of gambling houses was held to infringe upon the " criminal law " upon the same ground.[4] The judgment of Dubuc, J., in this last case would seem to be in accord with the later authorities. He considered the offence a crime at common law, but inclined to the view that in its local and private aspect it might also be the subject of local prohibition. The above authorities can go no further, it is submitted, than this: that where an act is an offence at common law provincial legislation cannot authorize it nor legislate with regard to it in its criminal aspect, but can legislate in reference to it in its local provincial aspect so long as such provincial legislation is not repugnant to the Dominion enactment.[5] It has been held, for example, that a medical council may, acting under powers conferred by provincial Act, investigate into and discipline members for acts which may amount to crimes, and, even after acquittal on a criminal prosecution, may still enquire into the doing of the act alleged and discipline the member in accordance with the Council's own view of the facts.[5a]

In regard to Sunday observance laws, stress was laid by some of the judges of the Supreme Court of Canada upon the fact that Sabbath breaking was an offence at common law and should for that reason be held to fall within " the criminal law " assigned to federal jurisdiction.[6] And the same idea

[3] *L'Ass'n de St. J.-B.* v. *Brault*, 30 S. C. R. 598. Girouard, J., dissented on the ground that it was no offence at common law to conduct a lottery, and that although the Criminal Code has now brought lotteries within the purview of the criminal law the agreement sued on, having been made before the code came into force, was valid.

[4] *R.* v. *Shaw*, 7 Man. L. R. 518.

[5] See *ante*, p. 488.

[5a] *Re Stinson & Coll. of Physicians (Ont.)*, 22 Ont. L. R. 627.

[6] *Ouimet* v. *Bazan* (1912), 46 S. C. R. 502.

underlies a recent decision of the Court of Appeal of Manitoba upholding a provincial enactment which permitted an attorney or solicitor to bargain with a client for a share in the money or property to be recovered in an action. Champerty as an offence at common law had, in the opinion of the Court, became obsolete before 1870 and did not therefore become part of the criminal law of the province under the English Law Introduction Act.[7]

How is pre-Confederation statutory law on the subject of crimes to be divided? or is it to be divided at all?

As already indicated,[8] section 129 of the British North America Act would seem to be decisive upon this point; but there are some strong judicial *dicta* in support of the view that the criminal law as embodied in the statutes of the federating provinces became criminal law within class No. 27 of section 91. For example, Killam, J., uses this language:[9]

"It was an offence at common law to keep a gambling house. This offence, it appears to me, comes within the subject of criminal law referred to in section 91, sub-section 27 of the British North America Act. That term must, in my opinion, include *every act or omission which was regarded as criminal by the laws of the provinces when the Union Act was passed*, and which was not merely an offence against a by-law of a local authority. If this were not to be the rule of construction, more difficulty than ever would arise in drawing the line between the jurisdiction of the Dominion and the provincial legislatures. This gives us one clear line of demarcation which it would be dangerous to obliterate. I think

[7] *Thompson* v. *Wishart* (1910), 19 Man. L. R. 340.

[8] *Ante*, p. 583.

[9] *R.* v. *Shaw*, 7 Man. L. R. 518. On appeal Taylor, C.J., expressed his entire concurrence in the judgment of Killam, J. Cf. *R.* v. *Robertson*, 3 Man. L. R. 613, upholding provincial game laws in the absence of Dominion legislation.

it must be deemed to be one line which was intended to exist. How far parliament can exclude provincial or municipal legislation by creating new crimes is a question."

Among the statutes in force in Nova Scotia at the date of Confederation was one entitled "offences against religion." Some of its provisions were incorporated in and repealed by subsequent Dominion legislation; but certain sections were neither repealed nor re-enacted; of these one prohibited under penalty certain kinds of labour on the Lord's day. An amendment of this section by a provincial Act extending it to corporations was held *ultra vires*,[10] and Ritchie, J., puts his judgment on the sole ground that the pre-Confederation statute was part of the criminal law of Nova Scotia which a provincial Act could not afterwards touch.

On the other hand, an Act of the provincial legislature of New Brunswick prohibiting the sale of real or personal property on Sunday, or the exercise of any worldly business on that day, was held valid by the Supreme Court of that province,[1] and Barker, J., points out that not everything called "criminal law" in ante-Confederation legislation is to be deemed part of "the criminal law" assigned by the British North America Act to the

[10] *R.* v. *Halifax Tram. Co.* (1898), 30 N. S. 469. Reference is made to the fact that there was then no Dominion legislation in force respecting Sabbath observance. McDonald, C.J., dissented on the ground that the pre-Confederation statute was still in force by virtue of s. 129 of the British North America Act, and covered the offence charged.

[1] *Ex p. Green*, 35 N. B. 137. The offence charged was selling cigars on Sunday, and the judgment followed the view expressed by Taschereau, J., in *Huson* v. *S. Norwich* (1895), 24 S. C. R. at p. 160:—"There are a large number of subjects which are generally accepted as falling under the denomination of police regulations. . . . Take, for instance, the closing of stores and the cessation of labor on Sunday. Parliament, I take it, has power to legislate on the subject for the Dominion; but, until it does so, the provinces have, each for itself, the same power."

Dominion parliament *because the federating provinces differed in this respect.*[2]

And the same view has recently been expressed by Mr. Justice Anglin in the Supreme Court of Canada.[3] It will be seen by reference to the judgment of Lord Halsbury in the *Lord's Day Case* that express attention is drawn to the fact that the Ontario statute there in question had, apart from certain amendments, been in force in (old) Canada before Confederation; and apparently the argument had been advanced before the Supreme Court that this was the real ground of the decision. As to this Mr. Justice Anglin says:

"I do not regard the decision of the Judicial Committee as depending on the fact that the Upper Canada 'Lord's Day Act' (Con. Stat. U. C., 1859, c. 104), had been originally enacted by a legislature clothed with authority to pass criminal laws. Neither can I accede to an argument which involves the view that legislation held to be criminal in one province of Canada may be regarded as something different in another province."

Miscellaneous Cases:—As examples of what may be considered provisions relating to "criminal law" and criminal procedure the following may be noted:

A provision that penalties against justices of the peace for non-return of convictions may be recovered in an action of debt by any person suing for the same in any Court of record: *Held* to override a provincial enactment declaring that a county Court should not have jurisdiction in such cases.[4] The Dominion Act could, it is conceived, apply only

[2] The same difficulty was experienced in attempting to construe "municipal institutions" in the light, as it was put, of the Ontario candle only. See *post*, p. 791 *et seq.*

[3] *Ouimet* v. *Bazan*, 46 S. C. R. 502.

[4] *Ward* v. *Reid*, 22 N. B. 279.

to actions against justices for non-performance of duties imposed by Dominion legislation; and could modify the provincial law to that extent only.

In another case it was made a *quære* whether the Dominion Act relating to costs against justices is not *ultra vires* of the federal parliament as relating to procedure in a civil matter.[5] It is difficult to suggest any principle in denial of the right of the Dominion parliament, as part of general legislation in regard to criminal law, to pass an Act protecting magistrates in the exercise of their criminal jurisdiction in the constitutional sense of that term.

A provision that, in assault cases where the complainant has asked summary disposition of the charge, a certificate that the charge has been dismissed or that the penalty imposed upon conviction has been satisfied shall be a bar to a civil action for damages, has been held *intra vires* of the federal parliament.[5a]

The Criminal Code (section 534) provides that the civil remedy for an act shall not be suspended or affected because the act amounts to a criminal offence. Is this provision *ultra vires*?[6] As the suspension of the civil remedy was in the interest of the administration of criminal justice it would seem that it was a rule of criminal jurisprudence to be retained or abandoned as the parliament of Canada might determine.

The following provincial enactments have been held not to relate to "criminal law." The Supreme Court of New Brunswick upheld the validity of a provincial Act for the imprisonment in certain

[5] *Whittier* v. *Diblee*, 2 Pugs. 243.

[5a] *Wilson* v. *Codyre* (1886), 26 N. B. 516; *Flick* v. *Brisbin* (1895), 26 O. R. 423.

[6] *Quære* in *Pacquet* v. *Lavoie*, 7 Que. Q. B. 277, by Blanchet, J.

cases of a person making default in payment of a sum of money due on a judgment as being a matter relating to procedure in civil matters and not falling within the criminal law, or the law relating to bankruptcy and insolvency.[7] Allen, C.J., says:

"Now surely the enforcing the payment of a judgment is a civil right, and the mode of enforcing it a part of the administration of justice, and procedure in civil matters in the province; all of which are expressly within the jurisdiction of the provincial legislature.[8] Having therefore the right to legislate on these subjects, the 15th sub-section gives them power to enforce any such laws by imposing imprisonment. It would seem, therefore, that the powers conferred by this Act are directly within the 92nd section of the Act."

And provincial legislation empowering the Courts to award indefinite imprisonment in certain events in connection with proceedings by writ of *ca. sa.* to enforce a judgment, was held by the Superior Court at Quebec not to fall within "procedure in criminal cases," but to be a proceeding in a civil matter.[9]

The Crown in the Courts.

It is, of course, beyond the scope of this work, to deal in any large way with the question as to the administration of justice as between Crown and subject. But under our federal system, as already

[7] *Ex p. Ellis*, 1 P. & B. 593. The proceedings were under the common "judgment summons" clauses. Mr. Justice Weldon dissented from the judgment of the majority of the court, the legislation impugned being, in his opinion, legislation relating to the criminal law. Imprisonment had been awarded because it appeared from the debtor's examination that the debt had been fraudulently incurred (one of the cases specified in the Act). See *Peak* v. *Shields*, 6 O. A. R. 639.

[8] Compare the language of the judgment (quoted, *ante*, p. 430), in the *Voluntary Assignments Case*.

[9] *Quebec Bank* v. *Tozer*, 17 Que. S. C. 303. And see also *Parent* v. *Trudel*, 13 Q. L. R. 139; and *Re Plant*, 37 N. B. 500.

pointed out, the principle of the Crown's indivisibility must be modified by regard to the fact that the various governments in Canada, federal and provincial, are distinct statutory entities, departments, as it were, of His Majesty's government of Canada and its provinces. In administration each government comes into direct relation with the individual. It often, therefore, becomes a legal question to which government the subject must look for compensation for goods sold or services rendered to the Crown or for redress for wrongs inflicted by the Crown's servants. Conversely the question which government is entitled as against the subject to enforce his contractual obligations to the Crown or to represent the Crown in proceedings to prevent or punish wrongs done to the public, is a legal question to be determined by the Courts in each case in which the point arises.

Then, again, these governments are often brought into direct relations with each other and it is often a legal question which government is entitled to represent the Crown and to administer its proprietary rights and enforce its prerogatives in regard to particular public property;[10] and the controversy as to the jurisdiction of the respective legislatures through which laws are enacted by the Crown is and doubtless will be ever with us. To deal first with this phase of the subject: No practical difficulty has arisen. Except where by statute the title to Crown property is vested in some particular official, in which case he would, of course, be the proper party to sue or be sued,[1] His Majesty's Attorney-General, federal or provincial as

[10] See *Atty.-Gen. of British Columbia* v. *E. & N. Ry.*, 7 B. C. 221.

[1] See, for example, the *Liquidator's Case* (1892), A. C. 437; 61 L. J. P. C. 75, in which the Receiver-General of New Brunswick represented the Crown-provincial.

the case may be, has been uniformly recognized as the proper party to represent the Crown acting in right of the Dominion or of a province, as the case may be. And in a case where the dispute was of a purely financial character, costs were ordered to be paid by the Crown to the Crown.[1a]

As between Crown and subject, 'the administration of justice in the province' is, as a matter of executive action as well as of legislative jurisdiction,[2] in the hands of the various provincial governments. This, however, is subject to the paramount power of the federal parliament, if it see fit, to legislate as to the administration of justice in regard to any and all subjects within the ambit of its legislative authority; and there would appear to be no doubt that such legislation might validly prescribe who should represent the Crown in judicial proceedings.

In a number of cases the question as to the position in this regard of a provincial Attorney-General has been discussed. That, at all events in the absence of federal enactment to the contrary, he is the proper officer to represent the Crown in the prosecution of criminal charges has not been seriously questioned and has been recognized by the Dominion parliament.[3]

In Ontario, the late Master in Chambers (Mr. Dalton, Q.C.) held in 1871[4] that the Attorney-General of that province was the proper officer to grant a fiat for the issue of a *Sci. Fa.* to question the validity of a patent, limiting his judgment, however, to the case of a subject, domiciled in the province, seeking to avail himself of the peculiar privileges

[1a] *Indian Claims Case* (1897), A. C. 199; 66 L. J. P. C. 11.

[2] See *ante*, p. 359.

[3] See *Abraham* v. *The Queen*, 6 S. C. R. 10; see also *per* Strong, V.C., in *Atty.-Genl. (Ont.)* v. *N. F. Intern. Bridge Co.*, *infra*.

[4] *R.* v. *Pattee*, 5 P. R. (Ont.), 292.

of the Crown in order to the assertion of his own private interests. The learned Master desired that he should not be understood as speaking of a case where the Crown itself seeks to avoid a patent. On the other hand, it has been held in Quebec that a provincial Attorney-General cannot institute such proceedings; they can be legally taken only by the Attorney-General for Canada.[5] It seems difficult to appreciate the distinction between proceedings for breach of the criminal law and proceedings founded on a breach of the Patent Act. The former, perhaps, fall more properly within the common notion of the administration of justice.

In reference to proceedings against a company incorporated under Dominion law, for breach of its charter or for acts beyond its powers or for creating or maintaining a nuisance, the cases leave the question in some doubt. In an early case[6] Strong, V.-C., held that the Attorney-General of a province is the officer of the Crown who is considered as present in the Courts of the province to assert the rights of the Crown, and of those who are under its protection, and that he, and not the Attorney-General for the Dominion, is the proper party to file an information when the complaint is, not of an injury to property vested in the Crown as representing the government of the Dominion, but of a violation of the rights of the public of a province. The information in that case was in respect of a nuisance caused by the defendant company's interference with a railway incorporated prior to 1867. In a later case[7] it was held by the Court of Appeal,

[5] *Mousseau* v. *Bate* (1883), 27 L. C. Jur. 153; 3 Cart. 341.

[6] *Atty.-Genl. (Ont.)* v. *Niagara Falls International Bridge Co.* (1873), 20 Grant 34; 1 Cart. 813.

[7] *Atty.-Genl. (Ont.)* v. *International Bridge Co.*, 28 Grant 65; 6 O. A. R. 537; 2 Cart. 559. The judgment of Burton, J.A., alone deals with the constitutional point. See also *Atty.-Gen. (Can.)* v. *Ewen*, 3 B. C. 468.

reversing the judgment of Spragge, C., that the non-compliance by a company, incorporated by an Act of the Dominion parliament, with the terms of such Act, such non-compliance operating, as was alleged, to the detriment of the locality in which the work was being carried on, could not be the subject matter of an information at the instance of the provincial Attorney-General.

The Attorney-General of Quebec took action against a building society incorporated under Dominion law in respect of alleged *ultra vires* transactions in the province, and although the judgment of the Quebec Courts was reversed by the Privy Council, no objection was taken, either by Court or counsel, that the provincial Attorney-General was not the proper plaintiff.[8] In a somewhat similar proceeding against a Dominion company by the Attorney-General of Canada it was held by the Supreme Court of Canada[9] that he was entitled to bring the action; but the Court expressly reserved the question as to the right of a provincial Attorney-General to institute like proceedings.

In a case which went to the Privy Council in 1895,[10] the Attorney-General of Quebec took proceedings at the instance of a private relator against a federal railway company for a nuisance created by the stopping up of what was alleged to be a public lane in the city of Montreal; and in this case there is, again, no suggestion by Court or (so far as appears) by counsel, that the provincial attorney-general was not entitled to institute the proceedings. On the other hand,

[8] *Col. Bldg. Assn.* v. *Atty.-Genl. (Que.)*, (1884) 9 App. Cas. 157; 53 L. J. P. C. 27; 2 Cart. 275; 3 Cart. 118.

[9] *Dominion Salvage and Wrecking Co.* v. *Atty.-Gen. (Can.)*, 21 S. C. R. 72.

[10] *Casgrain (Atty.-Gen.)* v. *Atlantic & N. W. Ry.*, 64 L. J. P. C. 88.

In a case in the Supreme Court of British Columbia Mr. Justice Irving held that the Attorney-General of that province was not entitled to take action at the instance of a private relator to restrain a railway company, originally incorporated by provincial Act but afterwards brought within federal jurisdiction as a work for the general advantage of Canada, from taking steps claimed to be *ultra vires* and in alleged violation of its charter; the allegation, in effect, being that the company was creating a nuisance in the shape of a railway line not covered by its charter.[1]

In this connection reference may be made to a Quebec case in which the provincial Attorney-General sought to recover moneys due to the Crown. It was objected that the moneys were due, if at all, to the Crown in right of the Dominion. Dorion, C.J., said:

"Admitting that this debt belongs to the Dominion, it cannot be denied that it must be claimed by and in the name of Her Majesty, and that the Attorney-General has the right to appear for Her Majesty in all Courts of justice in this province. The question as to which government this sum belongs to does not arise here."[2]

With regard to claims against the Crown it will suffice here to say that where the claim is against the Dominion government it is to be prosecuted in the Exchequer Court of Canada; while claims against provincial governments are governed by provincial statutes providing, as a rule, for proceedings by way of Petition of Right. Where com-

[1] *Atty.-Genl. (B.C.)* v. *The V. V. & E. Ry. Co.* 9 B. C. 338. In addition to setting aside the order under the provincial *Quo Warranto* Act, as mentioned in the report, Irving, J., also dissolved the interim injunction (previously granted) on the ground stated in the text. Pending appeal the action was settled.

[2] *Monk* v. *Ouimet* (1874), 19 L. C. Jur. 71. See also *per* Taschereau, J., at p. 83; also *ante*, p. 13.

plaint is made of unauthorized action threatened by any Crown official an action lies for a declaration of the subject's right in the matter and in such an action the Attorney-General, federal or provincial as the case may be, is a proper defendant to represent the Crown. Whether such a declaratory *quia timet* judgment will be pronounced in any given case rests in the discretion of the Court.[3]

The Courts as Legal Advisers of the Crown.

It is now settled that legislation, federal and provincial, may impose upon the Courts the duty of advising the government upon questions either of fact or law.[4] This is not the place to discuss the expediency or inexpediency of such legislation. The judges have often protested; but the validity of such enactments was not seriously questioned until the reference by the Governor-General in Council to the Supreme Court of Canada in 1910 of certain questions regarding the limits of federal and provincial jurisdiction in relation to the incorporation of companies. The majority of that Court affirmed the validity of those sections of the Supreme Court Act which authorized such references;[5] and the Privy Council took the same view.

As a question of legislative power, therefore, the matter is now beyond controversy, although sometimes—as the Privy Council has recently remarked concerning the very questions which gave rise to the controversy—the task imposed is "an impossible one owing to the abstract character of the questions put."[6] The answers given, however, are only

[3] *Dyson* v. *Atty.-General of England* (1911), 1 K. B. 410; 80 L. J. K. B. 531; *S. C.* (1912), 1 Ch. 158; 81 L. J. K. B. 217.

[4] *Re References* (1912), *A. C.* 571; 81 L. J. P. C. 210; and see *ante*, p. 442.

[5] 43 S. C. R. 536.

[6] *References Case, supra.*

advisory and will have no more effect than the opinions of the law officers of the Crown.[7] It has never been suggested that they should be considered as judgments; and it would appear clear that any legislative attempt to give them effect as judgments, binding either the Court or the parties who might see fit to appear upon the argument of any such reference, would be beyond the powers of either the federal or a provincial legislature. For the Dominion or a province to empower a tribunal of its own choosing to pronounce a binding judgment upon questions which may or may not have arisen, which may or may not arise, between the Crown in right of the Dominion and the Crown in right of a province would be a rather startling proceeding. There is nothing in the British North America Act to support the notion, irrational in itself, that one party to a dispute, even if that party be a government, may without the consent of the other disputant nominate a tribunal to determine that dispute *in invitum*. That an existing Court before which similar question might arise in ordinary litigation might be named does not affect the argument. Any other tribunal might be created or named if the principle be conceded. But the principle seems radically wrong. It is in complete opposition to the underlying principles upon which our federal system rests that one government should as against another and independent government take upon itself to determine in such fashion as to it seems meet the method to be adopted for the settlement of the large debateable questions which must constantly arise between governments under such a system. There is no federal legislation which goes this far, but some of the provinces have passed Acts which purport to make the Court's opinion

[7] See however, *R.* v. *Brinkley* (1907), 14 Ont. L. R. 435 (C.A.)

upon a reference a judgment of such Court. The Full Court in Manitoba in 1901 refused to recognize the validity of such an enactment,[8] following a decision of the Supreme Court of Canada in 1897, in which it was held that there was no appeal to that Court from the opinion of the Supreme Court of British Columbia upon a reference under an Act of that province although the Act provided that the opinion should "be deemed a judgment" of the Court and appealable as such.[9]

[8] *Re Manitoba Liquor Act*, 13 Man. L. R. 239.

[9] *Union Colliery Co.* v. *Atty.-Gen. of British Columbia*, 27 S. C. R. 637. Rather curiously, the respondent Attorney-General moved to quash the appeal on the ground indicated.

CHAPTER XXIX.

Crown Property.

The sections of the British North America Act which bear directly upon the Crown's proprietary interests in Canada are as follows:

VIII. Revenues; Debts; Assets; Taxation.

102. All duties and revenues over which the respective legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one consolidated revenue fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided.

* * * * * *

107. All stocks, cash, banker's balances, and securities for money belonging to each province at the time of the union, except as in this Act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the provinces at the union.

108. The public works and property of each province, enumerated in the third schedule to this Act, shall be the property of Canada.

THE THIRD SCHEDULE.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with land and water power connected therewith.
2. Public harbours.
3. Lighthouses and piers, and Sable Island.

4. Steamboats, dredges, and public vessels.
5. Rivers and lake improvements.
6. Railways and railway stocks, mortgages, and other debts due by railway companies.
7. Military roads.
8. Custom houses, post offices and all other public buildings, except such as the government of Canada appropriate for the use of the provincial legislatures and governments.
9. Property transferred by the Imperial government, and known as ordnance property.
10. Armouries, drill sheds, military clothing, and munitions of war, and lands set apart for general public purposes.

109. All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

110. All assets connected with such portions of the public debt of each province as are assumed by that province shall belong to that province.

* * * * * *

113. The assets enumerated in the fourth schedule to this Act belonging at the union to the province of Canada shall be the property of Ontario and Quebec conjointly.[1]

* * * * * *

[1] It is not thought necessary to insert this schedule here. It may be found in the Act as printed in the Appendix. Section 142 provides for the adjustment of all financial questions between Ontario and Quebec by arbitration. It has been implemented by statutory arrangements sanctioned by the federal parliament and the two provinces. See *Indian Claims Case* (1897), A. C. 199; 66 L. J. P. C. 11; *Common Schools Fund Case* (1903), A. C. 39; 72 L. J. P. C. 9; *Re Arbitration, &c.*, 30 S. C. R. 151; *Interest Case*, 29 S. C. R. 14; *School Fund (Uncollected Sums) Case* (1903), A. C.

117. The several provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.

* * * * * *

126. Such portions of the duties and revenues over which the respective legislatures of Canada, Nova Scotia, and New Brunswick had before the union power of appropriation as are by this Act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each province form one consolidated revenue fund to be appropriated for the public service of the province.

British Columbia and Prince Edward Island:—On the admission of these provinces to the Canadian Union, the British North America Act became applicable to them as if they had been of the provinces originally united by the Act, subject to certain variations which so far as here material may be shortly stated.[2] To aid in the construction of the Canadian Pacific Railway, British Columbia agreed to transfer to the Dominion a large tract of her Crown lands lying along the route of the railway; and out of the transfer of this "Railway Belt" have arisen some notable disputes which will call for separate notice later on in this chapter. Prince Edward Island entered Confederation without any Crown lands available as a source of revenue. They had been alienated as Lord Durham afterwards complained[3] "in one day by the Crown in very

39; 72 L. J. P. C. 9; *School Fund (Constructive Receipt) Case* (1910), A. C. 627; 80 L. J. P. C. 35. The difficulties encountered in connection with the first attempt at arbitration are shewn in *Re Arbitration, &c.*, 6 L. J. N. S. 212; 4 Cart. 712.

[2] The Orders-in-Council are printed in full in the Appendix, *post*.

[3] See the author's "History of Canada," 105, 324.

large grants, chiefly to absentees." Allowance was made in the federal subsidy for this lack of revenue-producing property, and there will be found in the Order-in-Council admitting the Island some other provisions as to certain Crown properties which, however, will not call for further notice.

Manitoba, Alberta, Saskatchewan:—These provinces have been carved out of the territory transferred to Canada by the Hudson's Bay Company; and upon their establishment they were not given control of the Crown lands within their borders. Subject to these remarks, what follows in this chapter has application in all the Canadian provinces. The North-West Territories are, of course, entirely under federal rule.

Crown Property "belonging to" the Dominion or a Province:—In an earlier chapter[4] the position of the pre-Confederation provinces in reference to Crown property and Crown revenues within their borders was discussed. As a necessary part and parcel of responsible parliamentary government the assemblies of those provinces had been given full control and the right to appropriate to the purposes of government Crown property and Crown revenues as they might deem fitting. But, unless indeed some statute vested a particular public property or species of property in some particular Crown officer,[5] the title to what may be called government property remained then and still remains in the Crown. What is said of land in the following passages is, apart from statutory provision to the contrary, true of all species of public property:

"In construing these enactments it must be always kept in view that, wherever public land with its incidents is

[4] See *ante*, p. 325 *et seq.*

[5] See the *Liquidator's Case*, noted *ante*, p. 25 *et seq.*

described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown."[6]

In a recent case, after quoting the above passage, Lord Davey, delivering the judgment of the Privy Council, says:

"Their Lordships think it should be added that the right of disposing of the land can only be exercised by the Crown under the advice of the ministers of the Dominion or province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province."[7]

Residuum of Proprietary Rights Retained by the Provinces:—Section 117 of the Act declares that the provinces should retain all their public property not otherwise disposed of in the Act; and whether, in view of the subsequent phrase "lands or public property," the words "public property" in the earlier part of the section should or should not be taken to cover Crown lands, section 109 clearly leaves those lands with the provinces in which respectively they were situate. The result, either way, is as expressed by the Privy Council in the *Fisheries Case*:[8]

"Whatever proprietary rights were at the time of the passing of the British North America Act possessed by the provinces remain vested in them, except such as are by any

[6] *St. Cath. Milling Co.* v. *R.*, 14 App. Cas. 46; 58 L. J. P. C. 54.

[7] *Ont. Mining Co.* v. *Seybold* (1903), A. C. 73; 72 L. J. P. C. 5. See also *Farwell* v. *R.*, 22 S. C. R. 553:—"The rights of the Crown, territorial or prerogative, are to be passed under the Great Seal of the Dominion or Province (as the case may be) in which is vested the beneficial interest therein."

[8] (1898), A. C. 700; 67 L. J. P. C. 90. Extract *ante*, p. 436.

of its express enactments transferred to the Dominion of Canada."

The Dominion took nothing except by express grant of the property itself; and there is no presumption, for example, that the grant of legislative jurisdiction to the federal parliament over a particular subject-matter vested any proprietary interest therein in the Dominion. Legislative jurisdiction over "sea coast and inland fisheries" was not intended to imply any ownership in the Dominion of the fisheries of the lakes, rivers and streams which flowed through the Crown lands of the provinces; they are provincial assets, though subject to the effect of federal fishery regulations.[9] And the legislative authority of the parliament of Canada over "lands reserved for Indians" does not operate to divest the provinces of their beneficial interest in those Crown lands which are under the burden of the so-called Indian title.[10] How careful the Act was in this regard was forcibly put by Mr. Edward Blake in the case just mentioned:

> "Thus, by 91 legislative power is granted over 'militia, military and naval service, and defence.' But military roads, ordnance property, armouries, drill sheds, clothing and munitions of war were not conceived to be so transferred. Each of them is expressly vested by 108.
>
> Legislative power is granted over 'navigation and shipping.' But there is an express transfer of lighthouses, beacons, buoys, canals, harbours, steamboats, dredges, public vessels, river and lake improvements.
>
> Legislative power is granted over indirect taxation. But there is an express transfer of the custom houses.
>
> Legislative power is granted over the 'postal service.' But there is an express transfer of the post offices.

[9] *Fisheries Case, supra.*

[10] *Indian Lands Case*, 14 App. Cas. 46; 58 L. J. P. C. 59.

Legislative power is granted over 'the public property.' But there is an express transfer of land set apart for general public purposes.

Legislative power is granted over 'Sable Island.' But there is an express transfer of Sable Island."

It will be convenient, therefore, to deal first with the question: what public property of the pre-Confederation provinces was transferred to the Dominion?

Measure of Control:—First, however, it should be pointed out that, while legislative jurisdiction does not carry with it proprietary rights, the converse proposition is not true. In other words, property belonging to the Dominion or to a province is within the independent and absolute control of the Dominion or provincial government as the case may be. Provincial Crown property cannot be taken from the province by the federal authorities or by any person or corporation acting under federal legislation; the one exception being that indicated in section 117 of the British North America Act: Canada may assume any lands or public property required for fortifications or for the defence of the country. As against the individual, either government, federal or provincial, may for purposes within its jurisdiction exercise or empower others to exercise a power of expropriation if thereto authorized by statute; as against each other no such power is conferred by the British North America Act with the one exception noted. This phase of the subject has, however, been already discussed.[1]

[1] See *ante*, p. 386, *et seq.*

Dominion Government Property.

The enquiry, of course, is not as to property acquired by the Crown in right of the Dominion since Confederation either by gift, purchase, or expropriation, for purposes within federal jurisdiction. The question is simply, as already indicated: what public property of the pre-confederation provinces was transferred to the Dominion of Canada? And no practical question now arises except under section 108 and its schedule as already quoted.[2]

For Federal Purposes:—A perusal of the items set out in the schedule to section 108 discloses, as one might expect, that the property transferred to Canada was property of the kinds needed and in use for those purposes of government which the parliament of Canada was thereafter to carry out and control. As put by Lord Watson in his oft quoted judgment in the *Liquidator's Case*,[3] the British North America Act accomplished the object of its framers:

> "By distributing, between the Dominion and the Provinces, all powers, executive and legislative, and all public property and revenues which had previously belonged to the Provinces; so that the Dominion Government should be vested with such of these powers, property and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the Provinces for the purposes of the Provincial Government."

The general principle of distribution thus indicated should of course be borne in mind, but whether this should result in the case of any particular item in a liberal or a restrictive interpretation of the language used, may be a question. The former was strongly but unsuccessfully urged, for example, in

[2] See *ante*, p. 598-9.
[3] (1892), A. C. 437; 61 L. J. P. C. 75.

the case of item No. 5, "rivers and lake improvements," in support of the contention that all rivers themselves and not merely the public improvements upon them were the property of Canada.[3a] And there is another phrase, namely, "lands set apart for general public purposes" (item No. 10) which obviously calls for the application of the above principle to restrict the meaning to federal public purposes. There is however no reported case in which question has been raised as to the scope of this phrase or of the phrase "all public buildings" in item No. 8; the governments concerned having apparently adjusted any differences upon these items amicably. Buildings, particularly, might be used before Confederation for several public purposes which after Confederation would fall within different spheres of authority. How far and with what result the principle above indicated is to be applied in regard to those items which are still to be considered controversial topics, may be worth consideration. The most important item and the one which has created and still creates most dispute is item No. 2.

Public Harbours.

The Soil Transferred:—Putting aside for the moment the two questions: what is a harbour? and what constitutes a harbour a public harbour? this much is settled law, that the transfer effected by section 108 was more than of a franchise; it was a transfer of full ownership in the soil, so far as it was Crown property, under public harbours, the Crown's title thereto *usque ad coelum, usque ad centrum,* being held after Confederation in right of the Dominion and being thereafter alienable only

[3a] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90; see *ante*, p. 368. The argument is more fully stated in 26 S. C. R. 444.

on the advice of the Crown's federal ministers by grant under the Great Seal of Canada or otherwise as might be determined by federal law. This proposition was involved in a decision of the Supreme Court of Canada in 1881 concerning the harbour of Summerside in Prince Edward Island.[4] A grant of certain Crown property on the foreshore of that harbour made by the provincial government in the usual way—by grant under the Great Seal of the province—was held invalid. This view was afterwards re-affirmed upon the reference in the *Fisheries Case* and upheld by the Privy Council.[5] The Board, it is true, expressed the opinion that the Supreme Court of Canada had erred in laying down as a universal proposition that the foreshore or the whole foreshore of a public harbour is part of the harbour; but that the bed of the sea under all public harbours, whatever is properly comprised within that term, became vested in the Dominion was expressly affirmed.

Not Limited to Harbours Artifically Created at the Public Expense:—Summerside harbour was admittedly a natural harbour, neither created nor improved as such, although there was a wharf there which had been built by the government before Confederation. The Supreme Court of Canada, however, expressly declined to construe the words "public harbours" as covering only harbours which had in a special sense become public property by being created or improved as harbours at the public expense; and there is nothing in the judgment of the Privy Council in the *Fisheries Case* to cast a doubt upon the correctness of the decision of the Supreme Court of Canada upon this point. And

[4] *Holman* v. *Green*, 6 S. C. R. 707.
[5] 26 S. C. R. 444; (1898) A. C. 700; 67 L. J. P. C. 90.

in the later *Vancouver Harbour Case*[6] there was no suggestion of government expenditures to make or improve the harbour, either as a harbour or in any other way. What the Board said about public harbours in the *Fisheries Case* was this:

"With regard to public harbours, their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment of the third schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term 'harbour' upon which public works had been executed became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court in arriving at the same conclusion founded their opinion on a previous decision in the same Court in the case of *Holman* v. *Green* (1882), where it was held that the foreshore between high and low water mark on the margin of the water between the property of the Dominion as part of the harbour.

"Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description 'public harbour.' They must decline to attempt an exhaustive definition of the term, applicable to all cases. To do so would, in their judgment be likely to prove misleading and dangerous. It must depend, to some extent at all events, upon the circumstances of each particular harbour, what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court, in the case of *Holman* v. *Green*, that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water mark, being also Crown property, likewise passed to the Dominion.

"Their Lordships are of opinion that it does not follow that because the foreshore on the margin of a harbour is

[6] (1906) A. C. 204; 75 L. J. P. C. 38; 11 B. C. 289. See also *Lake Simcoe Ice Co.* v. *McDonald*, 26 Ont. App. R. 411.

Crown property it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would no doubt form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not."

There is nothing in this passage to suggest a doubt as to the correctness of the view expressed by the Supreme Court of Canada in *Holman* v. *Green* that the word "public" has reference solely to the right of user. A public harbour is a harbour which the public have a right to use.[7] It has been suggested that the word "public" might have been intended to indicate harbours which had been declared such by the Crown in the exercise of its prerogative right to establish ports and grant port franchises;[8] but there is nothing in the cases to support such a limited interpretation, and it is very doubtful if there were or could be any such ports in Canada at the date of Confederation.[9]

Private Ownership not Touched:—The transfer was, of course, of public property only. Accordingly, the harbour of St. John, N.B., has been held not to be a "public harbour" within section 108, being vested in the municipality. Nevertheless, the Attorney-General of Canada may file an information to prevent any obstruction to its navigation; but so long as drainage into it, authorized by pro-

[7] See *Atty.-Gen. of Canada* v. *Ritchie, &c., Co.* (1914), 20 B. C. 333, the *English Bay Case*, referred to later: *per* Macdonald, J.

[8] *Lefroy*, 'Canadian Federal System,' 691.

[9] See *ante*, p. 123 *et seq.* as to prerogative rights in a colony having a local assembly. In 1867 there were, of course, harbours recognized in, if not created by, statutes: *e.g.*, Toronto and Cobourg on Lake Ontario, and St. John in New Brunswick. See *Brown* v. *Reed*, 2 Pugs. 212.

vincial Act, creates no such obstruction, an injunction will be refused.[10]

The Date of Union the Material Date:—The judgment of the Privy Council in the *Vancouver Harbour Case*[1] is founded upon the manifest view that the date upon which the province concerned entered the Union is the date to be considered. The Crown's title is not subject, as it were, to a shifting use; yesterday for a province, to-day for the Dominion. It was fixed at the date of Union. The enquiry in that case was again as to the foreshore, no doubt being suggested as to the existence of a public harbour in front of the city. The trial judge, Mr. Justice Duff, treated as a question of fact to be enquired into as of the 20th July, 1871—the date of British Columbia's entry into the Union—whether or not the part of the foreshore in question had been in use as part of the harbour; and this method of enquiry was upheld by the Judicial Committee. If proper as to the foreshore, the same enquiry must be entered into in every case as to what may be called the harbour proper.[2] Was it a public harbour at the date of the Union? And this is where the chief difficulty appears.

What is a Harbour? Lord Esher, M.R., is reported as having defined a harbour as—

> "A place to shelter ships from the violence of the sea and where ships are brought for commercial purposes to load and unload goods."[3]

[10] *St. John Gas Light Co.* v. *R.*, 4 Ex Ct. R. 326.

[1] (1906) A. C. 204; 74 L. J. P. C. 38; 11 B. C. 289.

[2] In the Full Court of British Columbia, Hunter, C.J., had expressed the view that the jurisdiction of the parliament of Canada was "latent" and would attach to any inlet or harbour as soon as it becomes a public harbour and is not confined to such public harbours as existed at the union. With due respect, there seems to be confusion here between legislative jurisdiction and proprietary rights.

[3] *R.* v. *Hannam* (1886), Times L. R. 234.

Coulson & Forbes [1] define it thus:

"A harbour or haven is a place naturally or artificially made for the safe riding of ships. A port is a haven and something more,—it is a harbour where customs officers are established and where goods are either imported or exported to foreign countries and comprehends a city or borough called *caput portis* with a market and accommodation for sailors."

Lord Esher's definition, it will be seen, gives to a harbour some of the characteristics of a port; and, as will appear later, the question of commercial user is probably an element to be considered.

There is a still further question suggested by the cases. If 'harbour' is to be construed as a haven of safety, merely, and 'public harbour' as a haven which the public have the right to use, then —apart from the question as to the foreshore—the date of entry into the Canadian Union would be of no practical importance. The question would be one of geographical or physical configuration merely as to which dates would be ordinarily out of place. The matter is obviously one of great moment to all the maritime provinces of Canada and particularly so to British Columbia with its deeply indented coast line. There were in 1871 thousands of public harbours in that province if configuration merely is the test.

Then, again, if actual user, and not mere adaptability for use, is the proper test—but user as a haven of refuge only—the difficulty is not removed, for there is hardly a haven on any part of the coast, Atlantic or Pacific, that had not been sought at some time before Confederation as a refuge from wind and sea; though proof might be difficult now and still more difficult as the years go by. Even if the user must be shewn to have been a matter

[1] 3rd ed. 464, citing *Hale*, De Portibus Maris, cap. 2, 11, and *Houck*, Navigable waters, 175.

of custom, but a customary user as a haven of refuge merely, the difficulty would be lessened, but would obviously still be great. What amount of user? and by how many? in what sort of craft? and how about user by the Indian subjects of the Crown?

If, on the other hand, the notion of a port is covered by the words "public harbour," that is to say, if a public harbour, as meant in section 108, is a place to which ships were at the date of Union accustomed to resort not merely for shelter but for purposes of commerce, to load and unload goods, the difficulty while not entirely removed would be reduced to a minimum. In this view, the two elements of shelter and customary commercial user would have to be taken into consideration. And this view would seem to be that indicated in the judgment of the Privy Council in the *Fisheries Case* where reference is made to user of the foreshore for "harbour purposes, such as anchoring ships or landing goods." It is also supported by the collocation of "public harbours" with items relating to navigation and shipping in a commercial sense: canals, on the one hand, and lighthouses and piers, dredges, and river and lake improvements, on the other; all being items of public property held and used for the benefit of those engaged in maritime commercial pursuits.

Harbour Boundaries:—Taking the date of Union as the material date, the question whether a particular body of water was or was not at that date a public harbour, and, if so, what were then its boundaries seaward and landward, must be a question of fact. As to the foreshore this has been so held:[5] and it would seem clear that the proposition must

[5] *Vancouver Harbour Case*; see *ante*, p. 610.

apply equally to determine the harbour boundaries seaward. The result is that the question is one often very difficult of solution, depending on evidence as to facts which are daily becoming more obscure and hard to ascertain. It is a matter upon which there is no pronouncement binding in all the provinces and for that reason each province has to consider the decisions of its own Courts.

Provincial Decisions:—In *Nova Scotia* the question has been before the Courts several times. In 1885, the Full Court disregarded a provincial Crown grant of the foreshore at a spot in St. Margaret's Bay thus described by Thompson, J.:

> "It is the shore of a narrow creek or cove into which small vessels may pass as far as the *locus* extends but which has only been used by such vessels to approach lumber mills on rivers flowing into this creek, the practice being to carry the lumber down to be laden on board in the creek. . . . This creek or cove I do not regard as a part of those waters which form any of the recognized harbours in St. Margaret's Bay. It is one of the many small inlets which abound on the shores of the bay and which have neither the name nor character of public harbours."[6]

However, it was thought advisable to leave to a higher authority the drawing of a distinction in legal principle between "such a piece of coast and the shore of a harbour like Summerside." It will be noticed that attention was paid not merely to the physical configuration but to the user of the bay for commercial purposes at that particular cove or inlet.

In 1891, a provincial grant was held inoperative for the reason that the land covered by it was "situate in the navigable waters of Sidney Harbour." No serious question, however, was made

[6] *Fader* v. *Smith* 18 Nova Scotia R. 433. St. Margaret's Bay as a whole appears again in *Young* v. *Harnish*; see *post*, p. 615.

upon this feature of the case, the defendants being held both in the provincial Court and in the Supreme Court of Canada to be estopped from denying their grantor's title as against the plaintiff, his widow, who claimed dower.[7] In 1904, question again arose as to Sidney Harbour but this time as to one of its upper reaches.[8] That some part of the harbour was a "public harbour" within the meaning of section 108 was not doubted. The character of the particular part in question is thus indicated in the judgment of the Full Court delivered by Townshend, J.:

> "While up to the present very little, if any, use has been made of the harbour as far south as the *locus* and such wharves as have been built were merely for private use, yet the harbour is there quite navigable and suitable for shipping and trade purposes."

The opinion was ventured that in time the *locus* would be required for such purposes; and in that view the Court thought it would not be reasonable to hold that a portion of the harbour was not within section 108 because it had not yet come into use for commercial purposes although the evidence shewed its "capacity and adaptability" for such purposes. Sidney Harbour was, of course, the recognized geographical name long prior to 1867 of a fairly well defined and distinct sheet of land-locked water though of irregular outline; and this fact may have a bearing if it were attempted to apply the principle adopted by the Nova Scotia Court to the many more or less land-locked inlets, for example, of British Columbia which have at some place upon their shores a wharf or some other landing for commercial purposes.

[7] *Sword* v. *Sidney Coal Co.*, 23 Nova Scotia R. 214; 21 S. C. R. 152.

[8] *Kennelly* v. *Dom. Coal Co.*, 36 N. S. 495.

In the same year (1904) it was held that although St. Margaret's Bay was "very likely" a public harbour nevertheless the Dominion Government could not grant an exclusive right of fishing in its waters;[9] but, apart from the necessity for statutory authority, this view seems erroneous and inconsistent with that full proprietary interest in the soil which the Dominion undoubtedly has and of which the right of fishing is part.[10]

In *New Brunswick* question arose in 1897 as to the validity of a license granted by the federal authorities under the Fisheries Act to fish in the waters of Dark Harbour on the island of Grand Manan.[1] It had been originally a fresh water lake or pond, but before Confederation, a channel had been cut—largely at the public expense—through the low sea wall which separated it from salt water. Thereafter the tide ebbed and flowed on it, fish came in, and the harbour was used both for shelter and for commercial purposes; but as to this latter it was apparently in doubt whether, apart from fishing, it had not been so used exclusively by the plaintiff who owned the land on its shores. The harbour was held to be a public harbour within section 108 and the Court inclined to the view that commercial user need not be shewn, a distinction being drawn in this regard between a harbour and a port.[2] Tuck, J., expressed himself definitely as of opinion that it was not necessary that a harbour, in order to be

[9] *Young* v. *Harnish*, 37 N. S. 213. See the comment on this case in *Miller* v. *Webber* (1910), 8 E. L. R. 460.

[10] *Re B. C. Fisheries* (1914), A. C. 153; 83 L. J. P. C. 169. In the *Vancouver Harbour Case*, 11 B. C. 289, Hunter, C.J., had expressed the view that the ownership of the Dominion was a qualified property right and did not extend *ad centrum*. The province, he thought, would own a copper mine under a public harbour.

[1] *Nash* v. *Newton*, 30 N. B. 610.

[2] See *ante*, pp. 610-11.

properly so called, should be used for commercial purposes. The plaintiff failed in making proof of his own title and therefore decided expressions of view upon the other points were not called for or given, except as above indicated.

In the Court of Appeal for *Ontario*, Burton, C.J.O., expressed the opinion that the term " public harbour " is not restricted to those harbours which at the time of Confederation had been artificially constructed or improved at public expense, and instanced Halifax Harbour. In that case[3] a small bay in Lake Simcoe at which there was a wharf permissively used, but no mooring ground, and little shelter except from an off-shore wind, was held by the Court of Appeal not a public harbour. This question was not passed upon in the Supreme Court of Canada. Assuming a provincial grant of the *locus in quo* to be valid the majority of the Court held that the reservation in the grant, " subject to rights of navigation," included the right to cut a channel through the ice in order to float into shore ice cut farther out in the bay.

In another case in Ontario the view was expressed by the late Mr. Justice Street that the Sault Ste. Marie River in front of the town of that name was not a public harbour simply because there were wharves along it.[4] He was apparently of opinion that the ownership of a harbour " does not involve an ownership of the soil under the water " but he may have had in his mind merely the question as to what is the boundary off-shore of a public harbour: otherwise the view expressed seems clearly untenable in the face of *Holman* v. *Green*.[5]

[3] *Lake Simcoe Ice Co.* v. *McDonald*, 26 Ont. App. R. 411; 31 S. C. R. 130.

[4] *Perry* v. *Clergue* (1903), 5 Ont. L. R. 357. See *Pickels* v. [illegible], 14 Ex. Ct. R. 379, noted *post*, p. 619.

[5] See *ante*, p. 607.

Federal ownership of public harbours does not operate to prevent their inclusion within municipal boundary lines, and municipal by-laws validly enacted will have their due operation over the harbour. "For purposes within the ambit of provincial legislation they are within the jurisdiction of the province and its legislatures, provincial and municipal." Local prohibition of the sale of liquor within the town was accordingly held to cover the harbour.[6]

In *British Columbia* in 1889 an injunction was granted at the instance of the Attorney-General of Canada to restrain the driving of piles in the bed of False Creek, an arm of English Bay running into the heart of the city of Vancouver. It was held to be a public harbour, but as of what date and upon what evidence does not clearly appear. The transfer effected by section 108 was considered by Crease, J., as covering both the franchise of public harbours and the ownership of the soil within their boundaries.[6a]

In 1899 question was raised between private litigants as to the title to the coal under Nanaimo Harbour, which had undoubtedly been used as a harbour both for shelter and for commercial purposes long before 1871. The Attorney-General of the province brought action [6b] to stay the litigation on the suggestion of the Crown's interest. The private action was stayed accordingly, the majority of the Court declining to determine the question as between the province and the Dominion as a preliminary to granting a stay. Martin, J., dissented

[6] *Re Sturmer & Beaverton (Town)*, 24 Ont. L. R. 65. The judgment of Middleton, J., as above indicated was upheld by a Divisional Court (Boyd, C., Teetzel, and Latchford, JJ.), with a simple expression of concurrence therein on this point.

[6a] *Atty.-Gen. of Canada* v. *Keefer*, 1 B. C. (pt. 2) 368.

[6b] *Atty.-Gen. of British Columbia* v. *Esquimalt & N. Ry. et al.*, 7 B. C. 221.

holding that the Crown in right of the province should make out a *prima facie* case at least of title to the soil of the harbour. That it had no property therein he thought too plain for serious argument. The soil not only of the bed proper but of the foreshore[7] was, in his opinion, the property of the Crown in right of the Dominion in full ownership including minerals and all else. It had been argued that the transfer of "Military Roads" (item 7 of section 108) was a transfer of a modified interest only so far as necessary to give the right of superficial control, and that the same view should be taken as to public harbours. The argument, however, did not find favour; although in a later case, as already noticed,[8] it commended itself to Hunter, C.J.

In the *Vancouver Harbour Case* already referred to[9] Burrard Inlet, from the First to the Second Narrows, was considered by Mr. Justice Duff to have been a public harbour at the Union (1871); but the question was limited, so far as the foreshore was concerned, to the immediate water front at certain "street ends" of the City of Vancouver. These were held to be part of the public harbour "as was the whole of the foreshore adjoining the townsite of Granville" (now part of Vancouver). This finding of fact was upheld by the Privy Council.

In a recent case, English Bay, of which False Creek and Burrard Inlet are arms covered by the foregoing cases, was held not to have been a harbour at all even as a customary haven of refuge from wind and sea.[10] The date of British Columbia's

[7] The qualification upon this point which the Privy Council laid down in the *Fisheries Case* (see *ante*, p. 607) is not noticed in the judgment.

[8] See note 10, *ante*, p. 615.

[9] See *ante*, p. 610. See also *Vancouver (City)* v. *Can. Pac. Ry.* 23 S. C. R. 1.

[10] *Atty.-Gen. of Canada* v. *Ritchie, &c., Co.* (1914), 20 B. C. 333.

entry into the Union (20th July, 1871) was regarded as the material date and the evidence was directed to show the condition of affairs then. The delimiting of the boundaries of the Port of Vancouver by Order-in-Council under the Canada Shipping Act (R. S. C., cap. 113, sec. 850) had therefore no bearing on the enquiry. The judgment, however, was really based upon the configuration of the bay, which made it in no reasonable sense a harbour, though there were, as already intimated, two public harbours off its eastern end.

It was held by the *Exchequer Court of Canada* that where, prior to Confederation, a water lot fronting on Quebec Harbour had been granted by the Crown with a reservation of the right to resume possession in certain events, such right was, after 1867, exerciseable in right of the Dominion.[1]

And in a recent case in the same Court Mr. Justice Audette had occasion to consider a claim put forward in regard to a part of the river front of the Annapolis River in Nova Scotia.[2] It was contended by the Crown in right of the Dominion that Annapolis Harbour (or Basin) extended up river beyond the property held by the suppliant under a provincial Crown grant issued since 1867 and that, therefore, he had no title. This contention was overruled. The date of Confederation was taken as the material date and the erection since then by the federal government of wharves along the river above the suppliant's property was therefore immaterial. In any case such erections would not make of a river a public harbour, "not any more than all the wharves on the coast from Belle Isle to Quebec would make that part of the St. Lawrence a public harbour."

[1] *Samson* v. *R.*, 2 Ex. Ct. R. 30.
[2] *Pickels* v. *R.*, 14 Ex. Ct. R. 379.

Under a pre-confederation statute provision was made for a Board for the management of Toronto Harbour. In 1881, Spragge, C., held the Harbour Commissioners to be trustees within the meaning of the Ontario Trustees Act and accordingly entertained an application to fix their remuneration.[3]

CANALS, *with land and water power connected therewith.*

RIVERS AND LAKE IMPROVEMENTS.

It is now definitely settled that river improvements and not the rivers themselves vest in the Dominion.[4] Consequently, the soil of the river bed of the Ottawa River is vested in the provinces of Quebec and Ontario, each *ad medium filum*, and not in the Dominion.[5]

And in a case in the Exchequer Court of Canada the late Mr. Justice Burbidge held that the transfer to the Dominion of the Cornwall Canal did not operate to give it any proprietary interest in the St. Lawrence River from which the canal is fed.[6] Referring to section 108, item No. 1, he said:

"There is nothing in that, I think, to give the Dominion any proprietary right in the river from which the water is taken, beyond the right to take the water."

In a statute of the old province of Canada respecting public works a schedule of them appears, and under the heading "Navigations, canals and slides" there is the following item: "All those por-

[3] *Re Toronto Harbour Commrs.*, 28 Grant, 195.

[4] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90. See *ante*, p. 368.

[5] *Hurdman* v. *Thompson*, Que. L. R. 4 Q. B. 409. See *post*, p. 628, as to provincial ownership of the beds of rivers.

[6] *Macdonald* v. *R.*, 10 Ex. Ct. R. 394.

tions of the St. Lawrence navigation from Kingston to the Port of Montreal improved at the expense of Canada." The suppliant's claim was for damages alleged to have been suffered on a public work. The accident had happened as a matter of fact on the river, but the above schedule was relied on as making the entire "navigations" between the points mentioned a public work. Mr. Justice Burbidge, however, held that only improvements passed by virtue of section 108, following the *Fisheries Case*.

Government Railways.

It has been held by the Privy Council that the Dominion government acquired provincial railways —*i.e.*, government railways—subject to all claims against them, or, in other words, for no larger interest than the province had in them.[7] Whether the parliament of Canada could afterwards legislate in derogation of claims against such railways or obligations incurred by a province in respect of them before Confederation, was a question upon which the Board refrained from expressing any opinion. In the Court below Ritchie, J., had expressed the view that such legislation would be in relation to "property and civil rights in the province" (section 92, No. 13) and therefore beyond federal competence.

Property transferred by Imperial Government.

Section 108, item 9, had reference, of course, to ordnance property which at the date of the Union had already been transferred to the pre-confederation governments.[8] After the Union, however, there

[7] *Western Counties Ry.* v. *Windsor, &c., Ry.*, 7 App. Cas. 178; 51 L. J. P. C. 43; 2 Rus., & Geld. 280 (Nova Scotia R.).

[8] See *Kennedy* v. *Toronto*, 12 Ont. R. 201.

were still lands in different parts of Canada held by the Crown in right of the Empire. These, it is thought, have all since been transferred to Canada. For example, Deadman's Island in Vancouver Harbour was held by the Privy Council to be part of a military or naval reserve set apart in Sir James Douglas' time by the imperial authorities and, after the Union, transferred to the Dominion. The claim of the province to its ownership was accordingly denied.[9]

The "Railway Belt" in British Columbia.

The terms of Union embodied in the imperial Order-in-Council admitting British Columbia into the Dominion of Canada[10] have effect as an imperial statute by virtue of section 146 of the British North America Act. Amongst the terms so embodied are these:

11. The government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the union.

And the government of British Columbia agree to convey to the Dominion government in trust, to be appropriated in such manner as the Dominion government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia (not to exceed, however, twenty miles on each side of said line),

[9] *Atty.-Gen. of British Columbia* v. *Atty.-Gen. of Canada* (1906), A. C. 552; 75 L. J. P. C. 114.

[10] In Appendix.

as may be appropriated for the same purpose by the Dominion government from the public lands of the North-West Territories and the province of Manitoba: Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion government shall be made good to the Dominion from contiguous public lands; and provided further, that until the commencement, within two years, as aforesaid, from the date of the union, of the construction of the said railway, the government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion government agree to pay to British Columbia from the date of the union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

The Dominion failed to secure the commencement of the contemplated railway within two years. In fact there was a much longer delay, and, as a result, much dissatisfaction in British Columbia. In the end, however, certain modifications of the original terms were agreed upon and that agreement was ratified by both legislatures. By the provincial Act, passed on 19th December, 1883,[1] it was enacted:

"From and after the passing of this Act there shall be and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line as provided in the order in council, section 11, admitting the province of British Columbia into confederation; . . ."

[1] 47 Vict. c. 14 (B. C.).

In lieu of a grant of "contiguous public lands" to make good to the Dominion any lands in the belt already alienated under pre-emption right or Crown grant, a compact block of three and one half million acres in the Peace River region was to be transferred to Canada. On Vancouver Island a large area of land "including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein, or thereunder" was also transferred to the Dominion Government to aid in the construction of the Island branch, known as the Esquimalt and Nanaimo Railway.

Section 109 of the British North America Act provides that "all lands, mines, minerals, and royalties" shall belong to the provinces in which they are respectively situate, and the word "royalties" has been held to cover the Crown's prerogative right to the precious metals.[2] But the words "public lands" in the provincial statute above mentioned have been held by the Privy Council not to include the precious metals which therefore continue to belong to the Crown in right of the province.[3] As put by Lord Watson, although they are within the meaning of the word "royalties" even if that word in section 109 is to be limited to royalties connected with land, nevertheless they are not *partes soli*, but are held under prerogative title. Words of express grant are required to pass them; and, therefore, even the wide words, as quoted above, of the section of the provincial Act which

[2] "By the common law, all mines of gold and silver within the realm belong to the Crown; so also mines of copper, tin, lead, iron or other base metal, if they contain *aliquid auri aut argenti*: Comyn's Digest, *Waife*, H. 1. But by statute 1 Wm. & M., c. 30, s. 4, no mine of copper, tin, iron, or lead shall be taken to be a royal mine, although gold or silver may be extracted out of the same." *Forsyth*, 177.

[3] *Precious Metals Case*, 14 App. Case. 295; 58 L. J. P. C. 88.

granted the Vancouver Island railway belt to the Dominion were held equally ineffectual to transfer the precious metals in the belt, for they do not pass with the freehold.[4]

There is some uncertainty as to the date upon which the transfer under the provincial Act took effect. It was passed, as already mentioned, on 19th December, 1883. The Dominion Act ratifying the modified Terms of Union was passed on 19th April, 1884.[5] The date when the line was "finally located" does not appear to have been judicially determined, although Mr. Justice Strong spoke of it in one case as "a fact of common notoriety" that this date was prior to 15th January, 1885. No case is reported in which it became necessary to determine as between these date.[6]

The entire beneficial interest in everything which was transferred passed from the province to the Dominion; and it has been held by the Privy Council that the soil and everything which goes with the soil, including the beds of the rivers and lakes within the belt, water rights, and rights of fishing (except in tidal waters), became vested in the Crown in right of the Dominion.[7] In the *Precious Metals Case*,[8] Lord Watson expressed the view that when the Dominion had disposed of the land to settlers it would cease to be public land under federal control and would revert to the same position as if it had never passed from provincial control; but in the last case before the Privy Council upon this subject their Lordships expressly

[4] *Esquimalt & N. Ry.* v. *Bainbridge* (1896), A. C. 561; 65 L. J. P. C. 98.

[5] 47 Vict., c. 46 (Dom.)

[6] See *George* v. *Mitchell* (1912), 17 B. C. 531.

[7] *Burrard Power Co.* v. *R.* (1911), A. C. 87; 80 L. J. P. C. 69 (water rights); *Re B. C. Fisheries* (1914), A. C. 153; 83 L. J. P. C. 169 (fishing, river beds, &c.); and see *R.* v. *Farwell*, 14 S. C. R. 392.

[8] 14 App. Cas. 295; 58 L. J. P. C. 88.

noted that they had not to "consider questions which might arise if this had taken place." But in an earlier case such a situation had arisen in reference to the belt on Vancouver Island. That belt had been granted by the Dominion to the Esquimalt and Nanaimo Railway Co., which was to construct the Island line; and thus had become private property. A provincial Act was passed which provided for the issue of provincial Crown grants to any settler who could establish to the satisfaction of the provincial government that he had occupied or improved land within the belt prior to its transfer to the Dominion; and this confiscatory legislation was upheld by the Privy Council as relating to property and civil rights in the province. The provincial legislature it was held "had the exclusive right to so amend or repeal in whole or in part its own said statute of December, 1883 (47 Vict., c. 14)"—the Act granting the belt to the Dominion.[9] And in another case it was held by the Supreme Court of Canada that land in the "railway belt," not included in the statutory conveyance because held under pre-emption, fell to the province upon an abandonment by the pre-emptor.[10]

Water Records:—The matter of fishing rights and the extent of provincial rights under section 109 to the public lands within the boundaries of the province will be discussed later. With regard to "water rights" in the railway belt of British Columbia it may be noted that for many years before 1871 provincial legislation had provided for the grant of such rights as appurtenant to, or to be used with, lands held by settlers quite apart from riparian rights. In a recent case the Court of Appeal for British Columbia held that the proviso

[9] *McGregor* v. *Esquimalt & N. Ry. Co.* (1907), A. C. 462; 76 L. J. P. C. 85. With this compare *Royal Bank* v. *R.* (1913), A. C. 283; 82 L. J. P. C. 33.

[10] *R.* v. *Demers*, 22 S. C. R. 482.

reserving to the province the power to grant pre-emption rights to actual settlers pending the transfer of the belt would include the power to grant "water records" entitling the pre-emptor to take water from one or more streams for domestic use or for irrigation.[1] In view of the language of the proviso and of the failure of the Dominion to live up to the undertaking first mentioned in clause 11 of the original Terms of Union, it seems difficult to understand how the province—at all events after the two years had expired—was bound even by what has been called "an honourable engagement" to refrain from dealing with her public lands according to provincial law.[2] Construed as an imperial statute the Terms of Union could not, it is conceived, be invoked under such circumstances to invalidate titles under provincial grant.

Apart from the exclusive legislative authority of the parliament of Canada to legislate as to the Crown's proprietary interest in the lands of the railway belt, there is nothing to suggest a doubt as to the operation throughout the belt of provincial law in relation to all matters within provincial competence.[3] The cases shew merely that provincial legislation cannot operate to take away any part of the Dominion's proprietary rights; though indirectly it may, of course, affect them. Here manifestly co-operation is necessary if the wants of the province are to be adequately met.[4]

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[1] *George* v. *Mitchell* (1912), 17 B. C. 531.

[2] This was apparently the view of Macdonald, C.J., in the case last cited. As he points out, however, a provincial statute passed in 1880 (cap. 11) might create difficulty as to water-records west of Kamloops, the abandonment of the Yellowhead Pass route not substantially affecting the location of the line from Kamloops to the coast.

[3] See *Re Sturmer & Beaverton (Town)*, 24 Ont. L. R. 65, referred to *ante*, p. 617.

[4] See *ante*, p. 294 *et seq.*

Provincial Government Property.

Crown Lands.

The position, speaking broadly, is as put by Lord Watson:[5]

"The enactments of section 109 are, in the opinion of their Lordships, sufficient to give to each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries which at the time of the Union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under section 108, or might assume for the purposes specified in section 117. Its legal effect is to exclude from the 'duties and revenues' appropriated to the Dominion all the ordinary territorial revenues of the Crown arising within the provinces."

The beneficial interest referred to in this passage includes not merely the ownership of the beds of all rivers and streams tidal or non-tidal, of the beds of all lakes and arms of the sea (not being public harbours), and of the foreshore and bed of the sea so far as the same is "within the realm," but also the right to fish in the non-tidal waters of all these rivers, lakes and streams. It also includes the ownership of the waters themselves, subject to the provincial law touching riparian rights, and subject to the right of the public to fish in the sea and other tidal waters, and, possibly, to a public right to navigate all waters navigable in fact even though not at common law navigable waters.[6]

These matters, however, call for more detailed treatment elsewhere in this book. The question of

[5] *Indian Lands Case*, 14 App. Cas. 46; 58 L. J. P. C. 54.

[6] *Fisheries Case*, 26 S. C. R. 444; (1898), A. C. 700; 67 L. J. P. C. 90; *Burrard Power Co.*, 43 S. C. R. 27; (1911), A. C. 87; 80 L. J. P. C. 69; *Re B. C. Fisheries*, 47 S. C. R. 493; (1914), A. C. 153; 83 L. J. P. C. 169.

the proprietary interest of the Crown in the bed of the sea within the three-mile zone off the coast of Canada where it faces the open sea, as distinguished from the right to exercise therein or even farther out certain sovereign powers and to exclude the subjects of other countries from the coast fisheries, has been already discussed.[7] The matter of "water records" in the Railway Belt of British Columbia has also been dealt with.[8] And the matters of navigation and of the fisheries as special topics have still to be treated of.[9] The general proposition laid down by Lord Watson in the passage quoted above really covers the entire ground. In the earliest case before the Privy Council involving the interpretation of section 109 it was held that the right of the Crown to lands escheated for want of heirs is a right falling within the word "royalties" and therefore belongs to the province in which the land lies.[10]

The connection between section 102, sometimes spoken of as the Revenue Clause, and section 108 is indicated in the following passage from the judgment in the *Indian Lands Case*:[1]

"The extent to which duties and revenues arising within the limits of Ontario, and over which the legislature of the old province of Canada possessed the power of appropriation before the passing of the Act, have been transferred to the Dominion by this clause (section 102), can only be ascertained by reference to the two exceptions which it makes in favor of the new provincial legislatures.

"The second of these exceptions has really no bearing on the present case, because it comprises nothing beyond the revenues which provincial legislatures are empowered to raise

[7] See *ante*, p. 108 *et seq.*
[8] See *ante*, p. 626.
[9] See *post*, p. 695 (navigation) and p. 712 (fisheries).
[10] *Mercer's Case*, 8 App. Cas. 767; 52 L. J. P. C. 84.
[1] 14 App. Cas. 96; 58 L. J. P. C. 54.

by means of direct taxation for provincial purposes in terms of section 92 (2). The first of them, which appears to comprehend the whole sources of revenue reserved to the provinces by section 109, is of material consequence." After quoting this section at length, the judgment proceeds: "In connection with this clause it may be observed that by section 117 it is declared that the provisions shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject matter of the first exception, and the property which is directly appropriated to the provinces; but it hardly admits of doubt that the interests in land, mines, minerals, and royalties, which by section 109 are declared to belong to the provinces, include, if they are not identical with, the 'duties and revenues' first excepted in section 102." [2]

In *Mercer's Case* the question was left undecided whether "royalties" other than those connected with lands, mines, and minerals, were covered by this section; it was held that the section at all events reserved to the provinces all royal rights, "*jura regalia omnia ad fiscum spectantia*," connected with those three subjects. In a later case the Committee held that a statutory grant by the province of British Columbia to the Dominion of "public lands" was, in substance, an assignment merely of its right to appropriate the territorial revenues arising therefrom and could not, in the absence of express words, be construed as a transfer of the precious metals under such lands, the revenues derivable therefrom not being incident to

[2] The scheme of division of assets, &c., effected by Part VIII., has been exhaustively discussed in *Mercer's Case*, 8 App. Cas. 767; 52 L. J. P. C. 84; and the *St. Catharines Milling Co.'s Case*, *ubi supra;* and (as to the apportionment of liabilities) in the *Indian Claims Case* (1897), A. C. 199; 66 L. J. P. C. 11. As to the power of appropriation possessed by the provincial legislatures prior to Confederation: see *ante*, p. 325, *et seq.*

the land (as are mines of baser metal), but revenues arising from the prerogative rights of the Crown, which, under the word "royalties," passed to the provinces by force of section 109.[3] In one case Mr. Justice Street held that the right to grant a license to operate a ferry between an Ontario port and a United States port is a "royalty" which is reserved to the province by this section, notwithstanding the fact that legislative power over such ferries is with the federal parliament;[4] but this view was not taken by the Supreme Court of Canada upon a later reference to that Court of certain questions concerning international ferries.[5] Mr. Justice Nesbitt, after reviewing the cases noted above, said:

"I do not find any Court has laid down the rule that a mere right to create something, a mere authority to bring into being a corporate entity or privilege or anything of that character for which a fee could be charged is a 'royalty' within section 109, but I would rather place such a right under sections 12 and 108 than under 109."

Section 109 expressly provides that provincial ownership of Crown lands is "subject to any

[3] *Precious Metals Case*, 14 App. Cas. 295; 58 L. J. P. C. 88. The holding in the *Liquidators' Case* (1892), A. C. 437; 61 L. J. P. C. 75), that the prerogative right of the Crown to claim priority for debts due the Crown over the claims of private creditors is a prerogative right vested in the Lieutenant-Governor of a province so far as relates to debts due the Crown as representing such province, would appear to show that it was not necessary to rely solely upon the word "royalties" as vesting in the provinces (or in the Lieutenant-Governors as chief executive officers thereof) the Crown's prerogative rights in connection with lands escheated for want of heirs.

[4] *Perry* v. *Clergue*, 5 Ont. L. R. 357.

[5] *Re International Ferries*, 36 S. C. R. 206. Sedgewick and Girouard, JJ., concurred in the opinion of Nesbitt, J. The Chief Justice (Sir Elzear Taschereau), put the right to license an international ferry on section 102. See *ante*, p. 359 *et seq.*, as to the principle upon which the Crown's prerogatives are distributed by the British North America Act.

trusts existing in respect thereof and to any interest other than that of the province in the same." These expressions, it was said by Lord Watson speaking for the Privy Council,

"appear to their Lordships to be intended to refer to different classes of right. Their Lordships are not prepared to hold that the word 'trust' was meant by the legislature to be strictly limited to such proper trusts as a Court of equity would undertake to administer; but, in their opinion, it must at least have been intended to signify the existence of a contractual or legal duty, incumbent upon the holder of the beneficial estate or its proceeds, to make payment out of one or other of these of the debt due to the creditor to whom that duty ought to be fulfilled. On the other hand 'an interest other than that of the province in the same' appears to them to denote some right or interest in a third party independent of and capable of being vindicated in competition with the beneficial interest of the old province."[6]

In the judgment from which the above extract is taken the Privy Council dealt with a claim put forward by the Dominion and the province of Quebec against the province of Ontario in respect of the burden of certain annuities which the old province of Canada had in 1850 agreed to pay to certain Ojibeway Indians as the consideration, in part, for the surrender by the Indians of their 'title' to large tracts of land on the shores of Lakes Huron and Superior. These lands after Confederation were exclusively within Ontario; and it was contended that the right of the Indians to be paid the annuities constituted an "interest other than that of the province" in the surrendered lands, or, at all events, that the lands were subject to a trust "existing in respect thereof." There was nothing in the language of the Treaties to charge the annuities either upon lands themselves or even upon

[6] *Indian Claims Case* (1897), A. C. 199; 66 L. J. P. C. 11; sometimes referred to as the *Robinson Treaties' Case.*

the revenues to be derived from their sale to settlers and others; and under these circumstances the Privy Council held that there was clearly no interest other than that of the province in the surrendered lands and, moreover, that no trust could be said to exist in respect of them. The obligation to pay the annuities was an ordinary government debt to be adjusted as between the Dominion and the two provinces in the manner contemplated by other sections of the British North America Act, and not charged to Ontario alone. With regard to surrenders made since Confederation it has been held, as already intimated,[7] that the Dominion acts upon its own constitutional responsibility in arranging treaties of that character with the Indians and has no legal claim to contribution from the province in which the lands may lie, although such province undoubtedly reaps a peculiar benefit by the extinction of the Indian "title."

The Indian Title.

The proclamation which followed upon the Treaty of Paris (1763) contained provisions designed to protect the aborigines "in the possession of such parts of our dominions and territories as, not having been ceded to us, are reserved to them or any of them as their hunting grounds." To this end the governors of Quebec, East Florida, and West Florida were forbidden to issue patents for unsurrendered lands and it was further declared—

"to be our Royal will, for the present as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the lands and territories not included within the limits of Our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company."[8]

[7] See *ante*, p. 390 *et seq.*

[8] See *post*, p. 847 *et seq.*, as to the Hudson's Bay territory.

The nature of the interest thus recognized has been the subject of much controversy; and in the *Indian Lands Case*[9] the Privy Council declined to express any opinion as to the "precise quality of the Indian right." The majority of Canadian judges had intimated the opinion that the title or interest of the Indians was one which could not come into competition with a Crown grant in the issue of which the Indian "title" had been ignored.[10] In the judgment of the Privy Council, however, the Indian title to unsurrendered lands was expressly stated to be an "interest other than that of the province in the same" within the meaning of section 109; and that phrase is defined in the *Robinson Treaty Case*[1] as denoting "some right or interest in a third party independent of and capable of being vindicated in competition with the beneficial interest" of a province. And in the same case it is stated that these lands become available to the province "as a source of revenue whenever the estate of the Crown is relieved of the Indian title."

The controversy in the eastern provinces may be considered as closed; the middle provinces do not own the public lands; and even in British Columbia where, it is suggested, the proclamation of 1763 does not apply and where the Indian "title" has been denied and almost completely disregarded, an effort is being made to adjust the whole matter amicably not only as between the Dominion and the province but also as regards the interests

[9] *St. Cath. Milling Co.* v. *R.*, 14 App. Cas. 46; 58 L. J. P. C. 54.

[10] Boyd, C, (10 Ont. R. 196); Hagarty, C.J.O., Burton and Osler, JJ.A. (13 Ont. App. R. 148). Ritchie, C.J., Fournier, Henry, and Taschereau, JJ., (13 S. C. R. 577). Strong, J., put the right on higher ground, and it has been suggested that his view is that which accords most nearly with that taken by the Privy Council.

[1] (1897), A. C. 199; 66 L. J. P. C. 11; extract *ante*, p. 632.

of the Indian tribes. The subject therefore does not seem to call for extended treatment.

While declining to express an opinion as to the "precise quality of the Indian right" under the proclamation Lord Watson described it as

"a personal and usufructuary right dependent upon the good will of the Sovereign. . . . There has been all along vested in the Crown a substantial and paramount estate underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished." [2]

The traditional policy, as stated in the proclamation of 1763, had been universally followed. No Crown grants issued until a treaty of surrender had been negotiated. From time to time Indian tribes had surrendered their title to portions of the reserved territory, usually upon terms which secured to them a more definite right of occupation of some small subdivision of it. These smaller tracts were known as "Indian reserves." In the view of Canadian Courts the phrase "lands reserved for the Indians" (section 91, No. 24) applied only to these, and not to the larger indefinite areas covered by the proclamation of 1763; but this view was distinctly negatived by the Privy Council. The power of the Dominion government is a power of legislation and administration in respect of Indians, and the lands reserved for them over both these larger areas and the more restricted areas of the "Indian reserves" (so called) until the surrender and extinguishment of the Indian title.[4] The Crown's title and the effect of a surrender is thus put:

[2] *St. Catharines Milling Co.* v. *R.*, 14 App. Cas. 46; 58 L.J.P.C. 59.
[3] *Church* v. *Fenton*, 5 S. C. R. 239; 4 O. A. R. 150; 28 U. C. C. P. 384.
[4] *St. Catharines Milling Co.* v. *R.*, *ubi supra.*

"Prior to that surrender the province of Ontraio had a proprietary interest in the land under the provisions of section 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title and, upon the extinguishment of that title by the surrender, the province acquired the full beneficial interest in the land, subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty." [5]

Section 91, No. 24, confers legislative power only and does not in any way operate to "vest in the Dominion any proprietary right in such lands or any power by legislation to appropriate lands, which by the surrender of the Indian title had become the free public lands of the province, as an Indian reserve in infringement of the proprietary rights of the province." The treaty of 1873 in question in the earlier case provided for the setting aside of smaller areas as Indian reserves. Afterwards parts of these smaller areas were in their turn surrendered to the Crown under the Indian Act, 1880, upon trust to sell the same and invest the proceeds for the benefit of the Indians concerned. But, in the words of Mr. Justice Street,

"the act of the Dominion officers in purporting to select and set aside out of it certain parts as special reserves for Indians entitled under the treaty, and the act of the Dominion government afterwards in founding a right to sell these so-called reserves upon the previous acts of their officers, both appear to stand upon no legal foundation whatever. The Dominion government, in fact, in selling the land in question was not selling 'lands reserved for Indians' but was selling lands belonging to the province of Ontario."

The Privy Council upheld this view [6] and a Dominion patent for the lands in dispute was held

[5] *Ontario Mining Co.* v. *Seybold* (1903), A. C. 73; 72 L. J. P. C. 5; sometimes spoken of as the *Special Reserves Case*.

[6] *Special Reserves Case* (1903), A. C. 73; 72 L. J. P. C. 5; 32 S. C. R. 1; 32 Ont. R. 301; 31 Ont. R. 386.

invalid and title under a provincial patent was upheld.

The result is, as intimated on a previous page,[7] that the Indian interest can be practically dealt with only by the co-operation of the two governments. A treaty of surrender can be negotiated only by the Crown in right of the Dominion. This is the view of the majority of the judges of the Supreme Court of Canada as expressed in the *Indian Treaties (Indemnity) Case*[8] and is indicated in the following passage from the judgment of the Privy Council in the same case:

> "The Crown acts on the advice of ministers in making treaties and in owning public lands holds them for the good of the community. When differences arise between the two governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two governments are separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively."

Executive action must be grounded on legislative jurisdiction in this as in all other matters.

On the other hand, the usual provision for smaller special reserves with larger propriety rights therein on the part of the Indians can only be made by the province at the request and with the concurrence of the Dominion.

There is no reported case in Canada of any action by or on behalf of any Indian or tribe of Indians to vindicate, as Lord Watson puts it, the Indian "title" in competition with the beneficial interest of a province or its grantee. Probably none

[7] See *ante*, p. 394.

[8] (1910), A. C. 637; 80 L. J. P. C. 32; 42 S. C. R. 1. See also *per* Rose, J., in *Caldwell* v. *Fraser*, as reported in *Macpherson & Clark's* Law of Mines, p. 15.

would lie;[9] but there are *dicta* to the effect that there is no right to sell until after surrender of the Indian title.[10]

[9] See *Te Teira* v. *Te Roera Tareha* (1902), A. C. 56; 71 L. J. P. C. 11.

[10] For example, *per* Rose, J., in *Caldwell* v. *Fraser:* see note (8), *ante*, p. 637. Other cases which may be referred to on the general subject are *Mowat* v. *Casgrain* (1896), R. J. S. 6 Q. B. 12; *Corinthe* v. *St. Sulpice, &c.* (1912), A. C. 872; 82 L. J. P. C. 8; *Doe d. Burk* v. *Cornier* (1890), 30 N. B. 147 (as to operation in New Brunswick of the proclamation of 1763). And see also *Hodgins*, Provl. Legislation, 1254, 1024.

CHAPTER XXX.

Taxation.

The following sections of the British North America Act bear directly upon taxation:

VI. Distribution of Legislative Powers.

Powers of the Parliament.

91. . . . 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:— . . .

3. The raising of money by any mode or system of taxation. . . .

8. The fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada. . . .

Exclusive Powers of Provincial Legislatures.

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say:— . . .

2. Direct taxation within the province in order to the raising of a revenue for provincial purposes. . . .

4. The establishment and tenure of provincial offices and the appointment and payment of provincial officers. . . .

9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes. . . .

VIII. Revenues, Debts, Assets, Taxation.

121. All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the union, be admitted free into each of the other provinces.

125. No lands or property belonging to Canada or any province shall be liable to taxation.[1]

Plenary Powers:—It is beyond the scope of this work to specify and distinguish the various methods to which a legislature possessed of plenary powers may resort in order to the raising of the monies required for carrying on the work of government. It will be necessary, indeed, in dealing with provincial powers of taxation to discuss to some extent the question as to the incidence of taxation, that is to say, whether a tax can or cannot be said to be imposed upon property or transactions as distinct from some person interested in the property or concerned in the transactions aimed at or made the basis of provincial taxation; but beyond that necessary enquiry very little if any attempt will be made to classify the various possible modes of taxation. Subject to the restrictions indicated in the above sections, some of which apply to all Canadian governments, federal as well as provincial, and some to provincial taxation only, the power to impose taxation, like every other legislative power conferred by the British North America Act, is the plenary power of a sovereign legislature.[2] That

[1] Sections 122, 123, and 124, were of temporary operation only. They may be read in the Appendix. There are three other sections of the Act touching taxation, namely, sections 53 and 54 (federal) and section 90 (provincial); but they enact rules of parliamentary procedure only. Tax Acts must originate in the popular chamber and be recommended by message from the Governor-General or Lieutenant-Governor, as the case may be.

[2] See *ante*, p. 349. As to taxation of foreign-built ships on application for British registry in Canada, see *ante*, p. 214.

these powers may possibly be abused is no argument against their existence.[3] The possible result under a federal system is an inconvenient liability to double taxation. For example, as the Privy Council has pointed out,[4] both the Dominion parliament and a provincial legislature may, each for its own purposes, impose a tax by way of license as a condition of the right to fish; and possible instances might be multiplied indefinitely. The difficulties arising from such taxation of the same subject matter and within the same area by different authorities would no doubt, as the Board observed, be obviated in practice by the good sense of the legislatures concerned.[5] And provincial powers of taxation are not to be curtailed through fear of their injurious operation upon subjects committed to the Dominion parliament;[6] and the converse proposition is undoubtedly true. Then, again, there is no rule or limitation that taxation, federal or provincial, under the British North America Act must be uniform or without discrimination.[7]

Provincial Taxation of Federal Officers:—In an early case in Ontario[8] it was held that provincial powers of taxation do not extend over the salaries of the executive staff of the Dominion; and this until recently was the generally accepted view. The decisions were based not so much upon the limited

[3] See *ante*, pp. 481-2.

[4] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90.

[5] See also *R.* v. *Neiderstadt*, 11 B. C. 347.

[6] *Lambe's Case*, 12 App. Cas. 575; 56 L. J. P. C. 87.

[7] See *ante* p. 358, where the cases are cited.

[8] *Leprohon* v. *Ottawa*, 2 O. A. R. 522 (reversing 40 U. C. Q. B. 490, where will be found strong arguments in support of the contrary view); *R.* v. *Bowell*, 4 B. C. 498; *Ex p. Owen*, 4 P. & B. 487; *Ackman* v. *Moncton*, 24 N. B. 103; *Coates* v. *Moncton*, 25 N. B. 605; *Ex p. Burke*, 34 N. B. 200. But see *Fillmore* v. *Colburn*, 28 N. S. 292, noted *infra*.

range of No. 2 of section 92, "direct taxation within the province," as upon the broader grounds of public policy which underlie a federal system such as obtains in Canada; that a provincial legislature has no power to impose a burden upon the instruments by which the government of the Dominion is carried on.[9] Upon the same avowed principle it has been held that Dominion officials cannot be ordered to pay a judgment by instalments under provincial Acts,[10] and that their salaries cannot be attached or made exigible in execution under such Acts;[1] but these decisions, it may be noted, really rest upon a different footing.

But in a case from Australia[2] the Privy Council in 1906 held that the incomes of Commonwealth officials were liable to State taxation; and, following that decision, the Supreme Court of Canada in 1908 held that the same principle applied to warrant provincial taxation of the incomes of Dominion officials.[3] The judgment, however, does not touch the larger question as to the power of a provincial legislature to affect directly the salary payable by the Crown by provisions designed to intercept it and prevent its receipt by the officer to

[9] This decision was based largely upon authorities in the United States Courts, as to which see *ante*, p. 397. In the second edition of this book this comment was added: "Whether these decisions can stand in face of *Lambe's Case* (12 App. Cas. 575; 56 L. J. P. C. 87) is questionable. The argument *ab inconvenienti* is weakened by the fact that for provincial officers there is no escape from the burden of federal tariffs. In *Fillmore* v. *Colburn* (1896), 28 N. S. 292, performance of statute labour was enforced against a sectionman on the Intercolonial (Government) Ry. by the Supreme Court of Nova Scotia."

[10] *Ex p. Killam*, 34 N. B. 586.

[1] *Evans* v. *Hudon*, 22 L. C. Jur. 268; 2 Cart. 346.

[2] *Webb* v. *Outrim* (1907), A. C. 81; 76 L. J. P. C. 25.

[3] *Abbott* v. *St. John (City)*, 40 S. C. R. 597. In the dissenting judgment of Girouard, J., is a statement as to the view taken in Australia of the decision in *Webb* v. *Outrim*. See *ante*, p. 575, note.

to whom it is due. Such provisions could, it is conceived, be enacted by the federal parliament only. But the judgment does affirm that the amount payable may be properly made the basis of a provincial tax upon the income of a federal official. The converse proposition, that a federal tax might be imposed based on the income of a provincial official and in that sense on the income itself, would be an *a fortiori* one.

Taxation of Crown Property:—The constitutional restriction imposed by section 125 applies to both federal and provincial governments; but the only cases in which it has been invoked are cases in which provincial taxation, either general or municipal, has been questioned. The section, it is conceived, was unnecessary. It was not intended to affect the general rule as to the exemption of Crown property from taxation as that rule is to be applied, for example, in England or in a colony under one legislature only.[4] It was inserted by way of abundant caution to prevent the Dominion from levying taxes for federal purposes upon property held by the Crown for provincial purposes, and *vice versa*. It would operate no doubt to exempt from custom's duties goods purchased abroad by a provincial government, though there is no reported case on this point.

With reference to provincial taxation, it has recently been held by the Supreme Court of Canada that the section protects the Crown's interest only, and does not operate to prevent a province from taxing, or from authorizing a municipality to tax, the beneficial interest of any private person or cor-

[4] The latest English case is *Wixon* v. *Thomas* (1912), 1 K. B. 690; 80 L. J. K. B. 686 (C.A.).

poration.[5] Of course, as put by Mr. Justice Idington, the beneficial estate or interest privately owned "is all that is touched and all that becomes forfeitable or forfeited if not redeemed." Mr. Justice Anglin states it more precisely, thus:

"Full effect is given to section 125 of the British North America Act, 1867, by holding that it precludes the taxation of whatever interest the Crown holds in any land or property and that, so long as such interest subsists, the taxation of any other interest in the land and any sale or other disposition made of it to satisfy unpaid taxes, while valid, is always subject to the rights of the Crown which remain unaffected thereby."

In that case the lands in question formed part of a land subsidy granted by the Dominion Government under federal Act to a railway company, and at the time the provincial tax was imposed the Crown was a bare trustee, the lands having been "earned" by the company and duly set apart for it, though no Crown grant had yet issued. But the principle of the decision covers any beneficial interest, legally recognizable, in any person in land or property, notwithstanding that some beneficial interest as well as the legal title still remains in the Crown; and therefore upholds provincial taxation of homestead and pre-emption interests. This had been the view taken in the courts of the North-West Territories,[6] where the question was obviously of far-reaching importance, and afterwards in the provinces of Alberta and Saskatchewan; though the principle as now affirmed is, of course, of universal application in all the provinces.

This decision has very recently been re-affirmed and the principle of it held to cover the case of an

[5] *Calgary & Edmonton Land Co.* v. *Atty.-Gen. of Alberta* (1911), 45 S. C. R. 171.

[6] *Osler* v. *Colthart*, 7 Terr. L. R. 99.

interest in federal Crown lands in Saskatchewan held under grazing leases or licenses from the Minister of the Interior issued under federal legislation.[7] It was suggested that the lessee or licensee was a non-resident of the province, and this phase of the case will call for discussion later.[8]

In an earlier case in 1885 the Supreme Court of Canada had held that lands under lease to the Dominion Government for military purposes could not be taxed for municipal purposes by the city of Montreal;[9] but, although that case is mentioned and not criticized in the later case above discussed, it seems difficult to reconcile the two decisions. Certain pre-confederation statutes of Lower Canada were relied on and it may be that they were sufficient to exempt the owner's interest as well as that of the Crown; or it may be that the taxation purported to be in respect of occupation merely and not a tax on the land, as to which the report is not clear. That a municipality may not enforce contribution to municipal expenditures from an owner of property who, as Mr. Justice Strong put it, is fortunate enough to have the Crown as his tenant, would seem an untenable proposition, unless, indeed, the municipality is restricted by its charter to the levy of an occupation rate merely. Section 125 uses the expression "belonging to"; and the landlord's reversionary interest could not by any stretch of language be said to belong to the Crown.

The city of Quebec endeavoured to recover from the Dominion the cost of sidewalks laid in front of federal Crown lands in that city; but it appearing that no contractual relationship existed and that the cost had been assessed in the usual way against

[7] *Smith* v. *Vermilion Hills* (1914), 49 S. C. R. 563.
[8] See *post*, p. 681.
[9] *Atty.-Gen. of Canada* v. *Montreal* (1885), 13 S. C. R. 352.

the lands the city's petition of right was dismissed.[10] On the other hand the Court of Appeal for Ontario held the federal government liable to pay city water rates as being the price charged for a commodity furnished.[1]

Interprovincial Trade:—There is no instance reported of any attempt by any province to lay a tax upon imports from or exports to another province. The former would, of course, be indirect taxation; the latter might be direct taxation and might, moreover, be held not to fall within the letter of the restriction imposed by section 121 of the British North America Act as it appears at the beginning of this chapter. It has been held by the Court of Appeal for Ontario that a province in dealing with its public lands and the timber and wood thereon (section 92, No. 5) may impose such conditions as it sees fit upon purchasers and licensees even to the extent of prohibiting exportation from the province.[2] And provincial game laws may also go so far as to prohibit exportation.[3] But these were not really fiscal Acts.

In the *Local Prohibition Case*[4] the question was propounded: "Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province?" The answer of the Privy Council, as printed in the reports, was:

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[10] *Quebec (City)* v. *R.* (1886), 2 Exch. Ct. R. 450 (Fournier, J.).

[1] *Atty.-Gen.* v. *Toronto*, 18 O. A. R. 622. For other cases in which section 125 is discussed, see *Church* v. *Fenton*, 5 S. C. R. 239; *Quebec* v. *Leacraft*, 7 Que. L. R. 56 (see 13 S. C. R. 358); *R.* v. *Wellington*, 17 O. A. R. 421; *sub nom. Quirt* v. *R.*, 19 S. C. R. 510, as explained by Anglin, J., in 45 S. C. R. at p. 189 *et seq.*

[2] *Smylie* v. *R.*, 27 Ont. App. R. 172; 31 Ont. R. 202.

[3] *R.* v. *Boscowitz*, 4 B. C. 132; *R.* v. *Robertson*, 13 Man. L. R. 613.

[4] (1896), A. C. 348; 65 L. J. P. C. 26.

"Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion parliament."

But as recited in the formal Order-in-Council the report of the Board appears to have stated that

there might be circumstances in which a provincial legislature might have jurisdiction to prohibit the manufacture within the province of intoxicating liquors and the importation of such liquors into the province.[5]

What those circumstances might be is nowhere expressly stated. In the *Manitoba Liquor Act Case*,[6] it was unnecessary to carry the enquiry further for the provincial Act there in question did not prohibit importation, for it expressly excepted from the operation of the Act "*bona fide* transactions in liquor between a person in the province of Manitoba and a person in another province or in a foreign country"; and this provision was, as the Board expressed it, as much part of the Act as any other section contained in it. The Act would if effective manifestly interfere with the revenue of the Dominion, with licensed trades in the provinces and indirectly cut off much interprovincial business; but this was held to be no good reason for limiting provincial jurisdiction so long as the Act dealt with the liquor traffic as a local provincial evil. Section 121, which apparently contemplates interprovincial free trade, is not referred to in either of the above cases and the reference in the first extract to a possible trenching upon federal jurisdiction had evidently in view section 91, No. 2, "the regulation of trade and commerce." Section 121 contains a pro-

[5] This quotation is from the case cited in the next note.
[6] (1902), A. C. 73; 71 L. J. P. C. 28.

vision which would operate to restrict federal legislation as well as provincial. But it is a tax or revenue clause merely as the group heading indicates,[7] and would not, it is conceived, affect federal or provincial legislation not of a fiscal character.

Provincial Powers of Taxation.

Apart from the restrictions above indicated, which apply to limit the range of federal as well as of provincial taxation, provincial power is subject to two expressed limitations. First, the taxation must be "*direct* taxation"; a substantial and reasonable restriction. Secondly, it must be taxation "within the province"; a substantial restriction in this sense only, that the inability of any state to enforce abroad its fiscal legislation is obviously matter of substance, but a restriction which is unreasonable if interpreted as being more than the natural, and, as it were, casual expression of a universal limitation upon the power of a modern state. Neither of these two limitations was introduced to define the boundary line between federal and provincial powers of taxation; for, as already pointed out,[8] the two heads of sections 91 and 92 respectively which confer the power to tax do not come into competition at all. That power is the necessary adjunct of any independent government and was conferred upon all the governments established under the British North America Act. The third phrase, therefore, "in order to the raising of a revenue for provincial purposes" is but the casual

[7] See *ante*, p. 305. In *Re Provincial Companies* 48 S. C. R. at pp. 378-9, Idington, J., after quoting sec. 121, treats the word "free" as if it were "freely." "Interprovincial trade and commerce was to flow thereafter as freely as if its right to do so had been declared by an organic law." This appears too wide; "free" means, it is submitted, "free of taxation."

[8] *Ante*, p. 458.

statement of a limitation which would exist in any case. And the same is true, it is conceived, of the phrase "within the province," but upon this proposition a careful examination of the authorities is necessary, and in this connection the earlier chapter dealing with the doctrine of exterritoriality[9] should be consulted. It is advisable to keep the two limitations distinct as far as possible; but to some extent the authorities overlap, as will appear. It is proposed therefore to examine the cases before the Privy Council in their order.

First, however, it should again be noted that the third phrase "in order to the raising of a revenue for provincial purposes" was construed by the Privy Council in one of the earliest cases which came before it under the British North America Act as authorizing direct taxation for a local purpose upon a particular locality within the province and was not limited to taxation which should be incident on the whole province for the general purposes of the whole province.[10] In that case the tax necessary to pay a local *bonus* was directly imposed by the Act impugned, but, bearing in mind the principle of *Hodge* v. *The Queen*[1] as to the delegation of power, the decision in *Dow* v. *Black* is sufficient warrant for the whole system of municipal taxation now operative throughout Canada. Had the construction contended for prevailed, the taxing powers of a municipality would have been cut down to license fees under section 92, No. 9; and direct subsidies from the provincial governments must have been resorted to, if indeed that method could have been upheld as being for the general benefit and purposes of the whole province.

[9] Chap. VII., *ante*, pp. 65, 75.
[10] *Dow* v. *Black*, L. R. 6 P. C. 272; 44 L. J. P. C. 52.
[1] See *ante*, p. 350.

And municipalities may be ordered to contribute toward provincial expenditures within their limits.[2]

Direct Taxation:—In the latest case on the subject[3] Lord Moulton, delivering the judgment of the Privy Council, said:

"The language of this provision of the British North America Act, 1867, marks an important stage in the history of the fiscal legislation of the British Empire. Until that date the division of taxation into direct and indirect belonged solely to the province of political economy, so far as the taxation in Great Britain or Ireland or in any of our Colonies is concerned; and, although all the authors of standard treatises on the subject recognized the existence of the two types of taxation, there cannot be said to have existed any recognized definition of either class which was universally accepted. Each individual writer gave his own description of the characteristics of the two classes, and any difference in the descriptions so given by different writers would necessarily lead to differences in the delimitation of the two classes, so that one authority might hold a tax to be direct which another would class as indirect. But, so long as the terms were used only in connection with the theoretical treatment of the subject, this state of things gave rise to no serious inconvenience. The British North America Act changed this entirely. "Direct taxation" is employed in that statute as defining the sphere of provincial legislation, and it became from that moment essential that the Courts should, for the purposes of that statute, ascertain and define the meaning of the phrase as used in such legislation."

The decisions of the Privy Council bearing on the question up to the date of the judgment are then reviewed, and this passage follows:

"Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase

[2] *Atty.-Gen. of B. C.* v. *Victoria*, 2 B. C. 1.
[3] *Cotton* v. *R.* (1914), A. C. 176; 83 L. J. P. C. 105.

'direct taxation' in sec. 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill, and that this question is no longer open to discussion."

The definition referred to is in the following terms:

"A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

In the earliest case in which the subject came before the Privy Council[4] it was held that a province cannot under the guise of a license fee impose indirect taxation; in other words, that it cannot make what is in substance indirect taxation direct taxation by calling it a license fee. The legislature of Quebec passed an Act providing for the issue of licenses to insurance companies doing business in the province. Nothing was to be paid on the issue of the license, but on the issue of any policy by an insurance company stamps were to be affixed to an amount varying with the amount of the premium. This was held by the Privy Council to be not a license, but a stamp duty on policies. In the latter view it was held to be indirect taxation. In arriving at the meaning to be attributed to the words "direct taxation" the Committee pointed out that they may have a technical (economical or legal) or popular meaning. No attempt was then made to decide this question,[5] because it was held that, by whichever key interpreted, a stamp duty, such as was imposed by the Act, was not direct taxation.

[4] *Atty.-Gen. of Quebec* v. *Queen Ins. Co.*, 3 App. Cas. 1090. See *ante*, p. 487.

[5] Afterwards settled by *Lambe's* Case, noted *infra*.

In the next case[6] a duty payable in stamps upon papers filed in Court in the course of litigation was held to be indirect taxation for reasons thus stated:

"Can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very persons who it is intended or desired should pay it? It must be paid in the course of the legal proceeding, whether that is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain; and from the very nature of such proceedings until they terminate, as a rule, and speaking generally, the ultimate incidence of such a payment cannot be ascertained. In many proceedings of a friendly character, the person who pays it may be a trustee, an administrator, a person who will have to be indemnified by somebody else afterwards. In most proceedings of a contentious character, the person who pays it is a litigant, expecting or hoping for success in the suit, and whether he or his adversary will have to pay it in the end must depend on the ultimate termination of the controversy between them. The legislature in imposing the tax cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon anyone else. Therefore it cannot be a tax demanded 'from the very persons who it is intended or desired should pay it;' for, in truth, that is a matter of absolute indifference to the intention of the legislature. And, on the other hand, so far as relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified; and the law which exacts it cannot assume that that expectation and intention may not be realized. As in all other cases of indirect taxa-

[6] *Atty.-Gen. of Quebec* v. *Reed*, 10 App. Cas. 141; 54 L. J. P. C. 12. As to the method adopted in Manitoba to get over this decision, see *post*, p. 665. It is systematically ignored in some at least of the other provinces.

tion, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the second section of the ninety-second clause of the Act in question."

With this description of indirect taxation may be compared that of direct taxation as given in *Lambe's Case*[1] in which a tax imposed upon banks which carry on business within a province, varying in amount with the paid-up capital, and with the number of its offices, was held to be direct taxation.

"First, is the tax a direct tax? For the argument of this question, the opinions of a great many writers on political economy have been cited. . . . But it must not be forgotten that the question is a legal one, namely, what the words mean as used in this statute; whereas the economists are always seeking to trace the effects of taxation throughout the community, and are apt to use the words 'direct' and 'indirect' according as they find the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the tax-payers or by private bargains about its payment. Doubtless such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's defini-

[1] 12 App. Cas. 575; 56 L. J. P. C. 87.

tion will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

"After some consideration, Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. The definition is as follows: (as quoted on p. 651 *ante*).

"It is said that Mill adds a term, that, to be strictly direct, a tax must be general, and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point, nor would they presume to say whether, for economical purposes, such a condition is sound or unsound, but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

"Their Lordships, then, take Mill's definition, above quoted, as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellants' counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious *indicia* of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act.

"Now, whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. It is not like a customs' duty

which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid and intended to be paid by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank, apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one. The amount of recoupment cannot bear any direct relation to the amount of tax paid, and, if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec government."

In 1897, a provincial Act requiring brewers and distillers to take out a license and pay a fee thereon was held by the Privy Council to be direct taxation, being demanded, in the opinion of the Board, from the very persons whom the legislature desired to tax, with no intention or expectation that the burden would fall on other shoulders.[8]

In 1902 the range of the Quebec Succession Duty Act (1892) was in question before the Board. The province claimed to collect the duty in respect of property locally situate in the province but being part of the estate of a person who had died domiciled in Ontario.[9] Applying the rule of restrictive

[8] *Brewers' Case* (1897), A. C. 231; 66 L. J. P. C. 34.
[9] *Lambe* v. *Manuel* (1903), A. C. 68; 72 L. J. P. C. 17.

interpretation laid down by the English Courts as applicable to such Acts,[10] the provincial Courts had held that only property which the successor claims under and by virtue of Quebec law was touched by the statute and the Privy Council sustained this view.

In 1911, the question before the Board was as to the New Brunswick Succession Duty Act.[1] The province claimed—just as the province of Quebec had claimed in the case last noted—to collect the duty in respect of property situate in the province, but forming part of the estate of a person who died domiciled in Nova Scotia. It was contended that the rule of restrictive interpretation should be applied; but the Board held that while the rule or principle that personal property (*mobilia*) is supposed to accompany the person of its owner was a just and expedient rule as between nations and had been given full effect in the construction of taxing statutes both English and colonial, nevertheless its application might be excluded by the use of apt and clear words in a statute for the purpose, and that this had been done by the New Brunswick statute. The legislature of New Brunswick, it was held, had full authority to disregard the international rule. It was further contended that the tax was really a tax on the succession which had taken place in Nova Scotia under Nova Scotia law and that it was not therefore taxation "within the province." As to this their Lordships held that the mere calling of the tax a succession duty did not alter the fact that it was by the Act laid on the *corpus* of the property and that its payment was made a condition of the grant of ancillary probate by the New Brunswick Courts, under which alone

[10] See *ante*, p. 76; also the next case.

[1] *R.* v. *Lovitt* (1912), A. C. 212; 81 L. J. P. C. 40.

the executors were entitled to collect the debt in the province. As the next case indicates, these features were wanting in the Quebec statute in question in *Lambe* v. *Manuel*.[1a]

The latest case is *Cotton* v. *R.*[1b] from which the Board's judgment in the first of the above extracts is taken, substantially adopting as the legal definition of "direct taxation" the economic definition of John Stuart Mill. The Quebec Succession Duty Act in question in that case provided that:

> "All transmissions, owing to death, of the property in, usufruct or enjoyment of, moveable or immoveable property in the province shall be liable to the following taxes, calculated upon the value of the property transmitted, &c."

And the method of collection is thus described by Lord Moulton:

> "There is nothing corresponding to probate in the English sense; but there is an obligation on 'every heir, universal legatee, legatee by general or particular title, executor, trustee, and administrator, or notary before whom a will has been executed' to forward within a specified time to the collector of provincial revenue a complete schedule of the estate, together with a declaration under oath setting forth various matters relating thereto."

A declaration by one relieved the others; but the declarant, whoever he might be—in most cases, as the Board understood, the notary before whom the will had been executed—could be sued for the amount of the duty as fixed by the Act. No title was to vest in any beneficiary if the taxes were unpaid. The property in regard to which the dispute had arisen as to the right of the province to exact the duty was personal property actually situate outside the province, though the deceased had

[1a] See *ante*, p. 655.
[1b] (1914) A. C. 176; 83 L. J. P. C. 105; *ante*, p. 651.

died domiciled in the province. Where the beneficiaries lived does not appear. Their Lordships disregarded again the tax upon the "transmission" and in view of the obligation imposed upon the declarant held that the tax was indirect, not being demanded from the person intended to bear it but from some one—not necessarily nor even usually a person beneficially entitled to any part of the estate transmitted—who was expected to recoup himself "from the assets of the estate or more accurately, from the persons interested therein."

This disregard by the Board of the expressly laid tax upon "transmission," following upon the view expressed in *Lovitt's Case* that to call a tax a succession duty did not relieve the Court of the duty to examine the actual incidence of the tax, brings both cases into line with the earlier case in which a so-called Insurance "License" Act was held to be in its actual operation a stamp Act and, as payable, indirect taxation.[2] In the *Cotton Case* one example of the actual operation of the Act was indicated, from which it may be argued that the Board was of opinion that in no case and by no method could a provincial legislature tax property situate abroad to which a person resident abroad might succeed upon the death of a domiciled inhabitant of the province. In that case under the Quebec Act the province would be collecting from the declarant a tax which, it was premised, could be collected in no other way. But if the beneficiary, in order to get possession abroad, were obliged to procure probate or letters of administration from the provincial Courts, either himself or through executors or other administrators, there is nothing apparently to weaken the principle laid down in

[2] *Atty.-Gen. of Quebec* v. *Queen Ins. Co.* (1878), 3 App. Cas. 1090. It is to be noted, however, that this case is not mentioned in the judgment in *Cotton* v. *R.*

Lovitt's Case that the province as a condition of the grant could exact a duty, the amount of which could be fixed on any basis thought proper; for example, the total value of the property left by the deceased regardless of its local situation. The judgment in *Cotton's Case* is apparently based on a strict view of the actual obligation to pay as fixed by the statute;[3] and the phrase discussed was "direct taxation" only and not the phrase "within the province." Lord Moulton's statement that:

> "Indeed the whole structure of the scheme of these succession duties depends on a system of making one person pay duties which he is not intended to bear, but to obtain from other persons,"

is not to be taken as affirming that all succession duties so called are necessarily indirect taxation. Where the property passing is situate within the province imposing the tax, that tax can be imposed or be made a charge on the property itself or its payment can be made a condition of the grant of probate or of Letters of Administration; as was held by the Privy Council in *Lovitt's Case* in which both reasons were given for upholding the New Brunswick Succession Duties Act.[4] In a recent case in British Columbia, the Succession Duty Act of that province, which in its main outlines closely resembles the New Brunswick statute, was held valid so far as related to property within the province.[5] It was considered that Lord Moulton in the *Cotton Case* was—

> "speaking of the scheme of the Quebec Act then under examination and not of succession duties in general, as if the phrase 'Succession duty' had a well known and definite legal significance. Its real meaning must be gathered from

[3] See *Re Doe* (1914), 19 B. C. 536.
[4] *R.* v. *Lovitt* (1912), A. C. 212; 81 L. J. P. C. 140.
[5] *Re Doe*, 19 B. C. 536.

the statute in which it is used; the real character of the tax, whatever it may be styled, depends upon its intended incidence as disclosed by the statute itself."

On the other hand, the Succession Duties Act of Alberta was recently held *ultra vires* on the ground that the taxation was indirect, the liability being imposed on the personal representative and not on the beneficiaries or on the property.[5a]

Upon a careful examination of the judgments of the Privy Council the question is suggested: Can a tax be considered as laid upon anything other than some person or some property? What is the subject matter of a tax? A person may be compelled to pay, and a tax may be levied out of property; but a tax upon a transaction or a succession or other intangible concept is but a name for a tax upon some person concerned in the transaction or interested in the property passing from the deceased. In every case before the Privy Council the intangible has been disregarded; but in nearly all the cases a property tax, charged upon and payable out of the property, has been referred to as a recognized method of enforcing contribution to the state's expenditures. In a sense, perhaps, the contribution is borne by the person or persons interested in the property; and it is this incidence upon persons, it is true, that is alone considered in the definition of "direct taxation" which has now been "substantially" adopted by the Privy Council.[c] But a too literal application of the definition would make all taxes on property (so called) indirect taxation. The owner, if resident, could, of course, be caught by a direct personal tax based upon the value of his property; but if he were a non-resident of the province he could not be touched by provin-

[5a] *Re Cust*, 18 D. L. R. 647.

[c] See *ante*, p. 651.

cial taxation. That such is not the position is universally conceded in actual practice in Canada and has been recently affirmed by the Supreme Court of Canada.[7] Municipal taxation of the interest of a non-resident in grazing leases of Crown lands in Saskatchewan was upheld.

Within the Province:—The result, it is submitted, is that any person found within a province may be legally taxed there;[8] and there is no constitutional limitation which precludes a province from adopting as the basis of such taxation the wealth of the individual, whether that wealth consists in property at home or abroad and whether the income—if that be the basis of taxation—be received at home or re-invested abroad.[9] As stated by the Privy Council in a case from the colony of Victoria, without any suggestion that the principle did not apply to colonial taxation:

> "There is nothing in the law of nations which prevents a government from taxing its own subjects on the basis of their foreign possessions. . . . But the question is one of discretion and is to be answered by the statutes under which each state levies its taxes and not by mere reference to the laws which regulate successions to real and personal property;" [10]

and this case is spoken of in *Lovitt's Case*[1] without any intimation that a Canadian province is in a position in this regard different from that of a colony under one legislature, or different from that of the provinces before Confederation. As already

[7] *Smith* v. *Vermillion Hills*, 49 S. C. R. 563; and see *Re Doe*, 19 B. C. 536.

[8] *Lambe's Case*, 12 App. Cas. 575; 56 L. J. P. C. 87.

[9] The English authorities as to the sweep of tax Acts are collected in the chapter on "Exterritoriality," *ante*, p. 75.

[10] *Blackwood* v. *R.* (1882), 8 App. Cas. 82; 52 L. J. P. C. 10.

[1] *Ante*, p. 656.

pointed out,[2] there is no question of competition with federal jurisdiction; it is a question of the plenary power of a provincial legislature acting within its sphere. No point of self government is withheld,[3] except that provincial taxation must be laid directly upon the person from whom contribution to provincial expenditures is to be exacted. That condition observed, the basis of the tax may be whatever the legislature pleases.

And the same principle applies to a tax on property. Property outside the province cannot of course, though its owner within may, be taxed; but property within may be taken to answer provincial needs in such shape, in whole or in part, as the sovereign legislature of the province in its wisdom or unwisdom[4] deems proper, regardless of the whereabouts of those interested in the property.

As to probate or succession or legacy duty—whatever name may be given to an inheritance tax—if the beneficiary is "found" in the province he may be taxed upon the basis of property abroad to which he has succeeded;[5] and if the property passing is situate within the province it may be made available for public needs, no matter where the beneficiary to whom it passes may reside.[6] Where neither property nor beneficiary is within the province, it may be that any attempt to make the value of the property the basis in whole or in part of the sum to be exacted as a condition of local probate, would be held to be indirect taxation; but *Lovitt's Case* seems opposed to such a view, and *Cotton's Case* does not in terms affirm it, though in principle it may go that far.

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[2] *Ante*, p. 648.
[3] *Re References;* extract *ante*, p. 442.
[4] See *ante*, p. 358.
[5] See *ante*, p. 661.
[6] *Lovitt's Case*, *ante*, p. 656.

In this connection reference should not be omitted to another case which came before the Privy Council in 1908.[7] A transfer of property in the State of New York made by a domiciled resident of Ontario in contemplation, as alleged, of death, was after his death attacked by the Attorney-General of the province as a fraud upon the Succession Duty Act; and the property was therefore, under the terms of the Act, claimed to be part of the estate of the deceased. The attack failed, and in the judgment of the Privy Council as delivered by Lord Collins there is some sweeping language to the effect that neither directly nor indirectly can property outside a province be touched by provincial taxation. But in the *Colton Case* the Board expressly declined to rest its judgment upon the earlier case, because, as Lord Moulton expressed it, the circumstances of that case were so special and because there was so much doubt as to the reasoning on which the decision was based. Evidently the broad proposition above mentioned did not commend itself to their Lordships.[8]

Owing to the provision in the United States constitution that "no capitation or other direct tax shall be laid unless in proportion to the census," the cases there practically limit direct taxation to poll taxes and taxes on land, and are of little assistance in deciding what is direct taxation within the meaning of the British North America Act.

[7] *Woodruff* v. *Atty.-Gen. of Ont.* (1908), A. C. 508; 78 L. J. P. C. 10.

[8] See also on the general question *Nickle* v. *Douglas*, 37 U. C. Q. B. at p. 62, *per* Burton, J.A.; *Leprohan* v. *Ottawa*, 2 Ont. App. R. at p. 534, *per* Hagarty, C.J., who expresses an opinion against provincial taxation based on property situate outside the province. As already intimated this chapter should be read with the chapter on "Exterritoriality," *ante*, p. 65.

License Fees:—The only other class of section 92 expressly conferring upon the provinces power to tax is No. 9:—"Shop, saloon, auctioneer, and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes;"[9] and the license fees there authorized have been finally held to be direct taxation.[10] And the weight of judicial opinion would seem to be that a provincial legislature cannot impose indirect taxation under any of the classes of section 92. The payment of provincial officers[1] and the "maintenance" of certain provincial institutions[2] and of provincial Courts[3] rest with the provinces; and the question has arisen as to the means open to a provincial legislature in providing funds for such maintenance. In the "exhibits" case above referred to[4] the Privy Council declined to determine—

"whether, if a special fund had been created by a provincial Act for the maintenance of the administration of justice in the provincial Courts, raised for that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable."[5]

[9] Nos. 5 and 15 are the only other express revenue items.

[10] *Brewers' License Case* (1897), A. C. 231; 66 L. J. P. C. 34. See also the cases noted, *post*, pp. 666-7.

[1] Section 92, No. 4.

[2] *Ib.*, Nos. 6 and 7.

[3] *Ib.*, No. 14.

[4] *Atty.-Gen.* v. *Reed*, 10 App. Cas. 141; 54 L. J. P. C. 12. See *ante*, p. 652.

[5] In the same case in the Supreme Court of Canada (8 S. C. R. 408), Gwynne, J., had explicitly held that "the provincial legislatures cannot by an Act of theirs authorize the raising a revenue by any mode of taxation other than direct," citing *Atty.-Gen. (Que.)* v. *Queen Ins. Co.*, (1878), 3 App. Cas. 1090; but the above extract would indicate that the Privy Council did not in 1884 consider the question determined by any previous decision of the Board. See also *per* Wilson, J., in *R.* v. *Taylor*, 36 U. C. Q. B. 183, at p. 201; and *per* Duff, J., in *Re Companies*, 48 S. C. R. at p. 417.

There is no subsequent direct pronouncement by the Board upon the question; but the decision of that tribunal that the powers which a provincial legislature can bestow upon a municipality[6] must be limited to such powers as such a legislature itself possesses under the other classes of section 92,[7] would seem to afford a strong argument that provincial power to raise funds for "maintenance" is limited to direct taxation under classes Nos. 2 and 9.

The question has, however, been much litigated in Manitoba. Following the judgment of the Privy Council[8] the Court of Queen's Bench of that province held[9] that the then existing provincial statutes requiring payment of fees by means of law stamps on proceedings in that Court were *ultra vires*. Thereupon, acting upon the distinction suggested by the Committee, the Manitoba legislature passed an Act creating a special fund "solely for the maintenance of the administration of justice in the Courts of this province," to which fund the fees payable in stamps upon legal proceedings were appropriated. This Act being impugned was upheld by Mr. Justice Dubuc, but, on appeal to the full Court, this decision was reversed.[10] and the statute pronounced *ultra vires*. In the opinion of the Court, the only exception to the limitation laid down in class No. 2 is that expressed in No. 9, but as the Privy Council has since held that license fees are direct taxation,[1] the case may be taken as a decision that there is no exception to the rule. The Manitoba legislature surmounted the difficulty by

[6] Under s. 92, No. 8:—"Municipal Institutions."
[7] *Local Prohibition Case* (1896), A. C. 348; 65 L. J. P. C. 26.
[8] *Atty.-Gen. (Que.)* v. *Reed, ubi supra.*
[9] *Plummer Wagon Co.* v. *Wilson*, 3 Man. L. R. 68.
[10] *Dulmage* v. *Douglas*, 3 Man. L. R. 562; 4 ib. 495.
[1] *Ante*, p. 664.

declaring law stamps to be a direct tax and making good this declaration by enacting that such fees, so payable in stamps, are not to form any part of the costs of an action taxable between party and party, but are to be borne once for all by the party actually paying them in the first instance. This Act was declared *intra vires* by the full Court.[2]

Examples of Provincial Taxation:—The following kinds of taxation have been held to be within the legislative competence of a provincial legislature:

A tax, by way of license fee, upon brewers.[3]

An annual tax on ferrymen and ferry companies.[4]

A tax, by way of license fee, upon insurance agents.[5]

A tax on laundries.[6]

A tax by way of license fee, on Canadian or foreign companies doing business in a province.[7]

A license tax on merchants, wholesale and retail.[8]

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[2] *Crawford* v. *Duffield*, 5 Man. L. R. 121.

[3] *Brewers' License Case* (1897), A. C. 231; 66 L. J. P. C. 34; *Fortier* v. *Lambe*, 25 S. C. R. 422; *R.* v. *Halliday*, 21 O. A. R. 42; *R.* v. *Neiderstadt*, 11 B. C. 347; *Severn* v. *R.*, 2 S. C. R. 70, may now be considered as finally overruled. See, however, *per* Gwynne, J., in *Fortier* v. *Lambe ubi supra*, and in *Molsons* v. *Lambe*, 15 S. C. R. at p. 288-9.

[4] *Longueuil Nav. Co.* v. *Montreal*, 15 S. C. R. 566.

[5] *English* v. *O'Neill* (1899), 4 Terr. L. R. 74.

[6] *Lee* v. *Montigny*, 15 Que. S. C. 607; but see *R.* v. *Mee Wah*, 3 B. C. 403.

[7] *Halifax* v. *Western Ass'ce Co.*, 18 N. S. 387; *Halifax* v. *Jones*, 28 N. S. 452. In the earlier case the tax was upheld under No. 9 of s. 92, and the scope of No. 2 was limited in a way inconsistent with *Dow* v. *Black*. See *ante*, p. 649.

[8] *Weiler* v. *Richards* (1890), 26 Can. Law. Jour. 338 (B. C.).

A tax on mortgages held by a loan company.[9]

A tax on the income received in a province by an English company.[9a]

A tax on physicians for the support of a college.[10]

A license tax on "any trade, profession, occupation, or calling."[1]

A stamp duty on sales of land.[2]

But, as already noted, a province cannot, by calling a tax a license fee when it is in reality a stamp Act, impose indirect taxation.[3] The court will consider the real incidence of the tax, as indicated by this passage from a later case:[4]

> "It was argued that the provincial legislatures might, if the judgment of the Court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer, and that they might thus seek to raise a revenue by indirect taxation in spite of the restriction of their powers to direct taxation. Such a case is conceivable. But if the legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise."

And in a very recent case the Privy Council has held that a provincial Act which imposed upon a federal company the obligation to take out a license,

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[9] *Re Yorkshire Guarantee Corp.* (1895), 4 B. C. 258. "The tax is not imposed on the dollars, but on the owners of the dollars:" *per* Drake, J., at p. 274.

[9a] *Re North of Scotland, &c., Mortgage Co.*, 31 U. C. C. P. 552, referred to by Idington, J., in *Lovitt* v. *R.*, 43 S. C. R. at p. 125.

[10] *College de Medecins* v. *Brigham* (1888), 16 R. L. 283.

[1] *Ex p. Fairbairn* (1877), 18 N. B. 4; *Jones* v. *Marshall* (1880), 20 N. B. 61; *Ex p. Diblee*, 25 N. B. 119.

[2] *Choquette* v. *Lavergne*, R. J. Q. 5 S. C. 108; (*sub nom. Lamonde* v. *Lavergne*), 3 Q. B. 303.

[3] *Ante*, p. 651.

[4] *Brewer's License Case* (1897), A. C. 231; 66 L. J. P. C. 34.

for which a fee was payable, as a condition precedent to the exercise of its power to carry on its business in the province was invalid;[5] but such a tax without such a condition would no doubt be a valid imposition.[5a]

[5] *John Deere Plow Co. Case;* extract *ante*, p. 444.

[5a] See *International Book Co.* v. *Brown* (1906), 13 Ont. L. R. 644.

CHAPTER XXXI.

Aliens: Naturalization: Indians: Immigration.

The provisions of the British North America Act touching these topics are as follows—

VI. Distribution of Legislative Powers.

Powers of the Parliament.

91. . . . 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:— . . . .

24. Indians and lands reserved for the Indians.

25. Naturalization and aliens. . . .

Agriculture and Immigration.

95. In each province the legislature may make laws in relation to agriculture in the province and to immigration into the province; and it is hereby declared that the parliament of Canada may from time to time make laws in relation to agriculture in all or any of the provinces, and to immigration into all or any of the provinces; and any law of the legislature of a province relative to agriculture or to immigration shall have effect in or for the province as long and as far only as it is not repugnant to any Act of the parliament of Canada.

Aliens: *Naturalization*:—In an earlier chapter of this book the position of a British colony in reference to legislation respecting aliens and naturalization was discussed at some length.[1] What was there said may be summed up shortly as introductory to an examination of the position as between the federal and provincial legislatures.

[1] Chap. IX., *ante*, p. 165.

Alienage is the antithesis of nationality; and British nationality in its wide imperial sense can be conferred only by or under national, that is to say imperial, Act of parliament. The extent of colonial legislative power along this line depends therefore upon the colonial charter read in the light of the Colonial Laws Validity Act. In other words it depends upon permissive imperial legislation; and prior to the imperial Act of 1914[2] no colonial Act could, it is conceived, alter the *status* of an alien or—which is the same thing—confer full imperial nationality.[3] It was even considered doubtful whether a colonial legislature could impart to aliens resident in the colony the privileges or any of the privileges of naturalization to be exercised or enjoyed within the limits of the colony. There were two imperial statutes which were considered to stand in the way.[4] Apart from these, there would seem to be no doubt that each colony might determine as it might see fit the rights, civil or political, which an alien should enjoy in the colony. But, however this may be, the imperial Naturalization Act of 1847,[5] to do away with any doubt upon the subject, enacted:

"All laws, statutes and ordinances which shall hereafter be made and enacted by the legislatures of any of Her Majesty's colonies or possessions abroad for imparting to any person or persons the privileges or any of the privileges of naturalization, to be by any such person or persons exercised and enjoyed within the limits of any such colonies and possessions respectively shall within such limits have the force and authority of law, any law, statute, or usage to the contrary in anywise notwithstanding."

[2] "*British Nationality and Status of Aliens Act, 1914*" (Imp.); acted upon in Canada in *The Naturalization Act, 1914* (Dom.), which came into force on 1st January, 1915.

[3] See *ante*, p. 179.

[4] See note (2), *ante*, p. 180.

[5] 10 & 11 Vict. c. 83 (Imp.) There was also a clause validating past colonial Acts of like character.

Canadian Legislation as to Aliens:—This was the imperial Act in force at the date of the passage of the British North America Act, 1867; and there is no doubt the power conferred by section 91, No. 25, upon the parliament of Canada to make laws concerning "Naturalization and Aliens" was a power subject to the limitations expressed in the imperial statute. Any doubt upon this point[6] disappears in the face of the imperial Naturalization Act of 1870,[7] passed since Confederation, which re-enacts the above clause of the Act of 1847. Canadian legislation has at all events proceeded on that assumption. The result would appear to be that the *status* of alienage could not be altered by Canadian legislation; in other words the *status* of a national British subject could not be conferred upon an alien, although within Canada he might be given all the rights of a natural-born British subject. And, apart from authority, it would appear reasonable to read the imperial statute as conferring power upon the legislature of a British possession[8] to prescribe not only the conditions precedent upon which an alien should be given the privileges or some of the privileges of naturalization, but also whether he should be given all or only some; and, if only some, what particular privileges of a natural-born British subject he should have conferred upon him. As to aliens, apart from any question as to their naturalization, full legislative power is conferred upon the parliament of Canada, so that a provincial legislature cannot discriminate against an alien upon the ground of his lack of British

[6] See *ante*, p. 63.

[7] 33 Vict. c. 14 (*Br.* and *Imp.*); see *ante*, p. 176. The Canadian Act copies it closely; see R. S. C. (1906), c. 77.

[8] As already pointed out (*ante*, p. 179, note), the parliament of Canada has been given jurisdiction over naturalization by two imperial Acts, by the British North America Act, 1867, and the Naturalization Act, 1870 (Imp.)

nationality; but he may nevertheless be under disability, civil or political, by reason for example of racial descent, a disability which he would share with natural-born or naturalized British subjects of like extraction.[9]

Privy Council Decisions:—The matter however is one upon which the authorities are not at all in a satisfactory shape. It is a disturbing circumstance that in the two cases in which the Privy Council has been called upon to draw the line between federal and provincial jurisdiction in regard to these two subjects of naturalization and aliens—that is to say, aliens and the naturalization of aliens—no reference appears in the judgments of the Board to any limitation of federal power by reason of Canada's position as a colony generally or under the imperial Naturalization Act, 1870. These two cases call for careful study.

In the earlier case [10] the provincial legislation impugned provided that "no boy under the age of 12 years and no woman or girl of any age, *and no Chinaman*, shall be employed in or allowed to be for the purpose of employment in any mine to which this Act applies, below ground." This enactment was upheld as within provincial competence by the Courts of the province,[1] but the Privy Council held

[9] *Quong Wing* v. *R.*, 49 S. C. R. 440. See *ante*, p. 486.

[10] *Union Colliery Co.* v. *Bryden* (1899), A. C. 580; 68 L. J. P. C. 118.

[1] 5 B.C. 306. In earlier cases in British Columbia, Acts directed against the Chinese had been viewed with judicial disfavor as an infringement upon the power of the Dominion parliament to regulate trade and commerce, and as a contravention of Imperial treaties with China: see *Tai Sing* v. *Maguire*, 1 B. C. (pt. 1) 101; *R.* v. *Wing Chong*, 1 B. C. (pt. 2) 150; *R.* v. *Gold Comm. of Victoria*, 1 B. C. (pt. 2) 260; *R.* v. *Victoria*, 1 B. C. (pa. 2) 331, and *R.* v. *Mee Wah*, 3 B. C. 403, in all of which differential taxation of Chinese was held *ultra vires*. Having regard to the "pith and substance" of the various impugned Acts, the judgment in

it *ultra vires* as an invasion of the federal field. In the second case[2] the provincial legislation provided that no Japanese, whether naturalized or not, should have his name placed on the register of voters or be entitled to vote. The provincial Courts considered the matter concluded by the judgment of the Privy Council in the earlier case and held the enactment *ultra vires;* but again they were reversed by the Privy Council and the Act was held to be within provincial competence. The earlier case was thus distinguished:

"That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning a living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides."

Nevertheless it is not easy to reconcile the views expressed in these two cases as to the scope of the words "naturalization and aliens" or to harmonize the reasons given in support of the respective decisions; as the following extracts will show:

(1) *Extract from Lord Watson's judgment in Bryden's Case.*

"Every alien when naturalized in Canada becomes *ipso facto* a Canadian subject of the Queen; and his children are

Bryden's Case would seem to support those decisions; while the views expressed in *Tomey Homma's Case, infra,* would overrule them.

[2] *Vancouver City Collector of Votes* v. *Tomey Homma* (usually cited as *Tomey Homma's Case*), 1903, A. C. 151; 72 L. J. P. C. 23.

not aliens, requiring to be naturalized, but are natural born Canadians. It can hardly have been intended to give the Dominion Parliament the exclusive right to legislate for the latter class of persons resident in Canada;[3] but section 91, No. 25, might possibly be construed as conferring that power in the case of naturalized aliens after naturalization. *The subject of 'naturalization' seems prima facie to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized.* It does not appear to their Lordships to be necessary in the present case to consider the precise meaning which the term 'naturalization' was intended to bear as it occurs in section 91, No. 25. But it seems clear that the expression 'aliens' occurring in that clause refers to, and at least includes, all aliens who have not yet been naturalized; and the words 'no Chinaman,' as they are used in section 4 of the provincial Act, were probably meant to denote, and they certainly include, every adult Chinaman who has not been naturalized.[4] . . ."

"The provisions, of which the validity has been thus affirmed by the Courts below, are capable of being viewed in two different aspects,[5] according to one of which they appear to fall within the subjects assigned to the provincial parliament by section 92 of the British North America Act, 1867, whilst, according to the other, they clearly belong to the class of subjects exclusively assigned to the legislature of the Dominion by section 91, No. 25. They may be regarded as merely establishing a regulation applicable to the

[3] That is, natural-born British subjects of foreign extraction. Any legislation specially affecting such a class would be necessarily based upon race distinctions, real or supposed; and this passage affirms that such a distinction does not in any case serve to fix the line between federal and provincial authority; in other words, provincial legislation is not incompetent because based upon racial distinctions, if otherwise within its powers, as, indeed, *Tomey Homma's Case* decides. In Australia, on the contrary, the federal Parliament alone has power to pass "special laws for the people of any race."

[4] In *Tomey Homma's Case* it is said that the legislation in *Bryden's Case* covered "Chinese naturalized or not." See above extract.

[5] See *ante*, p. 480.

working of underground coal mines; and if that were an exhaustive description of the substance of the enactments, it would be difficult to dispute that they were within the competency of the provincial legislature by virtue either of section 92, Nos. 10 or 13. But the leading feature of the enactments consists in this—that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects,[6] and that they establish no rule or regulation, except that these aliens or naturalized subjects shall not work or be allowed to work in underground coal mines within the province of British Columbia.

"Their Lordships see no reason to doubt that by virtue of section 91, No. 25, *the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada.*[7] They are also of opinion that the whole pith and substance of the enactments of section 4 of the Coal Mines Regulation Act, in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects and, therefore, trenches upon the exclusive authority of the Parliament of Canada. The learned Judges who delivered opinions in the full Court noticed the fact that the Dominion legislature had passed a 'Naturalization Act,' No. 113 of R. S. C. 1886, by which a partial control was exercised over the right of aliens. Mr. Justice Walkem appears to regard that fact as favourable to the right of the provincial parliament to legislate for the exclusion of aliens, being Chinamen, from underground coal mines. The abstinence of the Dominion Parliament

[6] It seems to have been assumed or taken as proved that there were in British Columbia in 1890, when the prohibition against Chinese labor underground in mines was first enacted, no Chinese males over twelve years of age who were natural-born British subjects; and that this stamped the enactment as a colorable invasion of the federal field relating to "naturalization and aliens." The same argument would stamp with the same character the franchise clause in question in *Tomey Homma's Case*; for there were not, it is thought, any natural-born British subjects of Japanese extraction over 21 years of age in British Columbia at the date of the franchise enactment in question.

[7] That is, aliens or naturalized. See last note.

from legislating to the full limit of its powers [8] could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by section 91 of the Act of 1867."

(2) *Extract from Lord Halsbury's judgment in Tomey Homma's Case.*

"The first observation which arises is that the enactment supposed to be *ultra vires* and to be impeached upon the ground of its dealing with alienage and naturalization, has not necessarily anything to do with either. A child of Japanese parentage born in Vancouver City is a natural born subject of the King, and would be equally excluded from the franchise.[9] The extent to which naturalization will confer privileges has varied both in this country and elsewhere. From the time of William III. down to Queen Victoria, no naturalization was permitted which did not exclude the alien naturalized from sitting in parliament or in the Privy Council.

"In Lawrence's *Wheaton*, 903 (2nd annotated ed. 1863), it is said that 'though in the United States the power of naturalization be nominally exclusive in the Federal government, its operation in the most important particulars, especially as to the right of suffrage, is made to depend on

[8] The Canadian Naturalization Act provided, *inter alia*, that aliens may hold and transmit property of any kind (s. 3), and that an alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers, and privileges, and be subject to all obligations to which a natural born British subject is entitled or subject within Canada (s. 15). Provincial Acts as to the property rights of aliens have been questioned by Canadian Ministers of Justice, but the point has not been before the Courts, the provincial Acts not being restrictive, as a rule. The validity of provincial Acts debarring aliens from acquiring Crown land by pre-emption or direct purchase has not been questioned in any reported case.

[9] *Mutatis mutandis*, would not this sentence have been properly used in *Bryden's Case*? In other words, would not a Chinaman of any age be excluded from mines underground under the provincial Act there in question, even if he had been born in British territory; say in Hong Kong? The legislation in both these cases seems really to have been based on distinctions of race, not of nationality.

the local constitution and laws.'[10] The term 'political rights' used in the Canadian Naturalization Act is, as Mr. Justice Walkem very justly says, a very wide phrase, and their Lordships concur in his observation that, whatever it means, it cannot be held to give necessarily a right to the suffrage in all or any of the provinces. In the history of this country, the right to the franchise has been granted and withheld on a great number of grounds, conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign.

"Could it be suggested that the province of British Columbia could not exclude an alien from the franchise in that province? Yet if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of section 91, No. 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, *it is for the Dominion to determine what shall constitute the one or the other—but the question as to what consequences shall follow from either is not touched.*[1] The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality."[2]

[10] Art. I., sec. 8, of the Constitution of the United States confers on Congress power to "establish an uniform rule of naturalization." This clearly does not touch the consequence of naturalization. Art. XIV. (adopted in 1868), penalizes such states as unduly limit the franchise, by decreasing their representation in the House of Representatives at Washington.

[1] With this compare not only Lord Watson's language in the *Bryden Case* above, but also the language of Griffith, C.J., in a case before the High Court of Australia. *Robtelmes* v. *Brenan* (1906), 4 Comm. L. R. 395: "The power to make such laws as parliament may think fit with respect to aliens must surely if it includes anything include the power to determine the conditions under which they may be permitted to remain in the country and the conditions under which they may be deported from it."

[2] Naturalization, in these days, has very seldom, if ever, any other object than to confer political privileges; that is to say, to give to a person really identified by residence with the nation's affairs, a voice in its government. All else is a negligible quan-

The reconcilation of the conflicting views indicated in the italicized passages must be left for future adjudication. Lord Halsbury's *dictum* that the parliament of Canada may define what shall constitute alienage would appear to be opposed to earlier decisions or *dicta* of the Board;[3] but, apart from that, it is clear that the actual decision in *Bryden's Case* is not in terms approved. If the view taken by Lord Watson of the "pith and substance" of the Act in question in that case was correct, the actual decision stands; but the view expressed as to the scope of the two words, "naturalization" and "aliens" respectively must be taken to be overruled.

Present Position:—The question came before the Supreme Court of Canada in a recent case which has already been sufficiently noticed.[4] In the result, it appears clear that provincial legislation may take a much wider scope than the views expressed in *Bryden's Case* would warrant. It is suggested that the view which would reconcile all difficulty is this, that it is for the federal parliament alone to say what disability an alien is to be under in Canada through his lack of national character and how those disabilities may wholly or in part be removed by the grant of a certificate of naturalization; but that a provincial legislature, while powerless to discriminate against any one by reason of his lack of national character, may in its legislation discriminate as it sees fit upon any other lines.

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tity. See *ante*, p. 167. The italicized sentence tallies closely with what was said by McCaul, C.J., (7 B. C., at p. 372): "Apart from decisions binding upon me" (*i.e.*, *Bryden's Case*, *supra*), "I would have considered that the authority of the Dominion Parliament becomes exhausted with the naturalization, and that the person naturalized passes under the jurisdiction of the provincial legislature to the same extent as if born a British subject."

[3] See *ante*, pp. 179-180.

[4] *Quong Wing* v. *R.*, 49 S. C. R. 440. See *ante*, p. 486.

INDIANS.

As natural-born British subjects segregated into a class apart from the ordinary inhabitants of the Canadian provinces, the Indians seem to fall naturally into this chapter. Their lands and their 'title' thereto have been the subject of discussion elsewhere in this book;[5] but the Indians themselves as a special subject for federal legislation call for some attention. As mentioned on a previous page,[6] aliens and Indians are the only instances of persons as a class being specifically enumerated as a subject matter for legislation; and the view was expressed that all laws in relation to aliens and Indians as aliens or Indians respectively must emanate from the parliament of Canada. As to Indians the authorities are clear that in so far as the federal parliament has not made special provision as to their privileges and disabilities they are subject as any other inhabitant to the law of the province in which they live. Whether the federal parliament could remove them entirely from the scope of provincial law is, perhaps, doubtful; as a matter of fact, federal legislation has treated them as wards of the nation standing in need of protective measures, and has not attempted to exempt them from the laws which govern ordinary citizens further than such purely protective measures extend. Their special privileges (if any) and their special disabilities, as well as certain disabilities under which others labor in dealing with them, are designed for their own benefit only.[7] So far as these do not extend, Indians have the same rights and are subject to the same obligation to observe the law as the ordinary inhabitant of a province. In an early case

[5] See *ante*, p. 633.
[6] See *ante*, p. 461.
[7] See the Indian Act, R. S. C. (1906), c. 81.

in Ontario, for example, it was held that an Indian, if otherwise qualified, might be elected to membership in a municipal council;[8] and in a more recent case the Court of Appeal for that province held without hesitation that the Ontario Medical Act applied to prevent an Indian from practising without a license.[9] In this case Mr. Justice Osler expressed the view that the federal parliament might completely withdraw Indians from the scope of provincial law; in other words, might legislate for them in all their relations in life if deemed advisable. In a later case in Manitoba the same rule of subjection to provincial law in all matters not touched by the federal Indian Act was laid down, and an Indian was held entitled to deal freely with land privately owned by him.[10] The provisions of the provincial Estoppel Act were also applied in construing the Indian's deed.

Provincial Discrimination:—A more difficult question perhaps is whether a provincial Act can single out Indians as a class to be debarred from the benefit of provincial Acts. For example, can they be debarred from the franchise, if otherwise qualified to vote? In the *Tomey Homma Case*[1] Lord Halsbury treated it as beyond question that an alien could be debarred from the provincial franchise, meaning obviously on the simple ground of alienage. If so, there would apparently be no question as to the right to debar Indians simply as Indians. Such provisions relate to the provincial constitution and the legislative power of a province in that connection (section 92, No. 1) is guarded by a *non-obstante* later than that in section 91. But how about municipal and school-board elections? Are they part of the constitution of the province?

[8] *R. ex rel. Gibb* v. *White*, 5 Ont. Prac. R. 315.
[9] *R.* v. *Hill* (1907), 15 Ont. L. R. 406.
[10] *Sanderson* v. *Heap* (1909), 19 Man. L. R. 122.
[1] Extract *ante*, p. 676.

Immigration.

The position of a British colony in reference to immigration has already been sufficiently dealt with,[2] and little need be added here. There is nothing in the British North America Act to restrict in this particular the plenary powers of legislation conferred by it; and the doubt concerning the extraterritorial restraint of the person necessarily incident to deportation under our immigration legislation has been set at rest by the decision of the Privy Council in the *Cain & Gilhula Case*.[3] As between the Dominion and the provinces there is a concurrent power to make laws on the subject of immigration, but the federal power is paramount and provincial legislation is operative so far only as it is not repugnant to the provision made by federal law. Upon this principle an Act of the legislature of British Columbia placing restrictions upon Japanese immigration into that province was held invalid as being repugnant to the imperial Japanese treaty which had been adopted as part of the law of Canada by the Japanese Treaty Act of 1907.[4] And on the like ground of its repugnancy to the federal Immigration Act, the provincial Immigration Act, 1908, was held inoperative.[5]

There are a number of cases in which the validity of Orders-in-Council purporting to have been passed pursuant to the Immigration Act has been questioned.[6] Such Orders-in-Council must of course be founded on and cannot go beyond the statute; and the power conferred by the statute upon the

[2] Chapter X., *ante*, p. 192.
[3] See *ante*, p. 106.
[4] *Re Nakane* (1908), 13 B. C. 370; referred to *ante*, p. 143.
[5] *Narain Singh* (1908), 13 B. C. 477.
[6] For example, *Re Narain Singh* (1913), 18 B. C. 506; *In re Rahim* (1911), 16 B. C. 471; *Re Murphy* (1910), 15 B. C. 401.

Governor-General in Council cannot be delegated to any official as, for example, to the Minister of the Interior.[7]

In an Australian case it was held that the word "immigration" in the Commonwealth of Australia Constitution Act, 1900,—an imperial Act—would not cover the case of an Australian returning to Australia after an absence during which the intention to return had always existed, but it was a question whether true domicil was required or mere *bona fide* residence and how the facts were to be investigated and determined.[8] So far as the parliament of Canada is concerned the meaning to be put upon the word "immigration" would probably be immaterial for under the opening clause of section 91 the federal parliament would have plenary powers of exclusion apart altogether from section 95.[9] But in the case of the provinces, section 95 must, it is conceived, be necessarily invoked and, if so, the view taken by the High Court of Australia would limit the range of provincial legislation. The further view, too, might be taken as already intimated that provincial law could not prohibit the immigration of aliens as a class, but might reach them by discrimination along lines other than that of lack of British nationality. The "Indians" of the British North America Act are, of course, the Canadian aborigines, so that they are not as a class of practical concern here. As a matter of fact, the control of immigration into Canada is now, largely, if not entirely, exercised under federal law.

[7] *Re Behari Lal* (1908), 13 B. C. 415.

[8] *Atty.-Gen. of Commonwealth* v. *Ah Sheung* (1906), 4 Comm. L. R. 949.

[9] See *ante*, p. 192.

CHAPTER XXXII.

"The Regulation of Trade and Commerce."

(*Section 91, No. 2.*)

The exclusive authority of the parliament of Canada to make laws in relation to all matters coming within the class designated by the phrase "the regulation of trade and commerce" would manifestly, upon the bare words, cover a very large field of possible legislation; and naturally there has been from the very beginning much discussion as to its limits. Here, as in all other cases, the view taken by the Privy Council must govern and for that sufficient reason the judgments of the Board should first be examined. Not merely have the lines been laid down in certain individual instances but the reasons for so laying them down, the difficulties to which a different interpretation would lead, have been so stated as to make it possible to indicate with a certain degree of assurance the scope of federal authority under this head.

Parsons' Case:—In the earliest and what may still be called the leading case on this subject, an Act of the Ontario legislature prescribing certain uniform conditions to be inserted in all fire insurance policies in force in the province was attacked as an unwarranted invasion of the federal field.[1] The Act was upheld as a law relating to property and civil rights in the province; it was not, in the opinion of the Board, a regulation of trade and commerce within the meaning of that phrase in section 91, for reasons thus elaborated:

[1] *Parsons' Case* (1881), 7 App. Cas. 96; 51 L. J. P. C. 11.

"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 trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shows that the words are not used in this unlimited sense. In the first place, the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature when conferring this power on the Dominion parliament. If the words had been intended to have the full scope of which, in their literal meaning, they are susceptible, the specific mention of several of the other classes of subjects enumerated in section 91, would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest, and even 21, bankruptcy and insolvency.

"'Regulation of trade and commerce' may have been used in some such sense as the words 'regulation of trade,' in the Act of Union between England and Scotland (6 Ann., c. 11), and as these words have been used in Acts of State relating to trade and commerce. Article V. of the Act of Union enacted, that all the subjects of the United Kingdom should have 'full freedom and intercourse of trade and navigation' to and from all places in the United Kingdom and the colonies; and Article VI., enacted, that all parts of the United Kingdom, from and after the Union, should be under the same 'prohibitions, restrictions, and *regulations of trade*.' Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without it being supposed that it thereby infringed the Articles of Union. Thus, the Acts for regulating the sale of intoxicating liquors notoriously vary in the two kingdoms.[2] So with regard to Acts relating to bankruptcy, and various other matters.

[2] This would seem to indicate that such Acts are not a "regulation of trade and commerce." Nevertheless in *Russell* v. *R.* (7 App. Cas. 829; 51 L. J. P. C. 77), involving the validity of the Canada Temperance Act, 1878, Sir Montague E. Smith, in deliv-

"Construing, therefore, the words 'regulation of trade and commerce' by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring sanction of parliament, regulations of trade in matters of inter-provincial concern, and it may be that they would include general regulations of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contract of a particular business or trade, such as the business of fire insurance, in a single province, and, therefore, that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of section 92."

Bank Taxation:—In a later case[3] it was urged that the power of the Dominion parliament to regulate trade and commerce should operate to prevent a provincial legislature from levying taxes

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ering the judgment of the Privy Council, intimated that their lordships "must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges who held that the Act as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subjects, 'the regulation of trade and commerce.'" But this view has since been negatived. The power to regulate does not include, but *ex vi termini* excludes, power to prohibit: *Virgo's Case* (1896), A. C. 88; 65 L. J. P. C. 4; and Dominion prohibitory legislation can be justified only upon the "peace, order, and good government" clause of s. 91; *Local Prohibition Case* (1896), A. C. 348; 65 L. J. P. C. 26; while provincial power of prohibition is based squarely upon the residuary class, No. 16, of s. 92; *Manitoba Liquor Act Case* (1902), A. C. 73; 71 L. J. P. C. 28. Provincial power to license for fiscal purposes is founded on No. 9 of s. 92; regulation falls under No. 16; *Hodge's Case*, 9 App. Cas. 177; 53 L. J. P. C. 1, as explained in the *Local Prohibition Case*.

[3] *Lambe's Case*, 12 App. Cas. 575; 56 L. J. P. C. 87.

upon a bank. The Privy Council thus negatived this contention:

"The words 'regulation of trade and commerce' are indeed very wide, and in *Severn's Case*,[4] it was the view of the Supreme Court that they operated to invalidate the license duty which was there in question. But, since that case was decided, the question has been more completely sifted before the committee in *Parsons' Case*, and it was found absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures. It was there thrown out that the power of regulation given to the parliament meant some general or interprovincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parsons' Case*, they would be straining them to their widest possible extent."

Insurance Law:—In the *Local Prohibition Case*[5] the following passage occurs:

"The scope and effect of No. 2 of section 91 were discussed by this Board at some length in *Parsons' Case*, where it was decided that *in the absence of legislation upon the subject by the Canadian parliament*, the legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade. Their Lordships do not find it necessary to re-open that discussion in the present case."

The italicized words indicate that a general federal Act regulating trade and commerce might legitimately embrace such provisions as to the insurance trade throughout the Dominion as are contained in the Ontario Act.[6]

[4] 2 S. C. R. 70.

[5] (1896), A. C. 348; 65 L. J. P. C. 26.

[6] See *Re Insurance Act*, 1910, 48 S. C. R. 260, referred to *post*, p. 689.

Railway Traffic:—In the *Through Traffic Case*[7] federal authority to regulate trade and commerce was again evoked to support the provision in the Railway Act under which the Board of Railway Commissioners had directed a provincial railway to enter into certain prescribed agreements with a federal railway as to the rates to be charged by the provincial railway in respect of the carriage over its line of "through traffic." But the Board held that the large general power should not be so construed as to trench upon the specific and exclusive authority of the provinces over such local works and undertakings as provincial railways. Their Lordships repeat and emphasize that the authority of the parliament of Canada under the opening clause of section 91, that is to say, over the unenumerated residuum of federal matters,[8] is to be confined strictly to such matters as are unquestionably of Canadian interest and importance, and they add:

> "The same considerations appear to their Lordships to apply to two of the matters enumerated in section 91—namely, the regulation of trade and commerce. Taken in their widest sense, these words would authorize legislation by the parliament of Canada in respect of several of the matters specifically enumerated in section 92, and would seriously encroach upon the local autonomy of the provinces. . . . The invasion of the rights of the province which the Railway Act and the order of the Commissioners necessarily involve in respect of one of the matters enumerated in section 92—namely, legislation touching local railways—cannot be justified on the ground that this Act and order concern the peace, order, and good government of Canada, nor upon the ground that they deal with the regulation of trade and commerce."

Federal Companies:—In the latest case in which the Privy Council has had occasion to consider the

[7] *Montreal* v. *Montreal Street Ry.* (1912), A. C. 333; 81 L. J. P. C. 145. Extract *ante*, p. 440.

[8] See *ante*, p. 452.

scope of federal authority along this line the question was as to the position of companies incorporated under federal law for trading purposes.[9] It was held that the right of the parliament of Canada to confer upon such companies the charter-power or capacity to carry on their operations throughout Canada might well be rested upon the general authority to regulate trade and commerce in its large Canadian or interprovincial aspect; and that no province could lay down conditions precedent to the exercise in such province of the companies' functional powers.

Present Position:—A careful study of these decisions serves, it is conceived, to emphasize what was said on a previous page[10] that the enumerated classes of section 91, particularly when described in large general terms, are to be looked at as embracing only matters of Canadian concern and as not intended to preclude provincial legislation upon local provincial aspects of the same subject so long as such legislation is not repugnant to the general federal law competently enacted. They also emphasize as applicable to section 91 as well as to section 92 the rule laid down in *Parsons' Case* that those sections may reciprocally modify each other;[1] that the doctrine of implied powers can have but a limited application where federal and provincial powers are both set forth in class-enumerations, because the implication *prima facie* proper is forbidden by the existence of a specific enumeration of the would-be implied power in a competing class.[2]

In view of the assignment by the Privy Council of federal authority under No. 2 of section 91 to a

[9] *John Deere Plow Co.* v. *Wharton* (1915), A. C. 363; 84 L. J. P. C. 64. Extract *ante*, p. 444.

[10] *Ante*, p. 448 *et seq.*

[1] *Ante*, p. 480.

[2] *Ante*, p. 493 *et seq.*

position analogous to that occupied under the opening, peace-order-and-good-government clause of section 91, the language of the Board in the *Local Prohibition Case*[3] would apply. If it were once conceded that the parliament of Canada has authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest upon the false[4] assumption that those matters also concern the regulation of trade and commerce in a large Canadian sense, there is hardly a subject enumerated in section 92 upon which it might not legislate to the exclusion of the provincial legislatures. Is the subject one as to which there is a real community of interest as between two or more or all of the Canadian provinces or is it a mere matter of similarity of conditions? If the former, federal legislation is competent and paramount; if the latter, the right to local autonomy entitles each province to deal with its local conditions as it sees fit and differently, it may be, from every other province.[5]

The difference of opinion which may honestly exist upon the question in its relation to this particular topic is strongly indicated in the opinions of the judges of the Supreme Court of Canada upon a reference as to the validity of certain sections of the federal Insurance Act, 1910;[6] but as the matter is now before the Privy Council it is not thought advisable to do more than point out that the differences of opinion were substantially upon the very question above propounded.

[3] (1896), A. C. 348; 65 L. J. P. C. 26. Extract *ante*, p. 432.
[4] See *ante*, p. 470.
[5] See *ante*, p. 474.
[6] 48 S. C. R. 260.

Canadian Cases:—It is noteworthy that, at least since *Parsons' Case*, all the cases in which this class has been considered are cases in which provincial Acts have been attacked as infringing upon it; and that in none of them except the *John Deere Plow Co. Case*[7] has the attack been successful. In the absence of any general[8] Dominion law regulating trade and commerce, the regulation of particular trades and commercial transactions is within provincial jurisdiction. The local regulation and even prohibition of the liquor traffic, it is now settled, does not fall within this class No. 2 of section 91,[9] and that decision authoritatively affirms a long line of cases in which the local regulation of particular trades, the exclusion of certain persons from them, and even their total prohibition by provincial legislation has been upheld. For example: The provision in the Municipal Act of Ontario empowering municipal councils to pass by-laws "for preventing criers and vendors of small wares from practising their calling in the market, public streets and vacant lots adjacent thereto" was held *intra vires*[10] and this decision represents the law as it has ever since been recognized in that province.

An Act of the Quebec legislature authorizing the imposition of a license fee on butchers exercising their calling in places other than the public

[7] *Ante* pp. 687-8.

[8] "It is not general as including all particulars, but it is general as distinguished from certain particulars:" *per* Lord Watson on the argument of the *Local Prohibition Case*, as quoted in *Lefroy*, p. 553 (*n*).

[9] *Hodge's Case*, *Local Prohibition Case*, *Manitoba Liquor Act Case*; see *ante*, p. 685, note. One of the latest cases is *R.* v. *Bigelow*, 41 N. S. 499. As to the milk traffic: see *R.* v. *Garvin*, 13 B. C. 331.

[10] *Re Harris & Hamilton*, 44 U. C. Q. B. 641. The view there taken, however, as to the scope of No. 8 of s. 92 ("municipal institutions") cannot now be supported: see *post*, p. 791 *et seq.*

markets of a municipality, was held valid;[1] and a provincial legislature may authorize municipal bodies to pass by-laws in restraint of nuisances hurtful to public health.[2]

The Quebec Pharmacy Acts, requiring certain qualifications on the part of persons engaged in the business of selling drugs and medicines, have been twice passed upon and held valid.[3]

A license tax on merchants, wholesale or retail, may be imposed by provincial legislation;[4] and there is no constitutional distinction between wholesale and retail trade.[5]

A provincial Act may regulate the width of tires to be used upon particular streets.[6]

Provincial health regulations are *intra vires* as affecting the shipping trade and ships engaged in it.[7]

Provincial game laws may go so far as to prohibit exportation.[8]

Provincial law may prescribe the size and weight of loaves of bread offered for sale.[9]

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[1] *Angers* v. *Montreal*, 24 L. C. Jur. 259; *Mallette* v. *Montreal*, *ib.*, 263; *Montreal* v. *Ricndeau*, 31 L. C. Jur. 129 (1887); *Pigeon* v. *Recorders' Court*, 17 S. C. R. 495.

[2] *Ex p. Pillow*, 27 L. C. Jur. 216; *Pillow* v. *Montreal*, M. L. R. 1 Q. B. 401. The attack in this last case, it should perhaps be remarked, was upon the ground that such legislation conflicts with the power of the Dominion parliament over "criminal law" rather than with the power to regulate trade and commerce.

[3] *Bennett* v. *Pharm. Assn.*, 1 Dorion 336; 2 Cart. 250; *Re Girard*, Q. R. 14 S. C. 237 (1898). See also *Pharm. Ass'n* v. *Livernois*, 31 S. C. R. 43 (1900).

[4] *Weiler* v. *Richards*, 26 Can. L. Jour. 338, *per* Begbie, C.J., (B.C.): *McManamy* v. *Sherbrooke*, Mont. L. R. 6 Q. B. 409.

[5] *Brewers' License Case* (1897), A. C. 231; 66 L. J. P. C. 34; *Local Prohibition Case* (1896), A. C. 348; 65 L. J. P. C. 26; *Man. Liquor Act Case* (1902), A. C. 73; 71 L. J. P. C. 28.

[6] *R.* v. *Howe*, 2 B. C. 36.

[7] *C. P. N. Co.* v. *Vancouver*, 2 B. C. 193.

[8] *R.* v. *Boscowitz*, 4 B. C. 132; *R.* v. *Robertson*, 13 Man. L. R. 613.

[9] *Re Bread Sales Act* (1911), 23 Ont. L. R. 238.

A province may tax insurance agents,[10] foreign insurance companies,[1] commercial travellers,[2] or laundries.[3]

The provisions of the Ontario Mercantile Amendment Act, as to the rights and liabilities of consignees and indorsees of bills-of-lading, were held[4] to be provisions as to property and civil rights in the province, not regulations of commerce within the meaning of class No. 2.

The principles enunciated in the above cases support the validity of provincial Acts such as the Employers' Liability Acts and Factory Acts.[5] No doubt such Acts in a sense affect trade and commerce, but they have primary reference to the civil rights of employers and employees[6]—to matters of a merely local or private nature in the province—and cannot be deemed regulations of general trade and commerce within the meaning of this class as indicated in the deliverances of the Privy Council.

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[10] *English* v. *O'Neill*, 4 Terr. L. R. 74.

[1] *Halifax* v. *Western Ass'ce Co.*, 18 N. S. 387; *Halifax* v. *Jones*, 28 N. S. 452.

[2] *Poole* v. *Victoria*, 2 B. C. 271. See also *Three Rivers* v. *Major*, 8 O. L. R. 181.

[3] *R.* v. *Mee Wah*, 3 B. C. 403; *Lee* v. *Montigny*, 15 Que. S. C. 607.

[4] *Beard* v. *Steele*, 34 U. C. Q. B. 43. The reasons for upholding these provisions is more fully stated in *R.* v. *Taylor*, 36 U. C. Q. B. 212. The view is expressed that the Dominion parliament might pass a similar law "as a necessary and convenient matter to be dealt with in the regulation of trade and commerce." Somewhat similar provisions in the Bank Act (Dom.) were upheld in *Tennant* v. *Union Bank* (1894), A. C. 31; 63 L. J. P. C. 25. See also *Smith* v. *Merchants Bank*, 8 S. C. R. 512.

[5] *Quong Wing* v. *R.*, 49 S. C. R. at p. 444-5, *per* Fitzpatrick, C.J.

[6] See *Monkhouse* v. *G. T. R.*, 8 O. A. R. 637; *Can. S. Ry.* v. *Jackson*, 17 S. C. R. 316. To what extent Dominion railways, etc., are subject to provincial legislation of the above kind is discussed, *post*, p. 761.

The fact that provincial legislation may prejudicially affect trade and commerce does not operate to prevent the full exercise of the powers conferred upon provincial legislatures. For example, the right of the provinces to prohibit the export of timber cut upon Crown lands,[7] and their right to enact local prohibition despite its obvious effect upon inter-provincial trade,[8] have been recognized as beyond question.

In the latest case before the Supreme Court of Canada touching provincial power to regulate the local carrying on of particular trades, a Quebec statute empowering municipalities to pass "early closing" by-laws was upheld under No. 16 of section 92 as legislation relating to a matter which in every province is substantially of local interest only and is not of any direct or substantial interest to the Dominion as a whole. It was held not to be a regulation of trade and commerce within the meaning of section 91, No. 2.[9]

Another recent instance of provincial legislation attacked on the ground that it constituted a regulation of trade and commerce was the Ontario Act establishing a hydro-electric Commission to utilize water power in that province for the generating of electric power and authorizing municipalities to purchase from the Commission and to control within their own limits a supply of electric power.[10] The Act was upheld and the principle laid down that provincial control and, as founded thereon, municipal control of public commercial utilities

[7] *Smylie* v. *R.*, 27 Ont. App. R. 172; see *ante*, p. 646.

[8] *Manitoba Liquor Act Case* (1902), A. C. 73; 71 L. J. P. C. 28; see *ante*, p. 647.

[9] *Montreal* v. *Beauvais* (1909), 42 S. C. R. 211. The Privy Council refused leave to appeal.

[10] *Smith* v. *London* (1909), 20 Ont. L. R. 133; *Beardmore* v. *Toronto* (1910), 21 Ont. L. R. 505.

is within provincial competence and does not infringe upon federal authority; and this notwithstanding the fact that the water power utilized was that of the Niagara River through which passes the international boundary line. Whether or not the time will ever come when the generation and use of electric power will be substantially a quasi-national problem in Canada is a question for the future.

CHAPTER XXXIII.

Navigation and Shipping.

The following are the provisions of the British North America Act which bear directly upon this subject:—

VI. Distribution of Legislative Powers.

Powers of the Parliament.

91. . . . 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: . . .

9. Beacons, buoys, lighthouses and Sable Island.
10. Navigation and shipping.
11. Quarantine and the establishment and maintenance of marine hospitals. . . .
13. Ferries between a province and any British or foreign country, or between two provinces. . . .

Exclusive Powers of Provincial Legislatures.

92. In each province, the legislature may exclusively make laws in relation to matters coming within the class of subjects next hereinafter enumerated; that is to say: . . .

10. Local works and undertakings other than such as are of the following classes:—
    a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;
    b. Lines of steamships between the province and any British or foreign country;

c. Such works as, although wholly situate within the province, are before or after their execution declared by the parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces. . . .

VIII. Revenues, Debts, Assets, Taxation.

108. The public works and property of each province enumerated in the third schedule to this Act shall be the property of Canada.

The Third Schedule.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with land and water power connected therewith.
2. Public harbours.
3. Lighthouses and piers, and Sable Island.
4. Steamboats, dredges, and public vessels.
5. Rivers and lake improvements. . . .

In Part I. of this book dealing with imperial limitations upon Canadian powers of self-government a chapter was devoted to Merchant Shipping;[1] and it was there pointed out that many of the provisions of the imperial Merchant Shipping Act, 1894, extend to and are to-day in force in Canada. Furthermore, the modified power of repeal conferred by that Act upon the legislatures of British possessions is confined to ships registered in such possessions respectively; so that the law which governs very many of the ships which ply to Canadian ports must be looked for in the imperial statute. At the same time, as often pointed

[1] Chap. XII., *ante*, p. 211.

out,[2] a colonial legislature may legislate upon the various topics touched by imperial legislation extending to the colony so long as the colonial law is not repugnant to the imperial Act. That phase of the subject, however, was sufficiently dealt with in the earlier chapter already referred to. Here the question is as to the division of the field of possible Canadian legislation on or affecting the subject of navigation and shipping between the parliament of Canada on the one hand and the provincial legislatures on the other. The imperial statute has, however, this direct bearing on the question, that the parliament of Canada is, so far as Canada is concerned, "the legislature of a British possession" empowered to exercise the qualified right of repeal conferred by it;[3] so that as to all topics covered by the imperial Merchant Shipping Act, 1894, the legislative authority of the parliament of Canada has a double foundation, namely, that Act and the British North America Act, 1867.[4]

Provincial Steamship Lines, etc.:—Referring to the provisions of the British North America Act set out at the beginning of this chapter, it should perhaps be pointed out that the three excepted items of section 92, No. 10, are federal classes by virtue of section 91, No. 29;[5] but it is also obvious that "lines of steam or other ships" and "canals" (privately-owned) not operating or extending beyond a province are as "works and under-

[2] See with particular reference to this topic, *ante*, pp. 212, 231.

[3] See *ante*, p. 213, note.

[4] See *McMillan* v. *The S. W. Boom Co.*, 1 Pugs. & Burb. 715; 2 Cart. 542, referred to *post*, p. 707.

[5] Sec. 91, "29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." See *Re Alberta Railway Act* (1915), A. C. 363; 84 L. J. P. C. 58.

takings" within the exclusive jurisdiction of the provincial legislature, though subject doubtless to federal law competently enacted on the subject of navigation and shipping.

Proprietary Rights:—The transfer to Canada, under section 108, of various items of Crown property which prior to Confederation had been held and used as public property of the respective provinces in connection with navigation and shipping has already received sufficient notice.[6] It was thought proper to repeat the items at the beginning of this chapter in order to again emphasize that the grant to the federal parliament of legislative power over the subject-matter of navigation and shipping in no way implies federal ownership of the rivers, lakes, and sea-coast waters upon which ships may ply, or in regard to which there may exist rights of navigation either on the part of the public or on the part of private owners. While there can be little doubt that the parliament of Canada may, as against private persons and with or without making compensation, take and establish as public highways of navigation such waterways as it sees fit, there is apparently as little doubt that it cannot create a public right of navigation over provincial Crown lands covered by water where no public right of navigation now exists. As a matter of fact there is no federal Act which purports to create a right of navigation, either public or private, even over privately owned land covered by water; and certainly none as to provincial Crown lands so covered. Federal legislation, in other words, deals with the exercise of the public right of way by water known as the right of navigation,[7] aiding and safeguarding it as may be thought proper. And

[6] Chapter XXIX., *ante*, p. 598.

[7] *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839.

wherever ships ply, whether lawfully or as trespassers, those in control must conform to the laws of navigation as laid down in federal enactment. The question, however, as to the existence or non-existence of a public right to navigate all Canadian waterways which are in fact capable of being used for purposes of travel or transportation is not touched by any federal legislation, although it is open to argument that all such legislation is based upon the assumption that a public right exists to navigate all waters which in fact are capable of user as above indicated. The Crown's ownership of the bed or soil underlying tidal waters is subject to a paramount right in the public to navigate such waters and to fish therein otherwise than by contrivances fixed in the soil;[8] and the Crown without parliament cannot derogate from such public rights. Legislative power in Canada in respect to them rests exclusively with the federal parliament.

Non-tidal Waters:—But in regard to non-tidal waters the rule of the common law is that there can be no public right of fishing therein;[9] and in the *British Columbia Fisheries Case*[10] it was held by the Privy Council that the English common law rule was in force in British Columbia, the rule being thus stated:

> "The fishing in navigable non-tidal waters is the subject of property, and, according to English law, must have an owner, and cannot be vested in the public generally."

If in force in British Columbia it is equally in force in all the other provinces except, possibly, Quebec.

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[8] *Re B. C. Fisheries* (1914), A. C. 153; 83 L. J. P. C. 169.
[9] *Johnston* v. *O'Neill* (1911), A. C. 552; 81 L. J. P. C. 17.
[10] *Ubi supra.* As to Quebec, see *Wyatt* v. *Atty.-Gen. of Quebec* (1911), A. C. 489; 81 L. J. P. C. 63; *Maclaren* v. *Atty.-Gen. of Quebec* (1914), A. C. 258; 83 L. J. P. C. 201.

As to navigation, the rule of the common law was also clear, it would seem, that in the case of non-tidal waters there was no paramount right in the public to use them for purposes of navigation or as highways for travel and transportation. As against the Crown's grantee and his successors in title—that is to say, as against a private owner—a right of way by water might be acquired by the public just as a right of way might be acquired by land;[1] but there is, it is conceived, no case in England in which it has been held that such a right had been acquired in respect of waters, navigable in fact, flowing over Crown lands. There is, however, a strong current of authority in Canadian cases that the rule of the common law of England denying the existence of a public right of navigation in non-tidal waters is not the law of Canada even in those provinces which have adopted the common law of England as the basis of their jurisprudence.[2] It has been considered that either *jure naturae* or by a species of dedication by the Crown evidenced by throwing open the colonies for settlement a public right, paramount to the title of any private grantee of the Crown if not to the Crown's title itself, has always existed to make such use as was possible of the natural waterways, non-tidal as well as tidal, as a means of travel and transportation; in other words, that such waterways are public highways. The same view has obtained to some extent as to the existence of a right in the public to fish in such non-tidal waterways. How far the denial of this latter right by the Privy Council in the *British Columbia Fisheries Case*[3] may affect

[1] *Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839; *Keewatin Power Co.* v. *Kenora*, 13 Ont. L. R. 237; 16 Ont. L. R. 184.

[2] The authorities are all collected in the elaborate judgment of Mr. Justice Anglin in the *Kenora Case* (13 Ont. L. R. 237), cited in the last note.

[3] (1914), A. C. 153; 83 L. J. P. C. 169.

the question as to the existence of a public right of navigation upon non-tidal waters it would be rash to predict. In the Supreme Court of Canada upon the same reference Mr. Justice Duff made use of this language:

"It does not appear to me to be necessary for the purpose of dealing with this argument"—namely, that under the statutory transfer to the Dominion of the 'Railway Belt' in British Columbia only such rights were intended to pass as in the ordinary course would be granted to settlers —"to express any opinion upon the very important question of how far and upon what principle public rights of navigation are recognized by the law of British Columbia as existing in non-tidal waters capable of being navigated. Certain rivers and lakes in that province, which from the first settlement of it have been used as public highways are, one cannot doubt, subject to a public easement of passage. Such rights can, in the case of such waters, be maintained upon grounds which involve no straining of the principle of English law."[4]

In delivering the judgment of the Privy Council, the Lord Chancellor (Viscount Haldane), speaking of the right of the public to fish in tidal waters, says:

The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters, which were continuous with the ocean, if indeed it did not in fact first take rise in them. The right into which this

[4] *Re B. C. Fisheries* (1913), 47 S. C. R. at pp. 505-6. The Chief Justice (Sir Chas. Fitzpatrick), Davies and Brodeur, JJ., concur *simpliciter* in the judgment of Duff, J. The judgment of Idington, J., does not touch this point; while Anglin, J., adhered to the views he had expressed in the *Kenora Case*, *ante*, p. 700, in affirmance of the public right. And see also the recent judgment of Mr. Justice Audette (*Leamy* v. *R.* (1915), 15 Exch. Ct. R. 189), in which such a right is held to exist under the law of Quebec.

practice has crystallised resembles in some respects the right of navigating the seas or the right of using a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right as from immemorial antiquity, the Crown, as *parens patriae*, no doubt, regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts. . . . Neither in 1867, nor at the date when British Columbia became a member of the Federation, was fishing in tidal waters a matter of property. It was a right open equally to all the public; and, therefore, when by section 91, 'sea coast and inland fisheries' were placed under the exclusive legislative authority of the Dominion parliament, there was in the case of the fishing in tidal waters nothing left within the domain of the provincial legislature. The right being a public one, all that could be done was to regulate its exercise, and the exclusive power of regulation was placed in the Dominion parliament. Taking this in connection with the similar provision with regard to 'navigation and shipping,' their Lordships have no doubt that the object and the effect of these legislative provisions were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion parliament and to leave to the province no right of property or control in them. It was most natural that this should be done, seeing that these rights are the rights of the public in general and in no way special to the inhabitants of the province."

Later on, speaking of the waters within the 'Railway Belt,'[5] he says:

"So far as the waters are tidal, the right of fishing in them is a public right, subject only to regulation by the Dominion parliament. So far as the waters are not tidal, they are matters of private property, and all these proprietary rights passed with the grant of the railway belt and

[5] See *ante*, p. 622 *et seq.*

became thereby vested in the Crown in right of the Dominion. The question whether the non-tidal waters are navigable or not has no bearing on the question. The fishing in navigable non-tidal waters is the subject of property and, according to English law, must have an owner, and cannot be vested in the public generally."

The guarded language of the above extracts in reference to the public right of navigation is noticeable. There is really no expression of opinion as to existence or non-existence of such a public right in the case of non-tidal waterways which are navigable in fact; but in a very recent case in British Columbia it was considered that the views expressed even upon a reference [6] by a majority of the Supreme Court of Canada as above indicated should be followed, at least by a court of first instance.[7] Accordingly the Fraser River in its upper waters was held to be a common and public highway, judicial notice being taken of the fact that, apart from recent and unchallenged commercial user by steamboats and for the floating of logs, it had been from the earliest days of the colony a well-known highway for the traders of the Hudson's Bay Company and for early explorers.

The ad medium filum Rule:—The rule of the common law that ownership of land bordering upon a highway carried with it, *prima facie*, the ownership of the soil of the highway *ad medium filum viae* applied to highways by water as well as to highways by land. Consequently a grant of land bordering upon a non-tidal stream or body of water carried with it the grantor's title to the middle thread of the stream unless there were clear words of exclusion. In the *Kenora Case* [8] it was

[6] See *ante*, p. 596.

[7] *Fort George Lumber Co.* v. *Grand Trunk Pac. Ry.*, not yet reported.

[8] 13 Ont. L. R. 237, referred to *ante*, p. 291 *et seq.*

held by Mr. Justice Anglin that this rule did not apply to the navigable non-tidal streams and lakes of Canada, and that in the case of Crown grants of land bordering on any such waters the presumption was that the bed of the stream *ad medium filum* was not intended to pass to the Crown's grantee; in other words, that express words of inclusion were necessary if the bed were to pass. In the Court of Appeal for Ontario, this judgment was reversed.[9] The English common law rule was held to be part of the law of the province[10] even in the case of waters lying along the international boundary line between Canada and the United States; but it was pointed out that the rule was one of *prima facie* presumption only and that such presumption might be rebutted in the case, for example, of a grant of land upon the shores of one of the Great Lakes by the absurdity of the supposition that the grantee was intended to acquire thousands of acres of submerged land fronting upon his lot or farm of a few acres.

In a more recent case before the same court,[1] reference was made to a decision of the Court of Common Pleas in Ontario in 1872 that the bed of the St. Lawrence above tide-water is vested in the Crown and not in the riparian proprietors *ad medium filum*.[2] This decision had been based upon the view that the Crown of Great Britain had acquired upon the cession of Canada the same rights in regard to streams navigable in fact as had previously been held by the Crown of France; that the *locus* was included in the cession; and that therefore the bed would not pass to a subject under a Crown grant. As to this, Meredith, C.J.O., says:

[9] 16 Ont. L. R. 184.

[10] See *ante*, p. 291 *et seq.*

[1] *Haggarty* v. *Latreille* (1913), 14 D. L. R. 532.

[2] *Dixon* v. *Snetsinger*, 23 U. C. C. P. 235.

"How far, if at all, the reason upon which this decision was based is in conflict with what was decided in the *Kenora Case* it is unnecessary to enquire, as the same conclusion would have been reached on the ground that the *prima facie* presumption I have mentioned was rebutted in the case of the St. Lawrence as undoubtedly it would be in the case of the Great Lakes."

The question has been recently passed upon by the Privy Council and the rule of the English common law has been held to apply in its fullest extent in Canada.[3] In delivering the judgment of the Board, Lord Moulton said:

"It is settled law that no description in words or by plan or by estimation of area is sufficient to rebut the presumption that land abutting on a highway or stream carries with it the land *ad medium filum* merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream. This is precisely what we have here. The land is shewn as abutting on the river and is described as bounded by the river, and again as bounded by a line following the windings and sinuosities of the river bank. This clearly makes it abut on the river and gives rise, according to English law, to the presumption in question. . . . It is precisely in the cases where the description of the parcel (whether in words or by plan) makes it terminate at the highway or stream and does not indicate that it goes further that the rule is needed."

This strong statement as to the scope of the *ad medium filum* rule and its applicability to grants from the Crown even in the province of Quebec—it would apply *a fortiori* in the other provinces—does not, however, really touch the question as to the

[3] *Maclaren* v. *Atty.-Gen. of Quebec* (1914), A. C. 258; 83 L. J. P. C. 201. The question was as to Crown grants of land abutting on the Gatineau R. in Quebec.

existence in Canada of a public right of way over waterways which are capable of user and have in fact been used without question from the earliest colonial days as public highways for travel and transportation.[4] The right of the public to fish in such waters would appear to be a right different in kind from that of passage, the former tending, as it were, to waste the patrimony of the Crown or other private owner; but it is obviously arguable that to affirm a free right in the public generally to use a stream as a public highway is to burden the land with a servitude beyond the ordinary servitudes to which riparian property is subject by English law.

Federal and Provincial Jurisdiction:—It was held in an early case in the Supreme Court of Canada that provincial legislation cannot authorize such an obstruction of a navigable stream as would constitute a nuisance.[5] The case had reference to the Queddy River in New Brunswick and there was then no Dominion legislation upon the subject to alter the law as it existed in New Brunswick at the date of the Union. The true effect of the decision would seem to be contained in an observation of Mr. Justice Strong:

"The Queddy river is shewn to be a navigable tidal river, and the appellants have obstructed the navigation and thus committed an act which is *prima facie* a public nuisance, and which the respondent shews to be especially injurious to him

[4] "The public right of navigation is not thereby affected:" *per* Moss, C.J.O., in the *Kenora Case*, 16 Ont. L. R. 184. "The fact that the stream or other body of water is navigable or, in other words, a highway, obviously cannot take it out of the rule, for that would take every highway on land or water out of it, which no one can contend for."—*per* Meredith, J.A., *ib.*, p. 201.

[5] *Queddy River Boom Co.* v. *Davidson* (1883), 10 S. C. R. 222; See also *Re Brandon Bridge* (1884), 2 Man. L. R. 14; *R.* v. *Fisher* (1891), 2 Exch. Ct. R. 365.

as a riparian proprietor. The respondent was therefore entitled to an injunction to restrain the continuance of the obstruction, unless the appellants were able to shew some legal justification for the interference with the navigation of the river caused by the construction and maintenance of these booms; they however, shew nothing but an Act of the provincial legislature."

The provincial Act so far as it incorporated the appellants as a Boom Company was held *intra vires*.

And it has been held that a provincial enactment authorizing the erection of booms in a navigable river does not necessarily conflict with the power of the Dominion parliament over navigation and shipping; that those words are used in the same sense as in the several Imperial Acts relating to navigation and shipping, namely, as giving the right to prescribe rules and regulations for vessels navigating the waters of the Dominion and not as excluding, for all purposes, provincial jurisdiction over navigable waters.[6] A provincial legislature, for example, may extend the boundaries of a municipality so as to include therein part of a navigable river.[7] As put by Fournier, J.:

"If it is beyond controversy that navigable rivers are *for purposes of navigation* under the control of the parliament of Canada, it is not less clearly established that the provinces have, upon these same rivers, the right to exercise all municipal and police powers, so long as their legislation creates no hindrance to navigation.[8]

There is no doubt that the authority of the Dominion parliament extends, as already intimated,[9] to

[6] *MacMillan* v. *S. W. Boom Co.*, 1 Pugs. & Burb. 715; 2 Cart. 542.

[7] *Central Vermont Ry. Co.* v. *St. John*, 14 S. C. R. 288.

[8] See also *Re Sturmer & Beaverton*, *ante*, p. 617.

[9] See *ante*, p. 697.

all matters covered by the imperial Acts relating to navigation and shipping; manifestly a large part of the field of property and civil rights. The conservancy of navigation is also a matter within its control. The provisions of the Dominion 'Navigable Waters Protection Act'[10] under which, for example, no structures can be erected in navigable waters unless sanctioned and approved of by the Dominion government and under which also mill-owners and others are prohibited from allowing slabs, saw dust, or other matter which might obstruct navigation or pollute the waters to be deposited in navigable streams have been held by the Privy Council to be clearly provisions relating to navigation and as such within federal competence.[1]

The right of the public to navigate tidal waters is, as above intimated, paramount to the Crown's title in the soil underlying such waters and the Crown therefore cannot, without statutory authority, grant the right to place in any such waters, as, for example in a public harbor, any obstruction or impediment which would prevent the full exercise of the right of navigation.[2] And if there is a public right to navigate non-tidal waterways in Canada the position must be the same as to them. The Navigable Waters Protection Act has always been taken to apply to all waters, non-tidal or inland as well as tidal, which are navigable in fact; but there is in the Act no definition of the term 'navigable waters,' and if, as a matter of law, that term covers only waters in which there exists a public right of navigation, the question above discussed

[10] R. S. C. (1906), cap. 115.

[1] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90. The grounds of attack are set out in 26 S. C. R. 444, at p. 484 *et seq.* See also *Burrard Power Co.* v. *R.*, 43 S. C. R. 27, particularly *per* Anglin, J., at p. 55.

[2] *Wood* v. *Esson*, 9 S. C. R. 239, as explained in *Cunard* v. *R.*, 43 S. C. R. 88.

as to our inland non-tidal lakes, rivers, and other waters is one of much importance.

As between the two public rights of navigation and of fishing, the former is the paramount right.[3] And as between the various persons who may utilize navigable waters for purposes of travel or transportation the question, in the absence of statutory regulations, is one of reasonable user having regard to the fact that all have an equal right.[4] The public right of navigation includes the right to use the stream for the transportation of goods by mere flotation of the goods themselves as in the case of logs and lumber; at least, it has been so considered in American and Canadian cases. The use of the word 'navigation' is, of course, not strictly accurate, and the question is really as to the existence of a public highway. As put in an Ontario case:

"Every person has an undoubted right to use a public highway, whether upon the land or water, for all legitimate purposes of travel and transportation, and if, in so doing, while in the exercise of ordinary care, he necessarily and unavoidably impede or obstruct another temporarily, he does not thereby become a wrongdoer, his acts are not illegal, and he creates no nuisance for which an action can be maintained."[5]

Miscellaneous Cases:—Where by a pre-Confederation Act authority was given to the Crown to permit interference with navigation, such authority is exerciseable since 1867 by the Governor-General in Council, not by the provincial government.[6] And where the Crown had allowed a bridge to be built before Confederation which obstructed navigation,

[3] *Coulson & Forbes*, Law of Waters, 2nd ed., 359.

[4] *Kennedy* v. "*The Surrey*," 10 Exch. Ct. R. 29; *Graham* v. "*The E. Mayfield*," 14 Exch. Ct. R. 331.

[5] *Crandell* v. *Mooney*, 23 U. C. C. P. 212, at p. 221.

[6] *R.* v. *Fisher* (1891), 2 Exch. Ct. R. 365. See also *London & Canadian Co.* v. *Warin*, 14 S. C. R. 232.

the Dominion government was held bound.[7] The Attorney-General of Canada may take proceedings to restrain by injunction the pollution of navigable waters and, *semble*, a provincial Attorney-General may also take action to restrain such a nuisance.[8]

A provincial Act may incorporate a navigation or transportation company the operations of which are limited to the province;[9] or a boom company to operate on a navigable stream within a province.[10]

A grant by the province of Quebec of a water lot extending into deep water at the mouth of the River St. Maurice was held valid, subject to the implied restriction that the grantee should not use his power in such a way as to interfere with navigation.[1] Provincial ownership of the beds of all waters within the province, other than the public harbors and canals allotted to Canada by section 108, is unquestionable.[2] But statutory authority is necessary for their alienation by the Crown.[3]

Ferries plying entirely within one province fall within No. 10 of section 92 as local works and undertakings, although no doubt they would have to conform to any regulations imposed by Dominion legislation respecting navigation and shipping.[4]

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[7] *R.* v. *Moss*, 26 S. C. R. 322.

[8] *Atty.-Gen. Can.* v. *Ewen*, 3 B. C. 468. This last proposition is, it is conceived, doubtful law. See *ante*, p. 592 *et seq.*

[9] *McDougall* v. *Union Nav. Co.*, 21 L. C. Jur. 63; 2 Cart. 228; *Re Lake Winnipeg Transportation Co.*, 7 Man. L. R. 255.

[10] *Queddy R. Boom Co.* v. *Davidson*, 10 S. C. R. 222, referred to *ante*, p. 706.

[1] *Normand* v. *St. Lawrence Nav. Co.*, 5 Que. L. R. 215; 2 Cart. 231.

[2] *Fisheries Case* (1898), A. C. 700; 67 L. J. P. C. 90; *R.* v. *Moss*, 26 S. C. R. 322; *Lake Simcoe Ice Co.* v. *McDonald*, 29 Ont. R. 247; 26 O. A. R. 411; 31 S. C. R. 130. See *ante*, p. 628.

[3] *Cunard* v. *R.*, 43 S. C. R. 88.

[4] *Dinner* v. *Humberstone*, 26 S. C. R. 252.

Provincial powers of taxation may be exercised upon the shipping trade,[5] and navigation companies must observe the provisions of provincial health laws within the province.[6]

The Dominion parliament may create Maritime Courts having jurisdiction over matters falling within this class,[7] or may confer such jurisdiction upon other Courts, *e.g.*, upon Vice-Admiralty Courts existing in Canada under Imperial Acts.[8] In this last case, of course, nothing repugnant to such Imperial Acts would be valid.[9]

Ferries.—It was the opinion of Mr. Justice Street that the prerogative right of the Crown to create a ferry and to grant a franchise therefor was a "royalty" within the meaning of section 109 and as such belonged to the provinces since Confederation even in the case of such an international ferry as that at Sault Ste. Marie;[10] but this view has been overruled by the Supreme Court of Canada.[1] The granting of licenses to operate ferries is now governed in all the provinces by statutory provisions which can, of course, apply only to ferries operating entirely within the province. As local works and undertakings they are subjects of provincial jurisdiction, although governed by federal law touching navigation and shipping.[2] All other ferries are within Dominion jurisdiction.[3]

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[5] *Longueuil Nav. Co.* v. *Montreal*, 15 S. C. R. 566, following the general principle laid down in *Lambe's Case*, 12 App. Cas. 575; 56 L. J. P. C. 87. See *ante*, p. 653.

[6] *C. P. Nav. Co.* v. *Vancouver*, 2 B. C. 193.

[7] *The Picton*, 4 S. C. R. 648. See *ante*, p. 238 *et seq.*, as to Admiralty jurisdiction in Canada.

[8] *The Farewell*, 7 Q. L. R. 380; 2 Cart. 378.

[9] See *ante*, p. 59.

[10] *Perry* v. *Clergue*, 5 Ont. L. R. 357.

[1] *Re International Ferries*, 36 S. C. R. 206. See *ante*, p. 631.

[2] See *Gibson* v. *Garvin*, 2 W. W. R. 662.

[3] See R. S. C. (1906), cap. 118; the *Ferries Act*.

CHAPTER XXXIV.

"Sea Coast and Inland Fisheries."—Section 91. No. 12.

In an earlier chapter the nature and extent of the control which, through the Dominion parliament and government, Canada is entitled to exercise over her coast waters both as to the fisheries and otherwise was discussed;[1] and in the last chapter the question as to the existence of a public right to fish in the non-tidal waters of Canada was sufficiently dealt with. It was held in the *British Columbia Fisheries Case*[2] that the provinces have no rights of property in the fisheries in tidal waters; that the public generally and not merely the people of that province have a paramount right to fish in tidal waters; and that federal legislation alone can control and regulate the exercise of that right. It was also held that of the non-tidal waters embraced within the "Railway Belt" of British Columbia the Dominion has a full proprietary ownership, and that in such waters there is no public right of fishing. This holding with regard to the nature and extent of Dominion ownership of the tract in question establishes provincial ownership of all Crown lands belonging to a province as of the same nature and extent so far as touches the ownership of the fisheries in waters covering or running through such Crown lands. The fisheries in those waters are a provincial asset.

[1] See *ante*, p. 108, *et seq.* In addition to the cases there cited, reference should be had to the recent judgment of Martin, L.J. Adm., in *R.* v. *The Valiant*, 19 B. C. 521, in which is discussed the right of foreign ships to enter and remain in Canadian waters at places other than ports of entry, as well as the operation of the 1815 and 1818 Conventions with the United States.

[2] (1914), A. C. 153; 83 L. J. P. C. 169.

The different views that may be taken of the scope of the various classes of sections 91 and 92 are nowhere better illustrated than in the litigation [3] which arose out of the grant of a lease of a salmon fishery by the Minister of Marine and Fisheries under authority of a Dominion Act. The *locus* included part of the Miramichi river in New Brunswick above the ebb and flow of the tide, and the lease in question purported to give an exclusive right to fish in that part of the river, regardless of the rights of the riparian proprietor. After much litigation, the invalidity of the lease, and of the clause of the Dominion Act under which it was made, was finally declared by the Supreme Court of Canada. It was held that the scope of class No. 12 of section 91 is properly limited to—

"subjects affecting the fisheries generally, tending to their regulation, protection, and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and the increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth."

It was accordingly held that the Dominion parliament could not interfere with the rights of property (with all its incidents) vested in the riparian proprietors, whether a province or individual owners, further than laws within the above limits might curtail their exercise; and that, having no power to interfere directly, the Dominion parliament could not authorize others to interfere with

[3] Terminating in *R.* v. *Robertson*, 6 S. C. R. 52. The judgment of the Supreme Court in the *Fisheries Case* (26 S. C. R. 444), affords still further evidence of the possible differences of view above referred to. See also *Bayer* v. *Kaiser*, 26 N. S. 280 (1894).

those rights. Such legislation, it was said, would be confiscation, not regulation. The judgment of the Privy Council in the *Fisheries Case*[4] substantially affirms the views above expressed, with this exception, that laws as to the improvement and increase of the fisheries belonging to a province are no doubt within provincial competence, so long as they do not conflict with federal regulations.

The whole ground is exhaustively covered by Lord Herschell in delivering the judgment of the Board in the *Fisheries Case*:—

"Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading 'Sea Coast[5] and Inland Fisheries' in section 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed or the instruments which may be employed for the purpose (which it was admitted the Dominion legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion legislature." . . .

[4] (1898), A. C. 700; 67 L. J. P. C. 90.

[5] Note the curious error into which Lord Chancellor Selborne fell in *L'Union St. Jacques* v. *Belisle* (L. R. 6 P. C. 31; 1 Cart. 63) in not treating "sea coast" as an adjective. He speaks of the whole of the sea coast as put within the exclusive cognizance of the Dominion legislature.

"If, however, the legislature purports to confer upon others proprietary rights where it possesses none itself that, in their Lordships' opinion, is not an exercise of the legislative jurisdiction conferred by section 91. If the contrary were held it would follow that the Dominion might practically transfer to itself property which has by the B. N. A. Act been left to the provinces and not vested in it." . . .

"It follows from what has been said that in so far as section 4 of R. S. C. c. 95 (1886) empowers the grant of fisheries leases conferring an exclusive right to fish in property belonging not to the Domion but to the provinces, it was not within the jurisdiction of the Dominion parliament to pass it." . . .

"Regulations controlling the manner of fishing are undoubtedly within the competence of the Dominion parliament. The question is whether they can be the subject of provincial legislation also in so far as it is not inconsistent with the Dominion legislation[6] . . . Their Lordships feel constrained to hold that the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion legislature, and is not within the legislative powers of provincial legislatures.

"But while, in their Lordships' opinion, all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of provincial legislatures is incompetent merely because it may have relation to fisheries. For example,[7] provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of and the rights of succession in respect of it would be properly treated as falling under the heading 'Property and civil rights' and not as in the class 'Fisheries' within the meaning of section 91.[8] So, too, the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise disposed

[6] The passage here omitted will be found *ante*, p. 436.

[7] The examples here given all illustrate the general rule that the true nature and character of any Act must be determined in order to constitutionally classify it. See *ante*, p. 484 *et seq.*

[8] See the judgment of Idington, J., in *Re B. C. Fisheries*, 47 S. C. R. at pp. 496-7.

of, and the rights which, consistently with any general regulations respecting fisheries enacted by the Dominion parliament, may be conferred therein appear proper subjects for provincial legislation either under class 5 of section 92, 'The management and sale of public lands,' or under the class 'Property and civil rights.' Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not, in their Lordships' opinion, intended to be within the scope of the class 'Fisheries' as that word is used in section 91."

In the *British Columbia Fisheries Case*[9] it was held that the provinces have no proprietary interest in the fisheries in tidal waters, the right of the public to fish therein being a paramount right antedating the Union. The Board did not desire to express an opinion on the question whether the subjects of the province might be taxed in respect of the exercise by them of this public right, but, the Lord Chancellor (Viscount Haldane) added,—

"No such taxing power could enable the province to confer any exclusive or preferential right of fishing on individuals, or classes of individuals, because such exclusion or preference must import regulation and control of the general right of the public to fish, and this is beyond the competence of the provincial legislature."

Of the earlier decision he says:

"It recognized that the province retains a right to dispose of any fisheries to the property in which the province has a legal title, so far as the mode of such disposal is consistent with the Dominion right of regulation; but it held that even in the case where proprietary rights remain with the province, the subject matter may be of such a character that the exclusive power of the Dominion to legislate in regard to fisheries may restrict the free exercise of provincial rights. Accordingly it sustained the right of the Dominion to control the methods and season of fishing and to impose a

[9] (1914), A. C. 153; 83 L. J. P. C. 169.

tax in the nature of license duty as a condition of the right of fishing, even in cases in which the property originally was or still is in the provincial government."[10]

Miscellaneous Cases:—A provincial Act incorporating a company with power to catch and cure fish is not an Act in relation to fisheries within the meaning of this class, but falls properly within No. 11 of section 92, "The incorporation of companies with provincial objects."[1]

[10] See the chapter on "Taxation," *ante*, p. 643.

[1] *Re Lake Winnipeg Trans. Co.*, 7 Man. L. R. 255. As to fishing in public harbors, see *ante*, p. 615.

CHAPTER XXXV.

Companies.

Common Law Corporations:—At common law a corporation created by Royal Charter has power to bind itself by its common seal to all such contracts as an ordinary person can enter into, and may deal with its property as freely as an ordinary person may deal with his. Even if such contracts or methods of dealing with property are expressly prohibited by the charter they nevertheless bind both the corporation and the other parties thereto.[1] In other words, in the case of such corporations there can arise no question of *ultra vires;* a breach by such a corporation of any restrictive provision or any departure from the purposes or objects of incorporation is ground merely for *scire facias* proceedings by the Crown to cancel the charter.[2]

Statutory Corporations:—On the other hand, the position of statutory companies is radically different. It is not even a question of express or implied prohibition, though acts in breach of such a prohibition are undoubtedly *ultra vires* and void; it is a question of the extent of the company's capacity for action as measured and limited by the purpose of the incorporation and by the powers actually conferred to be used in furtherance of such purpose. And the powers actually conferred do not extend beyond what is covered by the words of the incorporating instrument and by what may

[1] *Sutton's Hospital Case* (1613), 10 Coke Rep. 1*a*, 30*b*; *Wenlock* (*Baroness*) v. *River Dee Co.*, 36 Chy. D. 674, at p. 685.

[2] *British South Africa Co.* v. *De Beers Consolidated Mines* (1910), 1 Chy. 354; 79 L. J. Chy. 345.

be reasonably implied therefrom. The incorporating instrument may, of course, be a special Act of parliament or it may be, as in most cases nowadays, the memorandum and articles of association upon which under general Companies' Acts a certificate of incorporation issues. As put by Lord Watson:[3]

"Whenever a corporation is created by Act of parliament with reference to the purposes of the Act,[4] and solely with a view to carrying those purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions. That appears to me to be the principle recognized by this House in *Ashbury Railway Carriage & Iron Co.* v. *Riche*[5] and in *Atty.-Gen.* v. *Great Eastern Ry. Co.*"[6]

to which should be added what was said by Lord Macnaghten in a recent well-known case:[7]

"The learned counsel for the appellants did not, as I understand their argument, venture to contend that the power which they claimed could be derived by reasonable implication from the language of the legislature. They said it was a power 'incidental,' 'ancillary' or 'conducive' to the purposes of trade unions. If these rather loose expressions are meant to cover something beyond what may be found in the language which the legislature has used, all I can say is that, so far as I know, there is no foundation in principle or authority for the

[3] *Wenlock (Baroness)* v. *River Dee Co.*, 10 App. Cas. at p. 362; 54 L. J. Q. B. at p. 581.

[4] A British Act of parliament could of course incorporate *simpliciter*, that is, could confer unlimited capacity to do, so far as possible, whatever a natural person can do.

[5] L. R. 7 H. L. 653; 44 L. J. Ex. 185.

[6] 5 App. Cas. 473; 49 L. J. Ch. 545.

[7] *Amalgamated Society of Railway Servants* v. *Osborne* (1910), A. C. 87; 79 L. J. P. C. 87, involving the right of a trade union to use its funds to promote the election to parliament of labor members.

proposition involved in their use. Lord Selborne no doubt did use the term 'incidental' in a well known passage in *Atty.-Gen.* v. *Great Eastern Ry. Co.* But Lord Watson certainly understood him to use it as equivalent to what might be derived by reasonable implication from the language of the Act to which the Company owed its constitution; and Lord Selborne himself, to judge from his language in *Murray* v. *Scott*,[8] could have meant nothing more."

"*Incorporation*":—What has been said with reference to statutory corporations as distinguished from common law corporations, so called, created by prerogative,[9] would indicate that it is of the essence of modern incorporation that the purpose of the incorporation, that is to say, its objects, should be defined in the instrument of incorporation. This is spoken of as the capacity of the corporation; its status is that of a person of limited capacity or vitality; and the question arises, are the powers which, as Lord Watson puts it,[10] a company may use in furtherance of the object of its incorporation something different from its capacity or capacities? It has been said that incorporation—

> "would include the constitution of the company, the designation of its corporate capacities, the relation of the members of the company to the company itself, the powers of the governing body,"[1]

and possibly more. The distinction, if any, between capacities and rights is not, perhaps, a matter of much importance where both may be conferred by a legislature having plenary legislative authority over all subjects; but as will appear later[2] the distinction has been drawn by the Privy Council and

[8] 9 App. Cas. 519; 53 L. J. Ch. 745.
[9] See *ante*, p. 718.
[10] See passage, *ante*, p. 719.
[1] *Re Companies*, 48 S. C. R. at p. 411, *per* Duff, J.
[2] See *post* p. 738 *et seq.*

treated as matter of substance in dealing with Canadian incorporation. But it is thought that no useful purpose can be served by further discussion of the abstract question here.

British Incorporation:—Chartered companies do not particularly concern us, but they have been mentioned in order to emphasize the fact that, apart from any question as to the powers of the legislature by which, or by whose authority, a company may be incorporated, its corporate capacity is measured and limited by its instrument of incorporation. Legislative power to incorporate should next be considered. The British parliament may, of course, incorporate or authorize the incorporation of a company for any purpose or object, and with no territorial limitation upon the exercise of the company's powers; and in such case all British Courts within the Empire must treat such a company as a legal person, while foreign Courts may and usually do so treat it as a matter of international comity. If, on the other hand, a territorial area is prescribed within which the company's activities are to have operation, that is a constitutional limitation upon the company's powers just as much as the clause, for example, which defines the business the company is to carry on. It is, in fact, part of that definition. In the case of a company incorporated to carry on a particular business in England, it may be that the recognition in a colonial Court of such a company would be, strictly speaking, based upon comity rather than upon strict legal right; but the point is not very material for the purposes of this chapter. The important matter in the instance put is that the company could not carry on its business anywhere but in England; but it would seem to be a reasonable implication that in the carrying on of its business in

England its rights, in the absence of any words of limitation, would be the same as those of any natural person carrying on such a business there. A company, for example, incorporated to carry on a departmental store business in London could not carry on such a business in Paris, but its stock might be bought in Paris or anywhere and sold to customers in Paris or anywhere on orders sent by such customers personally or through agents. Lord Watson, it will have been noticed, in the judgment from which an extract is printed above, distinguishes between the objects which were in view in securing incorporation and the powers to be used in furtherance of those objects, the same rule of limited capacity applying in each instance; but it would appear on principle obvious that where the objects are stated in general terms without specific indication of the powers to be used in furtherance of them, the right [3] to use all ways and means which a natural person might lawfully use in pursuit of like objects would be impliedly conferred. And territorial limitations are not to be read into the instrument of incorporation further than is required by those canons of construction—treated of at length in an earlier chapter of this book [4]—which operate to prevent the undue extension exterritorially of English statutes.

Colonial Incorporation:—The power of a colonial legislature, where it is the sole legislature for the colony, in reference to the incorporation of companies is in no respect different from that of the

[3] Perhaps a clearer distinction is required between powers which are really part of the capacity and powers which are strictly rights attaching to the personality of a company.

[4] Chapter VII., "Exterritoriality," *ante*, p. 65. This aspect of the English Companies Act, 1862, is discussed in *Princess of Reuss* v. *Bos*, L. R. 5 H. L. 176; 40 L. J. Ch. 655; *sub nom. Re General Land Credit Co.*, L. R. 5 Ch. 363; 39 L. J. Ch. 737.

British parliament. A colonially incorporated company would, perhaps, in other parts of the Empire receive recognition only upon grounds of international comity where a British company might be entitled to recognition as a matter of strict legal right; but the point, as already intimated, is not here of importance. What should be noted is that a colonial legislature may confer corporate capacity to transact business in any part of the world; and in determining the territorial scope of the language of the instrument of incorporation the same rules apply as to a British statute.[5] In a recent case, the Privy Council has expressly recognized the power of a colonial legislature to confer upon a corporation of its own creation the capacity to do business anywhere in or out of the colony.[6] A company had been incorporated by Act of the legislature of New South Wales at a time when that colony included what are now the colonies of Victoria and Queensland. The company by its original Act was limited as to the scope of its operations to the colony of New South Wales. After the separation of Victoria, a further Act of the legislature of New South Wales, passed in 1857, empowered the company to carry on its business "in or out of" the colony. The company afterwards so altered its by-laws as to extend its business to the United Kingdom and the British South African colonies. The exact contention raised appears from the following extract from the judgment of the Board:

"The contention is shortly this, that the words in the Act of 1857 empowering the society to carry on its business 'in or out of' New South Wales did not authorize an extension of the business to England or South Africa, but must be limited to those territories which formed part of

[5] See *ante*, p. 69, *et seq.*

[6] *Campbell* v. *Australian Mutual Provident Society* (1908), 77 L. J. P. C. 117.

New South Wales at the date of the original constitution of the society; that is to say, what are now New South Wales, Victoria, and Queensland. Their Lordships are unable to accede to this contention. The words are as wide as could be used and *there is no reason whatever for not giving them their natural construction.* This disposes of the case, so far as it is based upon the doctrine of *ultra vires.*"

The strength of this pronouncement lies largely in the fact that the power of the colonial legislature was not at all a matter of doubt; the question was treated as one of interpretation merely.

Under a Federal System:—The power to confer corporate capacity is no doubt a legislative power; but that capacity is always conferred for a purpose and not merely to establish a status.[7] That purpose is shewn in the objects of incorporation as defined in the instrument of incorporation. Under a federal system the legislative power of incorporation for any and all purposes and with or without territorial limitation might be specifically lodged with either the central legislature or the local legislatures respectively, though such an arrangement would be manifestly illogical and inconvenient; but if no mention were made of this particular legislative power it seems clear that under an exhaustive scheme of distribution—such for example as that effected by the British North America Act[8]—the power to incorporate for any object or purpose must rest with that legislature which has jurisdiction over such object or purpose.

In Canada:—Bearing in mind the large principle of allotment referred to in a previous chapter[9] as

[7] See the judgment of Marshall, C.J., in *McCulloch* v. *Maryland*, 4 Wheaton, 316, at pp. 410-411, as quoted and adopted by Idington, J., in *Canadian Pac. Ry.* v. *Ottawa Fire Ins. Co.*, 39 S. C. R. at p. 443.

[8] See *ante*, p. 453.

[9] Chapter XXII., *ante*, p. 448.

underlying the scheme of distribution embodied in the British North America Act, namely, that all matters of common concern are within federal jurisdiction and that all matters of local concern, not merely from the standpoint of a particular locality in a province but also from the standpoint of the province as a unit, are within provincial jurisdiction, it would appear to follow that in every case in which the object or purpose of incorporation might in regard to any province be truly characterized as a matter of "a merely local or private nature in the province," as that phrase has been authoritatively construed,[10] the power to incorporate a company for the pursuit of such object or purpose must rest with the province, even though that object or purpose might touch or affect subjects which in some aspects of them would clearly be within federal jurisdiction. This, it is conceived, would be the position if the class-enumerations of sections 91 and 92 contained no reference to the incorporation of companies. And there is high authority for the proposition that the specific allotment contained in the two sections respectively has not altered the situation; that the clauses were inserted simply by way of abundant caution; and that the result would be the same if they were not there.[1]

Express Clauses of the British North America Act:—Among the federal classes of section 91 the only express power of incorporation is that mentioned in No. 15: "Banking, *incorporation of banks*, and the issue of paper money;" while provincial legislatures are given exclusive power to make laws

[10] The authorities are collected *ante*, p. 449 *et seq.*

[1] This view really underlies or is apparent in several of the judgments in the *Ottawa Fire Ins. Co. Case*, and in *Re Companies*, to be referred to later. On this point, however, particular reference may be made to the judgment of Anglin, J., in the latter case, 48 S. C. R. at p. 450 *et seq.*

in relation to "*the incorporation of companies with provincial objects.*" The question of the interpretation to be put upon the words "with provincial objects" has given rise to much difference of opinion, particularly in reference to the right of a provincial company to transact business beyond the bounds of the incorporating province. The question first came before the Supreme Court of Canada in a case between private litigants.[2] The point was taken that the respondent company, which was a provincially incorporated fire insurance company, could not legally contract to indemnify against loss by fire happening to property situate without the province of Ontario, the incorporating province. The policy had been delivered by the company's agents at Montreal to the appellant railway company and it was contended that the contract had been entered into there, that is to say, outside the incorporating province; the insurance company's right to enter into a contract elsewhere than in Ontario being contested. Three of the judges (Idington, Maclennan, and Duff, JJ.) affirmed the validity of the policies, two (Fitzpatrick, C.J., and Davies, J.) held them *ultra vires*, while the sixth judge (Girouard, J.) declined to express an opinion upon the point. Afterwards upon a reference from the Governor-General in Council the judges of the Supreme Court in 1913 expressed their opinion upon the same question, put in this form:—[3]

"Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts—

[2] *Canadian Pacific Railway Co.* v. *Ottawa Fire Ins. Co.* (1907), 39 S. C. R. 405.

[3] *Re Companies*, 48 S. C. R. 331.

(*a*) within the incorporating province insuring property outside of the province;

(*b*) outside of the incorporating province insuring property within the province;

(*c*) outside of the incorporating province insuring property outside of the province?"

The Chief Justice (Sir Chas. Fitzpatrick) and Davies, J., answered in the negative, intimating however that the territorial limitation would not operate to invalidate contracts made with persons residing without the province in reference to matters ancillary or necessarily incidental to the exercise of the companies' substantive powers. The other four judges (Idington, Duff, Anglin, and Brodeur, JJ.) answered each of the three questions substantially in the affirmative.

A number of other questions were put touching the matter of provincial power in a more general and abstract way; but in view of the later pronouncement of the Privy Council in the *John Deere Plow Co. Case*[4] that the task set the judges of the Supreme Court of Canada by the reference in question was an impossible one, and in view also of the further fact that the whole matter is understood to be before the Privy Council upon appeal in the reference case itself, it is not thought proper to attempt any statement at length of the views expressed by the individual judges. The decision in the earlier case must be taken to represent the law in Canada to-day upon the questions of principle involved in the decision. There are, however, certain judgments of the Privy Council bearing directly upon those questions and these are, of course, authoritative and binding so far as they go. They must now be considered.

[4] (1915), A. C. 330; 84 L. J. P. C. 64.

Privy Council Decisions:—The subject of company incorporation in Canada first came before the Privy Council in *Parsons' Case*[5] in which it was held that "the legislative authority of the parliament of Canada over the regulation of trade and commerce" (section 91, No. 2) did not comprehend the power to legislate as to "the contracts of a particular business or trade, such as the business of fire insurance, in a single province;" and accordingly a provincial Act providing for certain uniform conditions in all fire insurance policies was upheld as a matter relating to "property and civil rights in the province" (section 92, No. 13). How far a company incorporated by or under an Act of the parliament of Canada is subject to the law of any province in which it may carry on its business was the question really before the Board; a question to be dealt with later. But incidentally the power of a provincial legislature in relation to company incorporation came up in this way. One of the appellant insurance companies was an English company, the other a company originally incorporated by the parliament of (old) Canada before Confederation. After Confederation a Dominion Act changed the name of the latter company and confirmed its incorporation and corporate rights. Mr. Justice Taschereau in the Supreme Court of Canada had considered that to assert the right of the province to legislate with regard to the contracts of such a company was to deny the right of the Dominion parliament to incorporate it. He had assumed that this latter right rested upon section 91, No. 2, "the regulation of trade and commerce." As to this the Privy Council said:

"It is not necessary to rest the authority of the Dominion parliament to incorporate companies on this specific

[5] 7 App. Cas. 96; 51 L. J. P. C. 11. Extract *ante*, p. 684.

and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces; and the only subject on this head assigned to the provincial legislature being 'the incorporation of companies with provincial objects,' it follows that the incorporation of companies for objects other than provincial falls within the general powers of the parliament of Canada. . . . The Dominion parliament had alone the right to create a corporation to carry on business throughout the Dominion. . . ."

In a later case[6] a company incorporated by a Dominion Act was the appellant. The validity of the Act of incorporation had been upheld in the Quebec Courts, but the company was held to be conducting its business illegally in contravention of provincial law. This was the chief matter in controversy before the Board, but their Lordships dealt also with the larger question in this way:

"The company was incorporated with powers to carry on its business, consisting of various kinds,"—to deal in land, to act as agents or trustees, etc.—"throughout the Dominion. The parliament of Canada could alone constitute a corporation with these powers; and the fact that the exercise of them has not been co-extensive with the grant cannot operate to repeal the Act of Incorporation, nor warrant the judgment prayed for, namely, that the company be declared to be illegally constituted. . . . What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area—namely, throughout the Dominion."[7]

[6] *Colonial Building & Investment Assn.* v. *Atty.-Gen. of Quebec*, 9 App. Cas. 157; 53 L. J. P. C. 27.

[7] As a matter of fact, there was no express territorial limitation in the Act of incorporation. There was a recital that the incorporators owned land in the district of Montreal and "elsewhere in the Dominion" and express power was conferred to establish branch offices or agencies not only throughout Canada but in England and in the United States.

As has been pointed out, this passage does indicate that there is a territorial limitation involved in the phrase 'with provincial objects;' that, taking the case actually decided, to carry on a business outside a province is not a provincial object. But it was also considered [7a] that on the authorities as to the meaning in a territorial sense of the phrase "to carry on business" and similar phrases, the opinion expressed by the Privy Council in the above extract should not be taken as opposed to the proposition that a company's business—the object of its incorporation—is not in law or in fact carried on outside of a province if it is controlled and managed from the head centre of the company within such province; if, as it has been put, the "brain" of the company has a fixed seat within the province.[8] This is the view which obviously underlies the opinions of the majority of the Supreme Court of Canada in reference to the powers of a provincially incorporated fire insurance company. Its business, that is to say, its object, is to enter into contracts of indemnity against loss by fire. To establish, conduct, and control from within the province such a business is not to carry it on without the province, even where the contract is made through agents abroad, with persons abroad, and in respect of property situate abroad.

In this view the limitation involved in the phrase "with provincial objects" is territorial in the same sense that the phrase "matters of a merely local or private nature in the province" (section 92, No. 16) involves a territorial limitation.

[7a] See particularly the judgment of Duff, J., in the *Ottawa Fire Ins. Co. Case*, 39 S. C. R. at p. 406 *et seq.*

[8] Many authorities are cited in the judgment of Duff, J., referred to in the last note. Later cases are *John Deere Plow Co.* v. *Agnew*, 48 S. C. R. 208; *Egyptian Hotels, Ltd.* v. *Mitchell* (1914), 3 K. B. 118; 83 L. J. K. B. 1510.

The question has very recently been again before the Supreme Court of Canada; and it was held by the majority that a company incorporated under the Companies Act of Ontario to carry on mining operations could not validly acquire mining properties in the Yukon Territory. There were no words of territorial limitation in the companies' memorandum of association, but it was considered that the carrying on of mining in the Yukon Territory could not be deemed a provincial object as to Ontario.[8a]

Companies' "Objects:"—The purposes or objects to be served by incorporation are, like the possible subjects of legislation,[9] numberless; but it may not be quite useless to consider some possible objects which touch closely the class-enumerations of the British North America Act. The "works and undertakings," for example, mentioned in section 92, No. 10, have been described by the Privy Council as physical things. Such of them as extend, actually or potentially, beyond the limits of a province are within the exclusive control of the parliament of Canada; and are manifestly not provincial objects for the establishment, control, and operation of which a provincial company could be incorporated. And the same remark applies to such undertakings as, though entirely located in one province, have been declared to be for the general advantage of Canada. That very declaration, the truth of which no Court can question, stamps them as objects other than provincial. On the other hand, a steamship line operating solely within a province is as a "work and undertaking" within the exclusive jurisdiction of the provincial legislature. And it has been held that it is also a provincial object for the management and control of which

[8a] *Bonanza Creek, &c., Co.* v. *R.* (1915), 50 S. C. R. 534.
[9] See *ante*, p. 442.

a provincial company may be validly incorporated.[10] There would be a manifest territorial limitation preventing such a company from extending its line beyond the province; but in no other sense would there be a territorial limitation. It might buy its boats in England, hire their crews in New York, and provision them in an adjoining province. And, nevertheless, in all its operations it would be subject to federal law validly enacted on the subject of navigation and shipping, just as it would be subject to the provisions of the imperial Merchant Shipping Acts where they applied.

The same view was taken in a case in Manitoba. A provincial Act incorporating a company as carriers within the province of passengers and goods by water was upheld.[1] The same company was further authorized to catch, cure, transport, and deal in fish within the province and this feature of its charter was also held valid, notwithstanding the power of the parliament of Canada over "sea coast and inland fisheries" (section 91, No. 12), but always of course subject to federal regulations validly enacted.

The view has been expressed that the question whether or not the objects of a company, to be gathered of course from the incorporating instrument or instruments, are provincial objects must in each case be determined as a question substantially of fact.[2]

[10] *Macdonald* v. *Union Navigation Co.* (1877), 21 L. C. Jur. 63. It is rather curious that no reference is made in the judgments to No. 11 of section 92. The incorporation was upheld under No. 10, supporting the view expressed by other judges (see *ante*, p. 725), that No. 11 was inserted through abundant caution and was really unnecessary.

[1] *Re Lake Winnipeg Transportation, &c., Co.* (1891), 7 Man. L. R. 255.

[2] *Per* Duff, J., in *Re Companies*, 48 S. C. R. at p. 399; repeated in *Bonanza Creek, &c., Co.* v. *R.* (1915), 50 S. C. R. at p. 575.

In this view, it is conceived, the question is really the same as arises constantly under section 92, No. 16, " matters of a merely local or private nature in the province."[3]

Territorial Limitation: *Other Cases*:—There is an early decision by the Supreme Court of Canada, upon a reference from the Senate, based apparently upon the view that the phrase " with provincial objects " has reference to the legislative jurisdiction of the incorporating legislature. A bill to incorporate the Christian Brothers was reported upon as *ultra vires* of the parliament of Canada as infringing upon the powers of the provinces in the matter of education.[4]

In an early case in Ontario it was held by the Master in Ordinary (Mr. Thos. Hodgins, Q.C.) that an insurance company incorporated under a provincial statute could enter into a contract insuring property situate out of the province.[5] On appeal the constitutional point was not touched. And in a later case in British Columbia it was held generally that a provincial company may carry on its business out of the province and yet that business might be provincial.[6] The view was expressed by Hunter, C.J., that the true antithesis of " provincial objects " is " non-provincial objects " and not " Dominion objects," and he added that provincial objects might possibly be extra-provincial. The reference, however, to the Act of the New Brunswick legislature in question in *Dow* v. *Black*[7] is inaccurate. The Act did not, as suggested, authorize a levy to

[3] See *ante*, p. 376.

[4] Coutlee's S. C. Cas. 1; Senate Jour. 1876, Vol. 10, 150, 206.

[5] *Clark* v. *Union Fire Ins. Co.*, 10 Ont. Prac. R. 313; 6 Ont. R. 223.

[6] *Boyle* v. *Victoria Yukon Trading Co.*, 9 B. C. 213.

[7] L. R. 6 P. C. 272; 44 L. J. P. C. 52. See *ante*, p. 415.

pay a bonus to a foreign railway, the operation of which was an object of provincial advantage; the bonus was payable to a provincial company operating a line in the province to connect with the foreign railway, not to the foreign railway itself. The very purpose or object of the incorporation in the British Columbia Case was to carry on a trading and transportation business between the province and the Yukon Territory, and it seems difficult to properly characterize such a business as a provincial object.

Enlargement of Capacity:—The object or purpose to be furthered by the incorporation of a company, as set forth in the instrument of incorporation, fixes the company's capacity. The territorial range of the actual exercise of its powers by a federal company does not affect the validity of the incorporation; and the same proposition applies, it is conceived, to a provincial company incorporated for an object truly "provincial." As to a federal company the proposition is one expressly laid down by the Privy Council that the fact that such a company does not see fit to extend its operations beyond the bounds of a single province cannot affect its status as a duly incorporated company or render its Act of incorporation void;[8] and, conversely, if the view which now prevails be sound that the business of a provincially incorporated company carried on within a province may validly cover transactions with persons, and affecting property, without the province, such transactions cannot weaken the validity of the incorporation or the status of the company as one incorporated "with provincial objects."

[8] *Col. Building Assn.* v. *Atty.-Gen. of Quebec*, 9 App. Cas. 157; 53 L. J. P. C. 27.

But, on the other hand, federal legislation cannot operate to enlarge the corporate capacity of a provincial company so as, in other words, to authorize it to carry on a business or pursue an object other than provincial, whatever may be the true interpretation of the phrase "with provincial objects;" and, conversely, provincial legislation cannot add a provincial object to the objects of incorporation as defined in the charter of a federal company, for those must be "other than provincial" as the Privy Council has said.[9] As to federal legislation in assumed enlargement of the capacity of a provincial company, the question was thus put on a reference to the Supreme Court of Canada:—

> Can the powers of a company incorporated by a provincial legislature be enlarged, and to what extent, either as to locality or objects by
>
> (*a*) the Dominion parliament?
>
> (*b*) the legislature of another province?[10]

And, although, as has been already pointed out, the judges of the Supreme Court differed radically as to the permissible territorial range of the operations of a provincial company, the above question was unanimously answered in the negative as to both its branches.

There is, however, one exception. A provincial company incorporated with the "provincial object" of establishing and operating a local work or undertaking, may become a federal company by its work and undertaking being declared by the parliament of Canada to be a work for the general advantage of Canada; the effect of such a declaration being that the object or purpose of incorporation is no longer a "provincial object." In such case it

[9] *Parsons' Case*, see *ante*, p. 729.
[10] *Re Companies*, 48 S. C. R. 331.

seems clear that the provincial Act of incorporation must be deemed thenceforth a federal Act, which no provincial Act could subsequently alter or repeal. But, as already noticed,[1] this is the one and only case in which under the British North America Act the distribution of legislative power thereby effected as between the Dominion parliament on the one hand and a provincial legislature on the other can be altered at the will of either.

As to the effect of conjoint action by the legislatures of two or more provinces, an early case before the Privy Council afforded clear authority for the unanimous view taken by the judges of the Supreme Court that one province cannot add to the corporate capacity of a company incorporated by another, that is to say, so as to warrant the pursuit of objects which would be other than provincial as to the incorporating province. The question before the Board was as to an Act of the province of Quebec purporting to deal as to that province with the Temporalities Fund of the Presbyterian Church.[2] That fund had been by a pre-confederation statute of the old province of Canada entrusted to an incorporated Board, and, having regard to the nature of the fund, the constitution of the Board, and the domicile of the beneficiaries in both Ontario and Quebec, it was held that the incorporating statute was not severable so as to be treated after the union as two provincial statutes, one of Ontario, the other of Quebec. In other words the objects of incorporation were not provincial objects as to either province, so as to entitle the legislature of either province to deal with the fund. The legislature of Ontario had passed an Act similar to the Quebec statute, but it

[1] *Ante*, p. 379.

[2] *Dobie* v. *Temp. Fund Board*, 7 App. Cas. 136; 51 L. J. P. C. 26.

was held that the maxim *juncta juvant* could not apply,—

"seeing that the power of the provincial legislature to destroy a law of the old province of Canada is measured by its capacity to reconstruct what it has destroyed. If the legislatures of Ontario and Quebec were allowed jointly to abolish the board of 1858, which is one corporation in and for both provinces, they could only create in its room two corporations, one of which would exist in and for Ontario and be a foreigner in Quebec, and the other of which would be foreign to Ontario, but a domestic institution in Quebec."

Subjection of Federal Companies to Provincial Laws, and vice versa:—It may be said generally that a company is in the same position as a natural person in regard to subjection to the law of the land. In the pursuit of its objects, a federal company is governed by all provincial laws validly enacted; and, conversely, provincial companies must obey the requirements of all valid federal laws.

(*a*) *Federal Companies*:—As to federal companies the position was thus stated in *Parsons' Case*,[3] in which the validity of an Ontario Act prescribing that certain uniform conditions should form part of all insurance contracts in the province was affirmed as against both a federal company and a company incorporated under a British Act:

It was contended, in the case of the Citizens' Insurance Company of Canada, that the company having been originally incorporated by the parliament of the late province of Canada, and having had its incorporation and corporate rights confirmed by the Dominion parliament, could not be affected by an Act of the Ontario legislature. But the latter Act does not assume to interfere with the constitution or *status*

[3] 7 App. Cas. 96; 51 L. J. P. C. 11.

of corporations. It deals with all insurers alike, including corporations and companies, whatever may be their origin, whether incorporated by British authority as in the case of the Queen Insurance Company, or by foreign or colonial authority, and, without touching their *status*, requires that if they choose to make contracts of insurance in Ontario, relating to property in that province, such contracts shall be subject to certain conditions." . . .

"Suppose the Dominion parliament were to incorporate a company with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended if such a company were to carry on business in a province where a law against holding land in mortmain prevailed (each province having exclusive legislative power over 'property and civil rights in the province') that it could hold land in that province in contravention of the provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the provinces having passed mortmain Acts, though the corporation would still exist and preserve its *status* as a corporate body."

This latter passage the committee explain in a later case by saying that they had not in view the special law of any one province, nor the question whether the prohibition was absolute, or only in the absence of the Crown's consent; that their object had merely been to point out that a corporation could only exercise its powers subject to the law of the province whatever that may be.[4] Speaking

[4] *Colonial Bldg. Assn.* v. *Atty.-Gen.* (Que.), 9 App. Cas. 157; 53 L. J. P. C. 27. And see *Cooper* v. *McIndoe*, 32 L. C. Jur. 210. In this connection also may be mentioned *McDiarmid* v. *Hughes*, 16 Ont. R. 570, in which the Divisional Court of the Queen's Bench Division (Armour, C.J., and Street, J.), held that the Dominion parliament has power to enact that a license from the Crown shall not be necessary to enable corporations to hold lands within the Dominion; and that a Dominion Act enabling a Quebec corporation to hold lands in Ontario, would operate as a license;—a view difficult to reconcile with the above cases. No doubt, as put by the Chief Justice, an Imperial Act might be

of the Act of incorporation in question in this later case, their Lordships say:

"What the Act of incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business which are defined, within a defined area, namely, throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings; but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of incorporation gives it capacity to do so."

A very recent case brings out strongly the fact that the objects of a company incorporated under federal Act may have special relation to some particular subject within exclusive federal jurisdiction. This is pre-eminently so in the case of companies incorporated to establish and carry on works and undertakings of the classes set out in the exceptions to No. 10 of section 92; such, for example, as federal railways, federal telegraph and telephone lines, federal steamship lines, and others. In such cases it is not going too far to say that the work and undertaking, itself within exclusive federal jurisdiction, is substantially the whole object of the incorporation. The result has been to create some confusion in the cases. Certain rights have been

passed extending to all Her Majesty's possessions providing that thereafter a license from the Crown should not be necessary to enable any corporation to hold lands therein; but it seems a *non sequitur* to say that an Act of the Dominion parliament would have effect throughout the Dominion in relation to matters over which, as between the Dominion parliament and the provincial legislatures, the latter have exclusive jurisdiction. The right of a corporation to hold land is part of the law relating to real property and governed therefore by the *lex loci*, and the grant of a license from the Crown to hold lands *non obstante* the Mortmain Acts must be made by the executive head of that government whose legislature has power to pass laws in relation to real property within its territorial limits.

treated as if conferred by the incorporation simply, whereas they really rest upon the legislative power of the parliament of Canada over the object or purpose of the incorporation, namely the work or undertaking. The distinction between such a case and the case of a federal company incorporated as an insurance company (as in *Parsons' Case*[5]) or as a land company (as in the *Colonial Building Co. Case*[6]) seems obvious. Federal works and undertakings will be dealt with in a separate chapter; but the recent case above referred to, and now to be dealt with, shows that in other cases as well the Act of incorporation of a company of a particular class may have peculiar relation to some subject within exclusive federal jurisdiction, so that both as to the capacities and rights of the company there is a greater legislative power in the parliament of Canada than in the case of such companies as those instanced above. In the *John Deere Plow Co. Case*[7] the Privy Council has just held that in the incorporation of a federal trading company the legislative power of the Dominion parliament over "the regulation of trade and commerce" comes into play to confer rights the exercise of which in any province cannot be prevented by conditions precedent enacted by the provincial legislature. But even in the case of such "interprovincial agencies of trade and commerce" (as they have been called[8]) provincial law no doubt governs them very largely in their business transactions, as intimated in the following passage:

> "It is true that even when a company has been incorporated by the Dominion Government, with powers to trade, it is not the less subject to provincial laws of general application enacted under the powers conferred by section 92.

[5] See *ante*, p. 730.
[6] See *ante*, p. 729.
[7] (1915), A. C. 330; 84 L. J. P. C. 64.
[8] See *Re Companies*, 48 S. C. R. at p. 407.

Thus, notwithstanding that a Dominion company has capacity to hold land, it cannot refuse to obey the statutes of the province as to mortmain (*Colonial Building Association* v. *A.-G. of Quebec*, 9 A. C. 157 at 164); or escape the payment of taxes, even though they may assume the form of requiring, as the method of raising a revenue, a license to trade which affects a Dominion company in common with other companies (*Bank of Toronto* v. *Lambe*, 12 A. C. 575). Again, such a company is subject to the powers of the province relating to property and civil rights, under section 92 for the regulation of contracts generally (*Citizens' Insurance Co.* v. *Parsons*, 7 A. C. 96).

To attempt to define *a priori*, the full extent to which Dominion companies may be restrained in the exercise of their powers by the operation of this principle is a task which their lordships do not attempt."

(*b*) *Provincial Companies*:—No doubt has been suggested as to the subjection of provincial companies to federal law validly passed in relation to any matters touched by the companies' operations. For example, a provincial company incorporated to establish and carry on a local work or undertaking such as a provincial steamship line or a boom company is subject to federal law relating to navigation and shipping;[9] and similar examples might be multiplied indefinitely. The federal Winding-up Act applies to provincial companies which have become insolvent.[10]

In short, the proposition may be put as to both federal and provincial companies in the most comprehensive way, that they are bound by all existing laws competently enacted whether by the legislature to which they owe their corporate existence or by any other, imperial, federal, or provincial.

[9] *Re Lake Winnipeg Transp. Co.*, 7 Man. L. R. 243; *MacMillan* v. *S. W. Boom Co.*, 1 Pugs. & Burb. 715; *Queddy R. Boom Co.* v. *Davidson*, 10 S. C. R. 222. See *ante*, p. 706.

[10] *Shoolbred* v. *Clark*, 17 S. C. R. 265; *Re Cramp Steel Co.*, 16 Ont. L. R. 230; and see *post*, p. 809 *et seq.*

CHAPTER XXXVI.

Works and Undertakings: Railways.

The sections of the British North America Act which directly touch this topic are section 91, No. 29, and section 92, No. 10, which should be read in reverse order as follows:

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:— . .

10. Local works and undertakings other than such as are of the following classes,—

a. Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

b. Lines of steamships between the province and any British or foreign country;

c. Such works as, although wholly situate within the province, are before or after their execution declared by the parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces. . . .

91. . . . 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:— . . . .

29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces. . . . .

As pointed out in the *Through Traffic Case*[1] the effect of section 91, No. 29, is to transfer to that section the three classes, *a*, *b*, and *c*, which are by section 92, No. 10, expressly excepted from provincial jurisdiction. And to those three classes, of course, the concluding clause of section 91 applies; that is to say, any matter falling within any one of those three classes is not to be deemed a local provincial matter exclusively within the scope of any of the class-enumerations of section 92.[2]

It was suggested in Ontario as late as 1880 that the class-enumerations of section 92, No. 10, were intended to apply solely to works and undertakings of a public character to be established at the public expense;[3] but in the same year the Privy Council dealt with a case in which a railway constructed by a private company under a provincial Act had been declared by the Dominion parliament to be a work for the general advantage of Canada, and no doubt seems to have been suggested as to the jurisdiction of that parliament to make such a declaration as to such a railway.[4] And no subsequent case lends any support to the contrary view suggested in the Ontario case.

Companies and their "Works:"—It was remarked in the last chapter that works and undertakings of the character indicated in these classes are usually established and managed by incorporated companies, and that some confusion had arisen in the cases through a failure to distinguish between

[1] (1912), A. C. 333; 81 L. J. P. C. 145. Repeated and emphasized in *Re Alberta Railway Act* (1915), A. C. 363; 84 L. J. P. C. 58.

[2] See *ante*, p. 451.

[3] *Re Junction Ry. and Peterborough*, 45 U. C. Q. B. at p. 317, per Cameron, J.

[4] *Bourgoin* v. *Montreal, O. & O. Ry.*, 5 App. Cas. 381; 49 L. J. P. C. 68.

the capacities and powers conferred by the instrument of incorporation merely and the powers or rights the bestowment of which in connection with the work or undertaking rests upon the legislative jurisdiction over such work or undertaking irrespective of the fact that a company is empowered to establish and operate it.[5] In truth, in such case the Act of incorporation is more than a mere instrument of incorporation; it is not only that but it is also substantive legislation relating to the work or undertaking. The result of not paying strict attention to the distinction indicated has been that of late a greater immunity from the requirements of provincial law has been claimed for federal companies than the earlier authorities would warrant.[6] And this claim has been put forward in cases in which the object or purpose of incorporation has relation to matters, as for example insurance contracts,[7] which in each province are *prima facie* within the ambit of provincial authority. The root of the difficulty is largely in the interpretation which has been put upon the judgment of the Privy Council in what is usually styled the *Hydraulic Company's Case*.[8] The matter is one of such moment that before proceeding to deal with works and undertakings strictly as such, and apart from any consideration as to their control by incorporated companies, it will be well to dispose, if possible, of this preliminary difficulty.

The Hydraulic Company's Case:—The appellant company was a provincial company incorporated to produce and sell electricity within a radius

[5] See *ante*, p. 739.

[6] *Colonial Building Co.* v. *Atty.-Gen. of Quebec; Parsons' Case, &c.*, see *ante*, pp. 740-1.

[7] See *Re Companies*, 48 S. C. R. 331, with particular reference to questions 6 and 7.

[8] *Compagnie Hydraulique de St. Francois* v. *Continental Heat & Power Co.* (1909), A. C. 194; 78 L. J. P. C. 60.

of a few miles from a Quebec village, and the Act of incorporation prohibited any other company from exercising similar powers within that territory. The respondent company was a federal company empowered to manufacture, supply, sell, and dispose of gas and electricity. It invaded the territory of the appellant company which thereupon applied for an injunction to restrain such invasion. The injunction was refused by the Quebec Courts and in a short judgment the Privy Council upheld the refusal. There is no mention in the judgment of any particular class in either section 91 or section 92, and no reference to the fact that the respondent company's enterprise was a work or undertaking extending, actually or potentially, beyond the limits of Quebec. What their Lordships said was this:

"The contention on behalf of the appellant company was, that the only effect of the Canadian Act was to authorize the respondent company to carry out the contemplated operations in the sense that its doing so would not be *ultra vires* of the company, but that the legality of the company's action in any province must be dependent on the law of that province. This contention seems to their Lordships to be in conflict with several decisions of this Board. Those decisions have established that where, as here, a given field of legislation is within the competence both of the parliament of Canada and of the provincial legislature and both have legislated, the enactment of the Dominion parliament must prevail over that of the province if the two are in conflict as they clearly are in the present case."

The particular decisions the Board had in mind are not specified.[9] In the Quebec Courts the *Bell Telephone Co.'s Case,* to be dealt with in a

[9] In the *Law Journal Reports* (78 L. J. P. C. 60) the reporter refers in a footnote to *Tennant's Case* (1894), A. C. 31; 63 L. J. P. C. 25; to the *Voluntary Assignments Case* (1894), A. C. 189; 63 L. J. P. C. 59; and to the *Contracting Out Case* (1907), A. C. 65; 76 L. J. P. C. 23.

moment, was considered the governing authority and that would seem to be manifestly the correct view. The 'given field of legislation,' referred to in the judgment, was evidently the field covered by "works and undertakings." The two Acts of incorporation were, as already suggested, more than mere incorporating instruments; they were substantive enactments in relation to certain works and undertakings, the one local or provincial only, the other federal, contemplating and authorizing physical extension both within and beyond the limits of the province. Any provincial legislation therefore which directly purported to restrict the intra-provincial area within which the federal work could extend itself would be repugnant to a valid enactment of the parliament of Canada, passed in relation to a work or undertaking over which, as a work or undertaking, a provincial legislature had no jurisdiction. This was the actual decision in the *Bell Telephone Co.'s Case*,[10] in which it was held that the company had the right, given to it by federal legislation relating to its work and undertaking, to erect poles and string its wires along the streets of Toronto without the consent of the city in spite of a provision to the contrary in the provincial Municipal Act. And the same principle underlies the recent decision of the Privy Council in the *John Deere Plow Co. Case*,[1] in which the company's Act of incorporation was treated not only as an instrument of incorporation but also as legislation relating to the regulation of interprovincial trade and commerce, and in which it was accordingly held that provincial legislation could not by way of conditions precedent shut out the company from a particular province.

[10] *Toronto* v. *Bell Telephone Co.* (1905), A. C. 52; 74 L. J. P. C. 22.

[1] *John Deere Plow Co.* v. *Wharton* (1915), A. C. 330; 84 L. J. P. C. 64.

Extension Beyond a Province: "Physical Things":—It was the opinion of the late Mr. Justice Street that the connection between two provinces, or the extension beyond a province, requisite to bring a work or undertaking within class *a* of section 92, No. 10, was intended to be real and physical, and not a mere paper connection or extension created by a charter; but this view has been expressly overruled.[2] Of course, a work or undertaking not created under statutory authority would have to be judged upon the actual facts, but no case of that kind has come up for adjudication, as parliamentary sanction by an Act of incorporation or otherwise is nearly always obtained. The result is that the character of the work or undertaking stands to be judged in most cases by the description of it contained in the instrument of incorporation. And the Privy Council has laid it down that it is the potential, and not the actual, sphere of operation which fixes the character of a work or undertaking as federal or provincial, just as a company's capacity for action and not the actual exercise of its powers fixes its objects as provincial merely or other than provincial.[3] The works and undertakings covered by these classes have been described by the Privy Council as "physical things not services."[4] Except in the case of class *c*, extension beyond the limits of a single province must be a feature of the work or undertaking. But the fact that at any given moment the work may be confined to a single province does not affect the validity of the federal Act providing for its establishment and operation, or make the work at any

[2] *Toronto* v. *Bell Telephone Co.*, 3 Ont. L. R. 465; reversed on appeal: see (1905) A. C. 52; 74 L. J. P. C. 22.

[3] *Colonial Building Co.'s Case*, 9 App. Cas. 157; 53 L. J. P. C. 27. See *ante*, p. 729.

[4] *Through Traffic Case* (1912) A. C. 333; 81 L. J. P. C. 145.

such moment a local work or undertaking, so as to subject it to any provincial law relating to local works and undertakings as such.[5]

Physical Continuity:—To what degree, if any, there must be a physical connection, actual or contemplated, between the works or undertakings in one province and in another in order that it may be said with truth that the whole work or undertaking extends or may extend beyond one province or that it connects one province with another, so as to make the work or undertaking as a whole a proper subject for federal legislation, is a question upon which there is no authoritative pronouncement. It is quite conceivable that a manufacturing company, for example, might be incorporated and properly incorporated by the Dominion parliament, for the purpose of erecting and operating manufacturing plants in two or more provinces; but whether in each province those plants would be other than local works or undertakings, and as such within the exclusive jurisdiction of the provincial legislatures, is a very debatable point. It is obvious that a continuous or even actual physical connection is not contemplated in some of the classes mentioned; for example, steamship lines, or a wireless telegraphy system; and, perhaps, the use of the word "undertaking" indicates that physical connection between the different parts of the undertaking is not essential, so long as the undertaking as a whole has to do with physical things worked and controlled as one, though spread over different provinces. In all these cases, as the Privy Council has just emphasized in the *Alberta Railway Act Case*,[6] it is a question of constitutional power.

[5] *Toronto* v. *Bell Telephone Co., supra; Kerley* v. *London & Lake Erie Ry.*, 28 Ont. L. R. 606 (C.A.).

[6] (1915), A. C. 363; 84 L. J. P. C. 58.

which should not be denied because of administrative difficulties. These are possible and indeed inevitable under a federal system; but no assumption is permissible that any legislature, federal or provincial, will abuse its power, in the one case to the detriment of any locality or province, in the other against the interests of Canada as a whole.

"*For the General Advantage of Canada*":— It has been made a question by individual judges whether the power of the parliament of Canada extends so far as to declare a particular class of works to be works for the general advantage of Canada or whether it is a power exercisable only in individual cases as they arise;[7] but no case has turned upon the point. Where the only declaration was in the shape of a preamble that it was desirable "for the general advantage of Canada" that a company should be incorporated for a certain purpose, there was a marked difference of opinion among the judges of the Supreme Court of Canada as to the effect of this preamble in bringing the work within class *c;* but as the work contemplated extra-provincial extension of its wires it was held to fall within *a* and therefore no declaration was necessary.[8] The view was further expressed that because the company's operations would interfere with the navigation of the Welland River the undertaking was within the exclusive jurisdiction of the parliament of Canada, but this, it is conceived, is not a correct statement of the law;[9] unless, indeed, the fact that the Welland River at the *locus* had by a pre-confederation statute of Canada been declared to be public property, as part of the Wel-

[7] See *Re St. Joseph and Quebec Central Ry.*, 11 Ont. L. R. 193.

[8] *Hewson* v. *Ontario Power Co.*, 36 S. C. R. 596; 8 Ont. L. R. 9; 6 Ont. L. R. 11.

[9] See *ante*, p. 707 *et seq.*

land Canal system, would make federal legislation necessary.[10]

Where the work or undertaking falls within either class *a* or class *b* of section 92, No. 10, a declaration by the parliament of Canada in the terms of class *c* is unnecessary and unmeaning;[1] and it has been recently held by the Court of Appeal for Ontario that the provision in the Dominion Lord's Day Act allowing provincial legislation in regard to Sunday labor on works which, but for such a declaration, would be within provincial jurisdiction as being local works and undertakings merely does not apply at all to railways or steamship lines falling within class *a* or class *b*.[2]

Railways.

Railways are mentioned in section 92, No. 10, as one particular species of "works and undertakings," and there are many federal railways and many provincial railways, which as works and undertakings are within the exclusive jurisdiction of the parliament of Canada and the provincial legislatures respectively, as the case may be. They may well be taken for special treatment, not merely because of their importance, but also because they are typical and the general principles governing all "works and undertakings" have been very largely settled in cases in which railways have been litigants. Moreover, in determining what enactments are to be constitutionally classified as laws in relation to "railways," resort has been had in a marked degree to the doctrine of implied or necessarily incidental or ancillary powers. Upon this

[10] This is one of the grounds taken by Britton, J., in the court of first instance: 6 Ont. L. R. 11.

[1] *Bell Telephone Co.'s Case, supra.*

[2] *Kerley* v. *London & L. E. Ry.* (1913), 28 Ont. L. R. 606.

feature of the cases touching railways reference should be had to a previous chapter in which the doctrine is discussed.[3] It was there pointed out that the doctrine must necessarily have but a restricted application in determining the scope of competing, mutually exclusive, class-enumerations; and that although the powers conferred are plenary powers of legislation and the descriptions of the classes should *prima facie* cover all that may be taken by reasonable implication from the language used, nevertheless the language describing a competing class may forbid an implication or inference which ordinarily might be legitimate, and so limit the scope of a given class. The general principles which underlie the distribution of legislative power under a federal system such as that established by the British North America Act, and the rules of interpretation which have been established as peculiarly to be borne in mind for the reconciliation of the apparently overlapping class-enumerations, must be constantly referred to here as always. But these have received separate treatment in earlier chapters[4] and therefore it should suffice here to note in order of authority the cases which have determined what is proper "railway" legislation, federal or provincial, as the case may be.

"Railway" Legislation.

Most of the cases to be examined on this head relate to federal enactments, but they would obviously apply to support similar enactments by provincial legislatures in reference to provincial railways.

Highway Crossings:—In the latest case upon this particular branch of our subject, the Privy

[3] Chap. XXVII., *ante*, p. 493.
[4] See Chaps. XXII. to XXVII., *ante*, pp. 448-507.

Council was called upon to pronounce upon the validity of a certain order made by the Railway Committee of the Privy Council of Canada directing the City of Toronto to pay a fixed proportion of the cost of maintaining gates and a watchman at a point where the Canadian Pacific Railway crossed on the level over one of the city's streets.[5] The Railway Act of Canada then in force provided that the Railway Committee might require protective measures to be adopted at such crossings and might order a portion of the cost of their establishment and maintenance to be paid by "any person interested therein." In the opinion of the Privy Council this legislation was clearly *intra vires*:

"The sections impugned do no more than provide reasonable means for safeguarding in the common interest the public and the railway which is committed to the exclusive jurisdiction of the legislature which enacted them, and were therefore *intra vires*. If the precautions ordered are reasonably necessary it is obvious that they must be paid for and, in the view of their Lordships, there is nothing *ultra vires* in the ancillary power conferred by the sections on the Committee to make an equitable adjustment of the expenses among the persons interested."

The application for the protective measures was made, it should be noted, by the city and their Lordships held that it was a "person interested." The contest, indeed, in the Courts below had been largely upon this latter point, which raised questions as to the position of provincial "municipal institutions," which must be discussed later.[6]

[5] *Toronto* v. *Can. Pac. Ry.* (1908), A. C. 54; 77 L. J. P. C. 29.

[6] See *post*, p. 796. In earlier litigation the County and Township of York, who had not been applicants but had been represented before the Railway Committee by counsel objecting to the Committee's jurisdiction, unsuccessfully took proceedings to question the order so far as it imposed liability upon them: *Re C. P. R. & York* (1898), 25 O. A. R. 65; (1896) 27 O. R. 559. Burton,

The same sections of the Railway Act, it should perhaps be noted, had been before the Supreme Court of Canada two years earlier and had been unanimously pronounced *intra vires*, although Mr. Justice Idington dissented from the rest of the Court upon the question whether or not the municipality in which the crossed highway was situate could be deemed a "person interested," being of opinion that it could not.[7] The Privy Council refused leave to appeal from this judgment.

After the decision of the Privy Council in *Toronto* v. *Canadian Pacific Ry.*, the further question came before the Supreme Court of Canada as to the power to direct a municipality into which a crossed highway led, but in which the actual crossing was not situate, to pay a portion of the cost of an overhead bridge at the crossing. The Board of Railway Commissioners had held that the municipality was in fact a "person interested" and had directed it to pay a certain proportion. This order

C.J.O., said:—"In all matters affecting its construction, operation, and management, including the expropriation of the lands required, everything in fact necessary to its full and efficient working, the legislation of the Dominion is of paramount authority, even though it interferes with property and civil rights and trenches upon matters assigned to the provincial legislature by s. 92;" but he expressed doubt as to the clauses giving power to impose upon parties other than the railway the burden of the cost of the structures, etc., deemed necessary. Of the clauses in question, Osler, J.A., said:—"As provisions relating to the safety of the public in connection with the management of a great Dominion undertaking they would appear to be eminently germane, if not absolutely necessary, to legislation on such a subject." See also *G. T. R.* v. *Ham. Rad. Elec. Ry.* (1897), 29 O. R. 143, *per* Street, J.: *G. T. R.* v. *Toronto* (1900), 32 O. R. 120, *per* Meredith, J. In the former case Street, J., held that an order of the Railway Committee allowing defendant company to cross the G. T. R. at grade was valid though contrary to the provisions of the defendant company's provincial Act of incorporation.

[7] *Toronto* v. *Grand Trunk Ry.* (1906), 37 S. C. R. 232.

was upheld by the Supreme Court, and the Privy Council afterwards refused leave to appeal.[8]

And reference may conveniently be made here to the later case before the Supreme Court of Canada[9] in which the above decisions were further considered, and in which the majority of the Court upheld an order of the Board of Railway Commissioners for Canada directing the appellants, a tramway company provincially incorporated, to pay a portion of the cost of certain overhead bridges or viaducts over a federal railway to be constructed along certain streets in Vancouver in lieu of the previous level crossings. The tramway line had running rights along these streets under agreements with the city. The matter had been brought before the Board by the city. It was the opinion of the majority of the Supreme Court that the tramway company was a " person interested " and, further, that the parliament of Canada could validly impose liability upon such a company under such circumstances. Mr. Justice Duff, with whom Mr. Justice Brodeur concurred, dissented for reasons based largely upon the decision of the Privy Council in the *Through Traffic Case*,[10] namely, that the imposition of liability under such circumstances upon a provincial undertaking was not legislation necessarily incidental to legislation in relation to the federal railway. The Privy Council, however, reversed the decision of the Supreme Court of Canada, but only on the ground that the Railway Act did not, upon its true interpretation, warrant any such order as the Board of Railway Commissioners had pronounced.[1] The constitutional point was

[8] *County of Carleton* v. *Ottawa* (1909), 41 S. C. R. 553. See also, to the same effect, *Re Grand Trunk Ry. & Kingston* (1903), 8 Exch. Ct. R. 349 (Burbidge, J.)

[9] *B. C. Elec. Ry.* v. *Vancouver, V., & E. Ry.*, 48 S. C. R. 98.

[10] See *post*, p. 768.

[1] (1914), A. C. 1067; 83 L. J. P. C. 374.

therefore not discussed though the reasons given in Mr. Justice Duff's judgment were characterized as "weighty."

Relations with Employees:—A provision in the Railway Act of Canada prohibiting any railway company from entering into contracts with its employees by which the latter should agree to relieve the company from liability to pay compensation in case of accidents resulting in injury to such employees was held *intra vires* by the Privy Council[2] for reasons thus stated:

"Inasmuch as these railway corporations are the mere creatures of the Dominion legislature—which is admitted—it cannot be considered out of the way that the parliament which calls them into existence should prescribe the terms which were to regulate the relation of the employers to the corporation. It is true that in so doing it does touch what may be described as the civil rights of those employees. But this is inevitable and indeed seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam*, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples may be cited provisions relating to the expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers."

The use of the colloquial phrase "not out of the way" serves to indicate the wide discretion parliament has in legislating as to railways.

Contracts of Carriage:—In reference to contracts of carriage, incidentally mentioned in the above extract, there is a statement in an early case in the Supreme Court of Canada[3] as follows:

"The contracts to convey passengers and goods on the railways under Dominion control, for instance, the contract

[2] *Grand Trunk Ry.* v. *Atty.-Gen. for Canada* (1907), A. C. 65; 76 L. J. P. C. 23; affirming 36 S. C. R. 136.

[3] *Parsons' Case*, 4 S. C. R. at p. 307, *per* Taschereau, J.

made by the sender of a message with a telegraph company, the contract of sale of bank stock, are all and every one of them, when made anywhere within the Dominion, regulated by federal authority. . . . It would be impossible for them to carry on their business if each province could impose upon them and their contracts different conditions and restrictions. A Dominion charter would be absolutely useless to them if the constitution granted to each province the right to regulate their business."

While there is confusion here between the powers conferred by incorporation and the powers under the exceptions specified in class No. 10 of s. 92,[4] no doubt has been cast upon the main proposition; but of course provincial laws as to such contracts would govern in the absence of express federal legislation.

Organization of Company:—The clause in the Railway Act which renders any person holding office in a federal railway company or interested in any contract with it ineligible as a director of the company was upheld by the Supreme Court of Canada "for the reasons given in the Court appealed from," namely, that—

"The capacity or incapacity of directors is a matter essentially connected with the internal economy of a railway company."[5]

And there would seem to be no doubt that the Act of incorporation of a railway company may provide as parliament wills for the company's form of organization.[6]

Limitation of Actions:—And the clause limiting the time within which an action may be brought

[4] See *ante*, p. 743 *et seq.*

[5] *Macdonald* v. *Riordan* (1899), 30 S. C. R. 619; affirming 8 Que. Q. B. 555.

[6] See *post*, p. 760.

against a railway company for injury sustained "by reason of the railway" or damage suffered through the construction or operation of it has been upheld by the Supreme Court of New Brunswick,[7] and the Full Court in British Columbia.[8] The Court of Appeal for Ontario divided evenly upon the question.[9] In the New Brunswick case the defendant company was originally incorporated by a pre-Confederation Act which provided for the fencing of the line. After Confederation, the railway was declared to be for the general advantage of Canada with the provision that the Dominion Railway Act should govern it so far as applicable and not inconsistent with the several Acts of the company. The provincial Act was held to govern as to fencing; the Dominion Act as to the time within which action should be brought.[10]

In the British Columbia case the action was one claiming damages for injury to the plaintiff's orchards caused by fire from the railway company's engines. In the Ontario case Hagarty, C.J.O., and Osler, J.A., upheld the enactment as being an almost essential part of railway legislation, while Burton and Maclennan, JJ.A., considered it an unnecessary interference with "property and civil rights in the province." The injury complained of was trespass to timber in connection with the construction and operation of the road.

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[7] *Levesque* v. *New Brunswick Ry.* (1899), 29 N. B. 588.

[8] *Northern Counties* v. *Can. Pac. Ry.* (1907), 13 B. C. 130.

[9] *McArthur* v. *Northern & P. J. Ry.* (1890), 17 Ont. App. 86.

[10] King, J., expressed doubt as to the clause allowing the company to plead the general issue, saying:—"I have not been convinced thus far of the power of the Dominion parliament to legislate as to pleadings in the Courts of civil jurisdiction established by provincial laws;" but held it unnecessary to decide the point, leave to amend having been granted. See also *Toronto* v. *Bell Tel. Co.* noted *ante*, p. 747, and *St. Joseph* v. *Que. Cent. Ry.*, 11 Ont. L. R. 193, as to the abrogation of provincial Acts by the exercise of the power conferred by exception (*c*).

There has been some difference of opinion as to the scope of the actual legislation upon this subject which from time to time has found a place in the Railway Act of Canada;[1] but in none of the cases is the constitutional authority of the parliament to legislate as it will on the subject been seriously questioned. In the absence of such legislation, provincial law governs. In a recent case in Manitoba the Court of Appeal for that province held, upon a full review of the authorities, that the clause in the Railway Act of Canada (sec. 306) which limits to one year the right to bring an action for damages suffered "by reason of the construction and operation of the railway," did not cover the case of a workman injured through the fall of a scaffold used in the erection of an ice-house for the company.[2] In the opinion of the Court, the section applied only to actions based on some specific provision in the Railway Act itself and not to common law rights of action or rights based on general provincial legislation as to the relation of master and servant. And in a very recent case the Privy Council held that a similar provision in the special Act of a provincial railway limiting the time to six months did not operate to alter the general law as enacted in Lord Campbell's Act or, rather, in its provincial counterpart, namely, a one year limitation.[3]

The section of the Railway Act which gives to any person injured through the failure of a railway company to observe the provisions of the Act a right of action "for the full amount of damages sustained" was held by the Court of Appeal for Ontario to be a valid enactment and to override a provision in a provincial Act which placed a limit

[1] See *Can. Northern Ry.* v. *Robinson*, 43 S. C. R. 387.

[2] *Sutherland* v. *Can. Northern Ry.* (1911), 21 Man. L. R. 27. See further as to provincial law, *post*, p. 759 *et seq.*

[3] *B. C. Elec. Ry.* v. *Gentile* (1914), A. C. 1034; 83 L. J. P. C. 353.

upon the amount recoverable by an employee under such circumstances.[4]

Federal Railways and Provincial Laws.

Dominion legislation in reference to federal railways is, of course, of paramount authority and may interfere with and modify or supersede provincial legislation. Provincial legislation strictly relating to such works and undertakings is incompetent; but in the absence of Dominion legislation upon what may be deemed ancillary topics provincial legislation in reference thereto would have operation.[5]

The line of demarcation between Dominion and provincial powers in reference to federal railways is indicated in two early decisions of the Privy Council.[6] In the later of the two cases it was held that a provincial legislature has no power to order any particular work, in that case fencing, in connection with the construction of federal railways, and that it cannot indirectly enforce such construction work by a provision that the company shall be liable in damages to any one injuriously affected by its absence. The earlier decision is thus referred to:

"The line seems to have been drawn with sufficient precision in the case of the *Canadian Pacific Ry.* v. *Notre Dame de Bonsecours*, where it was decided that, although any direction of the provincial legislature to create new works on the railway and make a new drain and to alter its construction would be beyond the jurisdiction of the provincial legislature, the railway company were not exempted from the municipal state of the law as it then existed, that all land owners,

[4] *Curran* v. *Grand Trunk Ry.* (1898), 25 Ont. App. 407.

[5] The general principle is discussed, *ante*, p. 493 *et seq.*

[6] *Can. Pac. Ry.* v. *Notre Dame de Bonsecours* (1889), A. C. 367; 58 L. J. P. C. 54; and *Madden* v. *Nelson & F. S. Ry.*, *ib.* 626, 148.

including the railway company, should clean out their ditches so as to prevent a nuisance."

The line is thus drawn in the earlier case:

"The British North America Act, whilst it gives the legislative control of the appellants' railway *quâ* railway to the parliament of Canada, does not declare that the railway shall cease to be part of the provinces in which it is situated or that it shall in other respects be exempted from the jurisdiction of the provincial legislatures. Accordingly the parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway and for its management, and to dictate the constitution and powers of the company;[7] but it is, *inter alia*, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the 'railway legislation,' strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion parliament. It therefore appears to their Lordships that any attempt by the legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its power. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that in the event of its becoming choked with silt or rubbish so as to cause overflow and injury to other property in the parish it should be thoroughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the legislature of Quebec."[8]

In a number of other cases provincial legislation has been held operative in respect to federal railways. For example:

[7] Compare with this the language of Burton, C.J.O., in *Re Can. Pac. Ry. v. York*, 25 Ont. App. 65, quoted in note on p. 752, *ante*.

[8] Approved of in the latest case before the Privy Council, *Re Alberta Ry. Act*. See *post* p. 766.

Master and Servant:—Those parts of provincial "employers' liability" and "workmen's compensation" Acts which do not touch the structural arrangement of a railway are applicable alike to federal and provincial roads. In 1897, the earlier authorities were thus summed up by Osler, J.A.:[9]

"In *Monkhouse* v. *Grand Trunk Ry.*,[10] it was held that the provisions of the Railway Accidents Act (Ont.) as to packing and filling frogs, guard rails, and wing rails, applied to those railway companies only which were within the jurisdiction of the provincial legislature and not to Dominion railway companies. The corresponding enactments of the Workmen's Compensation for Injuries Act (Ont.) must also, in my opinion, be confined in their application to the former class of railway companies and for the same reason, namely, that they relate to the construction or arrangement of the railway track itself. This is consistent with our decision in the case of *Rowlands* v. *Can. Southern Ry.*, 30th June, 1889, approved in *C. S. R.* v. *Jackson*,[1] where it was held that railway companies of both classes, just as other corporations or individuals within the province, were subject to other provisions of the Workmen's Compensation for Injuries Act dealing with the general law of master and servant and giving their servants a right of action against them under certain circumstances for injuries arising from the negligence of fellow servants."

In *Can. Southern Ry.* v. *Jackson*, referred to in the above extract, Mr. Justice Patterson says of the clauses there in question:

"It is not legislation respecting such local works and undertakings as are excepted from the legislative jurisdiction of the province by article 10 of s. 92 of the British North America Act. It touches civil rights in the province. The rule of law which it alters was a rule of common law in no way depending on or arising out of Dominion legislation,

[9] *Washington* v. *Grand Trunk Ry.*, 24 Ont. App. 183.
[10] 8 O. A. R. 637.
[1] 17 S. C. R. 316.

and the measure is strictly of the same class as Lord Campbell's Act, which, as adopted by provincial legislation, has been applied without question to all our railways."

But there is no doubt of the power of the parliament of Canada to legislate fully as to the relations, contractual and otherwise, which are to exist between any federal railway or other federal work or undertaking and its employees. That is definitely established by the *Contracting-out Case*,[2] and such federal legislation would override all inconsistent provincial law.[3] Whether such legislation was in extension or curtailment of the common-law or provincial-law rights of the workmen would not touch the question of legislative jurisdiction. Whether a provincial Act touching the law of master and servant could, in the absence of Dominion legislation, deal specially by way of exception or otherwise with the relation in that regard between a federal railway and its employees may be questioned; such special provision would, it is conceived, be really legislation as to the federal railway.

Provincial Process to Enforce Judgments:—A provincial statute providing for sequestration proceedings against railways in certain cases was upheld as applicable to a federal railway by the Quebec Court of Queen's Bench upon the ground that the Act was one relating to procedure to enforce a judicial sale.[4] It should be noticed, however, that there is apparently a difference between the statutory jurisprudence of Quebec and that of Ontario as to the sale of a railway under execution or by

[2] *Ante*, p. 755.

[3] See *Curran* v. *Grand Trunk Ry.*, 25 Ont. App. 407, referred to *ante*, p. 759.

[4] *Baie des Chaleurs Ry.* v. *Nantel* (1896), Que. L. R. 9 S. C. 47; 5 Q. B. 65, Hall and Wurtele, JJ., dissenting.

mortgagees. The policy underlying railway legislation in Great Britain forbids the transfer of such a quasi-public franchise to persons other than the company authorized by parliament to make use of it, the reason just suggested being thus elaborated by Lord Cairns:[5]

"When parliament, acting for the public interest, authorizes the construction and maintenance of a railway both as a highway for the public and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers them upon the company which parliament has before it and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred."

The result was that in England anyone having a judgment against, or holding a mortgage debenture of, a railway company could only procure the appointment of a receiver of the profits of the undertaking, and was not entitled to have the railway or the lands or other capital property of the company sold for payment of its debts. The same view was taken in Ontario as to the policy of railway legislation in that province.[6] But in Quebec it was laid down as settled law in 1888 that under the legislation of that province a railway could be seized and sold to satisfy the debts of the company; not indeed piecemeal but as an *integer*.[7] And this was taken by the Privy Council to be recognized by federal enactment which provided that where a federal road is sold under lawful proceedings, a

[5] *Gardner* v. *London, C. & D. Ry.*, L. R. 2 Ch. 201; 36 L. J. Ch. 323.

[6] *Peto* v. *Welland Ry.* (1862), 9 Grant 455; and the Privy Council in 1905 saw no reason to doubt the correctness of this view of the law in Ontario; *Central Ontario Ry.* v. *Trusts & Guarantee Co.* (1905), A. C. 576; 74 L. J. P. C. 116.

[7] *Redfield* v. *Wickham*, 13 App. Cas. 467; 57 L. J. P. C. 94.

permit may issue to the buyer to operate the railway until a company can be incorporated to take it over. As to provincial railways in Ontario the position is otherwise in the absence of any alteration in the statute law of that province;[8] in all the provinces indeed the position of provincial railways in this regard must depend upon provincial legislation. And the same is, of course, true as to federal railways; their position in this regard depends upon the Railway Act.

Examples of Ineffectual Provincial Legislation.

On the other hand, provincial legislation has been held either inapplicable to federal railways or an encroachment upon the Dominion field, in several instances. For example:

Affecting Structural Condition:—The Supreme Court of Canada, following avowedly the principle of the Privy Council decisions, has held that provincial legislatures have no jurisdiction to make regulations in respect to crossings or the structural condition of the road bed of railways subject to the provisions of the Railway Act of Canada.[9] And in a comparatively recent case the same tribunal held that the "Prairie Fires Ordinance" of the North-West Territories designed to enforce the ploughing of fire guards along the line of the Canadian Pacific Railway, on its true construction applied to that road, but that, as so applied, it was *ultra vires*, as legislation in relation to the company's right of way and to the equipment of its

[8] As to mechanics' liens, see *Crawford* v. *Tilden*, 13 Ont. L. R. 169; *King* v. *Alford* (1885), 9 Ont. R. 643; *Breeze* v. *Midland Ry.* (1879), 26 Grant 225.

[9] *Grand Trunk Ry.* v. *Therrien* (1900), 30 S. C. R. 485. See also *Grand Trunk Ry.* v. *Huard* (1892), Que. R. 1 Q. B. 502.

engines.[10] In an earlier case the Supreme Court of New Brunswick had held the "Forest Fires Act" of that province *intra vires* and applicable to the same railway;[1] but the Act was one of general application and did not touch structural conditions. It simply provided that any person setting out fire for clearing purposes during certain defined seasons should give notice and take certain precautions.

A provincial Mechanics' Lien Act cannot operate to place a charge upon a federal railway.[2]

As already intimated, those parts of provincial "Employers' Liability" and "Workmen's Compensation" Acts and Acts of that description which relate to the structure and arrangement of the railway plant and equipment cannot apply to federal railways.[3]

Amalgamation:—And where a railway incorporated under a provincial Act was declared to be for the general advantage of Canada, thus becoming a federal road, a subsequent provincial Act amalgamating the company at its own request with another (provincial) railway company was held *ultra vires* by the Privy Council.[4]

Federal Railways and Provincial Railway Law.

Crossings:—It was held in an early case in Ontario that the provision in the then Railway Act of Canada that no provincial railway should cross a federal line without the approval of the Railway

[10] *Can. Pac. Ry.* v. *R.* (1907), 39 S. C. R. 476.

[1] *Grant* v. *Can. Pac. Ry.* (1904), 36 N. B. 528.

[2] *Crawford* v. *Tilden* (1907), 14 Ont. L. R. 572, C. A.; 13 O. L. R. 169; *Larsen* v. *Nelson & F. S. Ry.* (1895), 4 B. C. 151.

[3] See *ante*, p. 761.

[4] *Bourgoin* v. *Montreal, O. & O. Ry.*, 5 App. Cas. 381; 49 L. J. P. C. 68.

Committee of the Privy Council was *intra vires*, the consent of the provincial Minister of Public Works under the Provincial Act being, of course, also necessary.[5] And the same view was taken in a later case in Manitoba.[6]

The right of a provincial legislature to enact provisions looking to the compulsory crossing of federal railways by provincial lines has been recently considered by the Privy Council. The Railway Act of Alberta contained a clause permitting a provincial railway to take lands belonging to any other railway and to operate over its right of way, subject to the approval of the Lieutenant-Governor in Council. In 1912 the Act was amended so as to make it clear that the words "any other railway" would cover a federal railway, so long as the taking and using would not unreasonably interfere with the construction and operation of the crossed line. In the opinion of the Privy Council, the Act before its amendment could apply only to the crossing of one provincial line by another provincial line and was *intra vires*. The amendment was held to be clearly beyond the powers of a provincial legislature as being—

> "unquestionably legislation as to the physical construction and use of the tracks and buildings of a Dominion railway and that of a serious and far-reaching character."[7]

And, in the opinion of the Board, the striking out of the word "unreasonably" would not mend matters.

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[5] *Credit Valley Ry.* v. *Great Western Ry.* (1878), 25 Grant, 507, *per* Proudfoot, V.C.

[6] *Can. Pac. Ry.* v. *Northern Pac. & Man. Ry.* (1888), 5 Man. L. R. 313, *per* Killam, J. See also *Re Portage Extension of Red R. Valley Ry.*, Cassell's Supreme Ct. Dig., 487.

[7] *Atty.-Gen. of Alberta* v. *Atty.-Gen. of Canada* (1915), A. C. 363; 84 L. J. P. C. 58; affirming 48 S. C. R. 9.

"It would still be legislation as to the physical tracks and works of the Dominion railway and as such would be beyond the competence of the provincial legislature. These are matters as to which the exclusive right to legislate has been accorded to the parliament of the Dominion so that the provincial legislatures have no power of legislation as to them; and this holds good whether or not the legislation is such as might be considered by juries or judges to be reasonable."

Provincial Railways and Federal Railway Law.

Through Traffic:—Federal railways and provincial railways, of course, often cross each other, and this necessarily involves structural arrangements at the point of intersection. And traffic originating on one line must often, before reaching its ultimate destination, be transferred to and be carried over another line. Moreover railways both federal and provincial have often to cross navigable waters; and in connection with their operation there is obviously room for penal enactments. The Railway Act of Canada provides [8] that every provincial railway crossing or connecting with a federal railway shall, although not declared to be for the general advantage of Canada, be subject to those provisions of the Act which relate, (a) to the crossing or connection of one railway by or with another, (b) to through traffic, (c) to criminal matters, and (d) to navigable waters. There is added a proviso that in the case of a provincial railway owned by a province the provisions of the Act as to through traffic are not to apply except by consent of the province; a proviso which by implication leaves or purports to leave provincial government railways subject to the other provisions mentioned in the section. The section, it will be noticed, leaves untouched the question as to the

[8] R. S. C. (1906), c. 37, sec. 8.

operation as regards provincial railways of the general law of Canada relating to navigation and crimes; it is only the special provisions of the federal Railway Act upon these topics which are covered by the section. In the *Through Traffic Case*[9] the Privy Council held the section *ultra vires* so far as the enactment as to through traffic was concerned, without any expression of opinion as to the other items. The question before their Lordships was as to the validity of an order made by the Board of Railway Commissioners under the above mentioned section requiring a provincial railway to enter into certain prescribed arrangements with a federal railway fixing the rate to be charged by the former for the carriage over its line of "through" traffic. So far as the order purported to bind the federal railway it was held to be valid, but as to the provincial railway the provincial legislature in the opinion of their Lordships had exclusive jurisdiction over it in regard to its carriage of freight and passengers. Federal legislation purporting to control the rates it should charge could not be considered as in any proper sense legislation relating to the federal railway. If a public evil had grown up the only remedy lay in the co-operation of the federal and provincial governments, each putting the necessary legislative pressure upon the railway subject to its jurisdiction.[10]

But what is said in the judgment as to the embarrassment of dual control should not, it is conceived, be pushed too far. Provincial railways and railway companies are subject in many matters to federal law, the execution of which is necessarily in the hands of federal officers. The dual control deprecated by the Privy Council is a dual control

[9] (1912), A. C. 333; 81 L. J. P. C. 145. See *ante*, p. 502.
[10] See *ante*, p. 394.

of a provincial railway as a local work and undertaking, that is to say, in matters which, as in the case of federal railways, would be properly described as railway legislation.

And the established principle of federal paramountcy must be recognized here as elsewhere. An enactment, for example, as to the construction of bridges over navigable waters would apply to a bridge on the line of a provincial railway although in one aspect of the enactment it might be said to be a law in relation to a provincial railway, and although no doubt in the absence of any federal law on the subject the provincial legislature could prescribe the character of such bridges as well as any others on provincial railways. And the same considerations would apply to the criminal law. It would appear indeed that the reference to the two subjects of navigation and the criminal law in the section above mentioned might naturally suggest a limitation of federal jurisdiction which does not exist, namely, to those provincial railways only which cross or connect with federal lines.

Crossings:—And in the most recent case before the Privy Council[1] the Board very distinctly affirmed the validity of that part of the section of the Railway Act of Canada above referred to which dealt with the question of crossings and connections. In their Lordships' opinion the Act gives an effective remedy against undue obstacles being put in the way of a provincial railway which may desire to cross a federal line, by imposing upon the Board of Railway Commissioners for Canada the duty, to be exercised of course in the public interest, to afford facilities for such crossings and

[1] *Re Alberta Railway Act* (1915), A. C. 363; 84 L. J. P. C. 58. See *ante*, p. 766.

giving to provincial railways a *locus standi* as applicants therefor. As to the constitutional validity of the enactment their Lordships say:

"These portions of the provincial railways are made subject to the clauses of the Dominion railway legislation, which deals also with the crossings of two Dominion railways, so that the provincial railways are in such matters treated administratively in precisely the same way as Dominion railways themselves. The parliament of the Dominion is entitled to legislate as to these crossings because they are upon the right of way and track of the Dominion railway as to which the Dominion parliament has exclusive rights of legislation."

Expropriation:—In a recent case before the Supreme Court of Canada there was a marked difference of opinion as to the power of the parliament of Canada to authorize the expropriation by a federal railway of land belonging to a provincial railway.[2] The Railway Act of Canada (section 176) authorizes a Dominion railway company to take lands belonging to any other railway company, subject to the approval of the Board of Railway Commissioners. It was unanimously held that on the proper interpretation of the Act the words "any other railway company" in the section in question do not apply to a provincial railway company. Had they so applied, Mr. Justice Duff was of opinion (in which the Chief Justice concurred) that the enactment would be *ultra vires* as establishing that dual control over provincial railways which the Privy Council had held in the *Through Traffic Case*[3] unwarranted by the British North America Act. Mr. Justice Idington was clearly of a contrary opinion; Mr. Justice Brodeur

[2] *Montreal Tramways Co.* v. *Lachine, &c., Ry. Co.* (1914), 50 S. C. R. 84.

[3] (1912), A. C. 333; 81 L. J. P. C. 145.

thought it "likely" that a federal railway could take the land by expropriation proceedings under the relevant sections of the Act; and Mr. Justice Anglin expressed no opinion upon the point. As to the particular order of the Board of Railway Commissioners under appeal, Mr. Justice Idington thought it should be upheld as merely supplementary to a previous order approving conditionally the location of the respondent's line, but the other judges were all of the opinion that it could be founded only on section 176, which, as already mentioned, the Court unanimously held inapplicable.

The recent pronouncement by the Privy Council in the *Alberta Railway Act Case*[4] while not expressly dealing with the point, would seem to affirm the constitutional authority of the parliament of Canada to authorize the taking of the lands of a provincial railway company by a federal railway for crossing purposes or otherwise, the exercise of the right being in fact subject to the controlling jurisdiction of the Board of Railway Commissioners to be exercised apparently upon the application of the federal railway for the Board's approval of the location plans. Upon that application the provincial line would be entitled to urge all proper safeguarding of its interests. But federal paramountcy must, it is conceived, be recognized.

Exterritorial Connections.

A provincial legislature was held by the New Brunswick Supreme Court to be entitled to legislate with respect to a provincial railway running only to the boundaries of the province, such railway being a local work and undertaking within section 92, No. 10, although, as appeared by the

[4] *Ante*, p. 769.

facts of that case, legislation had been procured in the State of Maine incorporating an American company to build a railway in that State to connect with the provincial railway in question.[5]

A provincial Act authorizing a municipality to grant a bonus to a railway built to connect with one beyond the province, was held by the Privy Council [6] to fall within No. 2 of section 92,[7] or under No. 16.[8] It was held not to be touched by No. 10 at all. A question, however, was raised in that case which the committee abstained from deciding, namely: Does class *a* cover a railway extending from one province, not into another, but into a foreign country? The limitation of class *b* to *steamship* lines was urged in support of the view that a provincial legislature has power to enact laws as to *railways* extending from the province into a foreign country. A provincial legislature, it is conceived, has no such power, nor indeed has the Dominion parliament so far as the operation of the road without Canada is concerned. So far as the incorporation of any such company is concerned No. 11 of section 92 would prevent action by a provincial legislature, as the object would not be provincial.[9]

[5] *European & N. A. Ry.* v. *Thomas*, 1 Pug. 42; 2 Cart. 439. See also *Re Windsor & Annapolis Ry.*, 4 R. & G. 322; 3 Cart. 399.

[6] *Dow* v. *Black*, L. R. 6 P. C. 272; 44 L. J. P. C. 52; 1 Cart. 95.

[7] "Direct taxation within the province, etc."

[8] "Generally all matters of a merely local or private nature in the province."

[9] See *ante*, p. 731.

CHAPTER XXXVII.

Public Services.

The exclusive legislative authority of the parliament of Canada extends to all matters falling within the following classes of subjects as enumerated in section 91 of the British North America Act, namely:

5. Postal Service.

6. The census and statistics.

7. Militia, military and naval service, and defence.

9. Beacons, buoys, lighthouses, and Sable Island.

11. Quarantine, and the establishment and maintenance of marine hospitals.

12. Sea coast and inland fisheries.

14. Currency and coinage.

28. The establishment, maintenance and management of penitentiaries.

There is concurrent federal and provincial jurisdiction under section 95 in relation to—

Agriculture and Immigration;

with the proviso that provincial legislation is to have effect as long and as far only as it is not repugnant to any Act of the parliament of Canada.

The provincial legislatures have exclusive jurisdiction under section 92 over matters relating to—

6. The establishment, maintenance and management of public and reformatory prisons in and for the province.

7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals.

And by section 93 the subject of

Education

is placed in the hands of the provinces with certain restrictions in the matter of separate schools for religious minorities which will call for discussion in a later chapter.

It is obvious that legislation upon some of the above topics results in the creation of private rights and the imposition of obligations both toward the public and toward individuals. And some of the other class-enumerations of sections 91 and 92 cover legislation which is more or less in the nature of public service, such as navigation and shipping, the criminal law, the administration of justice, municipal institutions, and others. These, however, have received separate treatment in other chapters, and those of the above classes which present aspects touching rights and obligations as between one citizen and his fellows have in that aspect received sufficient incidental treatment throughout other chapters.

There is not much room for differences of opinion as to the classes dealt with in this chapter so far as they relate to public service simply. At all events there are very few cases in which their scope in this aspect of them has been in question before the Courts. Not much, therefore, need be said about them here.

The Census and Statistics.

There has been no expression of judicial opinion as to the scope of this class, although a number of questions suggest themselves. It must be construed so as to exclude provincial legislation upon whatever matters are properly included in it; and any construction other than "the Census, and Statistics in relation thereto" would land one in difficulties. So construed, it has reference to the census required to be taken every ten years by section

8 of the British North America Act, and to the compilation of statistics in reference to nationality and creed, the increase or decrease of population, and kindred matters. In the Quebec Resolutions [1] the words " and statistics " do not appear. No wider interpretation is needed to enable the Dominion parliament to institute inquiries and compile statistics as to any matters upon which information is desired in order to intelligent legislation upon the various subjects committed to its legislative care. Acts authorizing such proceedings would be laws " relating to " such subjects. Any wider interpretation would have the absurd effect of condemning provincial legislatures to legislate in the dark upon many very important matters.[2]

" *Militia, Military and Naval Service, and Defence.*"

This is perhaps the matter in which, above all others, the Imperial authorities continue to exercise supervision over colonial legislation, and in respect to which, also, the British parliament habitually passes Acts of express colonial application. This matter, however, has received attention in a previous chapter,[3] and, as no serious question of any competing jurisdiction in Canada has arisen further treatment seems uncalled for.[4] From the

[1] No. 29 (12). See appendix.

[2] In this connection reference should be had to the recent case, *Attv.-Gen. of Australia* v. *Colonial Sugar Refining Co.* (1914), A. C. 237; 83 L. J. P. C. 154, in which the powers of the Commonwealth of Australia to gather information *compulsorily and under oath* were held to be somewhat limited. See also *Re Companies*, 48 S. C. R. at p. 384, *per* Idington, J.

[3] Chapter XI., *ante*, p. 201, *et seq.*

[4] The subjection of militiamen to the ordinary law of the land is touched upon in *R.* v. *Hill* (1907), 15 O. L. R. 406; and see also *Re Harris* (1909), 19 Man. L. R. 117 (C.A.) as to military law. As to the effect of war upon the work of the Courts, see *Marais* v. *Officer Commanding* (1902), A. C. 109; 71 L. J. P. C. 42.

colonial point of view, the position is clearly this: so far as Imperial legislation upon this subject is made applicable to the colonies generally, or to Canada in particular, any Canadian legislation repugnant thereto, in whole or in part, must be held to be void and inoperative to the extent of such repugnancy, but not otherwise.[5] In other words, in so far as Canadian legislation is supplementary to and not inconsistent with Imperial legislation upon the subject, section 91, No. 7, distinctly affirms the authority of the Dominion parliament, as distinguished from provincial assemblies, to pass such legislation.

Agriculture and Immigration.

The subject of immigration has already received attention.[6] "Agriculture" has been given a very wide interpretation, covering all matters connected with the farm, such as the care and improvement of stock, horsebreeding, dairying, and kindred matters. As properly falling under this head the federal Animals Contagious Diseases Act has been upheld.[7] And a provincial Act which provided a penalty for fraud in entering horses in a wrong class at race meetings of agricultural associations was considered as competent legislation under this head, there being no federal legislation to which it was repugnant.[8]

[5] Colonial Laws Validity Act, 1865. See *ante*, p. 57.

[6] *Ante*, p. 681 *et seq.*

[7] *Brooks* v. *Moore* (1907), 13 B. C. 91.

[8] *R.* v. *Horning* (1904), 8 Ont. L. R. 9. See also *R.* v. *Wason*, 17 Ont. App. 221, and *R.* v. *Stone*, 23 Ont. R. 46 referred to *ante*, p. 567. See also *R.* v. *Garvin*, 13 B. C. 331; 14 B. C. 260.

CHAPTER XXXVIII.

Education.

Section 93 of the British North America Act, 1867, provided as follows:

93. In and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union;

(2) All the powers, privileges, and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec;

(3) Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall lie to the Governor-General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

(4) In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the parliament of Canada may make

remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section.

Upon the admission of Prince Edward Island and British Columbia, this section as it stands was, with other parts of the British North America Act, made applicable to those provinces as if they had been originally parties to the Union. As will appear, it was somewhat modified in Manitoba's case, and, afterwards, in the recently formed provinces of Saskatchewan and Alberta. The North-West Territories are, of course, in a restricted position with regard to this question owing to the legislative supremacy exercised over these territories by the Dominion parliament. Although, therefore, it is thought advisable to treat the whole subject in one place, it will be equally advisable to consider the matter by provinces.

Ontario and Quebec.

At the date of Confederation that part of the then province of Canada known as Upper Canada had a Roman Catholic separate school system established by law.[1] Immediately prior to Confederation it was in contemplation to pass an Act placing the denominational minorities of what is now the province of Quebec in the same position as that occupied by the Roman Catholic minority of the Upper Province, but no Canadian legislation took place upon the subject, the end aimed at being

[1] 26 Vic. c. 5: "An Act to restore to Roman Catholics in Upper Canada certain rights in respect to separate schools." There was also upon the statute book of (old) Canada an Act conferring rights and privileges upon Protestants and "colored people" in regard to the establishment of separate schools. The separate schools of the "colored people," not being denominational, are not protected by the British North America Act.

secured by sub-section 2 of section 93. That sub-section is applicable to the province of Quebec only and it puts the two provinces of Quebec and Ontario upon so much the same footing that these two provinces may be dealt with together.

Prior to Confederation the position of the Roman Catholic minority in Upper Canada, under the Roman Catholic Separate School Act, had been considered in the Courts of that part of the province, and the view taken by those Courts is thus summed up by Hagarty, C.J.:[2]

"As Burns, J., remarked in *Re Ridsdale & Brush*:[3] 'The legislature intended the provisions creating the common school system, and for working and carrying that out, were to be the rule, and that all the provisions for the separate schools were only exceptions to the rule, and carved out of it for the convenience of such separatists as availed themselves of the provisions in their favour:' and my brother Gwynne, commenting on these words in *Harding* v. *Mayville*,[4] says that 'it lies on the plaintiff claiming exemption as a separatist to aver and prove all those exceptional matters, taking him out of the general rule.'"

These exceptional and special rights—privileges enjoyed by religious minorities in the different districts of the provinces over and above those rights enjoyed at common law or under statutory enactment by the inhabitants of the province at large—are the rights and privileges protected by this 93rd section. Having in view what is laid down by the Privy Council,[5] they may be shortly stated as follows:

[2] *Free* v. *McHugh*, 24 U. C. C. P. at p. 20.
[3] 22 U. C. Q. B. 124.
[4] 21 U. C. C. P. at p. 511.
[5] *Winnipeg* v. *Barrett* (1892), A. C. 445; 61 L. J. P. C. 58; *Brophy* v. *Atty.-Gen. (Man.)*, (1895), A. C. 202; 64 L. J. P. C. 70. In this connection the recent expressions of opinion by the judges of the Supreme Court of Canada in the *Regina School Case* (1915), 50 S. C. R. 589, should be taken into account.

1. The right to establish denominational schools;

2. The right to invoke state aid in the collection of taxes necessary for the support of such schools from their supporters;

3. The privilege of exemption from taxation for the support of the public schools of the province;

4. The privilege of having taught in such separate schools the religious tenets of their denomination;

to which should perhaps be added the right or privilege which any member of any denomination has to choose which he will support, the separate schools of his denomination or the public schools of the province.[6] Any legislation of a compulsory character would, it is thought, be unconstitutional as prejudicially affecting the right or privilege which such persons had by law at the date of Confederation.

It has been recently held that the use of the French language in schools in Upper Canada attended by French-Canadian children, whether those schools were public schools or denominational (separate) schools, was not a right enjoyed by law at the date of the union, and that therefore the provincial legislature of Ontario has the fullest discretion as to how far the French language is to be now used or taught in the schools of that province.[7]

Provincial legislatures have full power of legislation in relation to education and educational systems in the province, including the separate school system therein, so long as such legislation does not offend against the provisions of sub-section 1, that is to say,

[6] As to the position of teachers, see *Christian Brothers* v. *Minister of Education* (1907), A. C. 69; 76 L. J. P. C. 22.

[7] *Mackell* v. *Ottawa Separate School Board* (1914), 32 Ont. L. R. 245 (Lennox, J.).

does not *prejudicially* affect any right or privilege thereby protected.[8] Subsections 3 and 4 are indicative of the expectations of the framers of the British North America Act that there would be legislation by provincial legislatures in relation to denominational schools. The validity of such legislation is, in a sense, recognized by the deliverance by the Divisional Court of the Chancery Division in Ontario of an opinion on certain questions submitted to that tribunal as to the effect to be given to certain clauses of the Assessment Act of Ontario working amendment of the separate school law as it existed at the union by making more elaborate provision for classifying ratepayers into two classes, supporters of public, and supporters of separate, schools; although no discussion seems to have taken place, and no expression of opinion is to be found in the judgment, upon this constitutional question.[9] The matter however appears so clearly upon the construction of the statute that no doubt has ever been expressed as to the correctness of the views enunciated by Vice-Chancellor Blake. As put by him in the case cited:

"It would be a most unfortunate result of this enactment if it were found that it precluded the remedying defects in, or improving the machinery for, working out the separate school system. . . . It is therefore clear that the provincial legislature has some power to legislate as to denominational schools: and it is scarcely possible to conceive a case in which it could, and should, more properly interfere than where, as here, it is asked to remove an ambiguity in the working of the Act, and to give to separate schools the same class of machinery for carrying on its work, as is given to the public schools—a machinery which, after much thought and

[8] *Board* v. *Grainger*, 25 Grant. 570; *per* Blake, V.C.

[9] *Re R. C. Sep. Schools*, 18 O. R. 606; see also *Trustees of R. C. Sep. School* v. *Arthur*, 21 O. R. 60.

many years' experience, is found to be the best and simplest we have yet had."

Question for the Courts:—It has been contended that owing to the appeal provided for by sub-section 3, and the power given to the parliament of Canada to pass remedial laws in certain cases under sub-section 4, the question of the validity of separate school legislation has been entirely withdrawn from the Courts, but this view has been decisively negatived by the Privy Council:—

"At the commencement of the argument a doubt was suggested as to the competency of the present appeal in consequence of the so-called appeal to the Governor-General in Council provided by the Act. But their Lordships are satisfied that the provisions of sub-sections 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country."[10]

It devolves upon the Courts, therefore, in any given case, to decide whether or not any provincial legislation regarding denominational schools does, or does not, *prejudicially* affect any right or privilege with respect to denominational schools which any class of persons had by law in the provinces at the Union.

Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia.

Only in the event of the future establishment of a system of separate or dissentient schools by any one of these provinces can their full autonomy in relation to educational matters be interfered with

[10] *Barrett's Case* (1892), A. C. 445; 61 L. J. P. C. 58: re-affirmed in *Brophy's Case* (1895), A. C. 202; 64 L. J. P. C. 70. Sub-sections 2 and 3 of the Manitoba Act correspond with 3 and 4 of sec. 93 of the British North America Act.

by the parliament of Canada. In none of these provinces could the claim to a "right or privilege" existing at the time of the Union be more strongly supported than in New Brunswick; and, as to that province, it has been held by the Privy Council that no such right or privilege existed there.[1]

Manitoba.

This province became part of the Dominion in 1870, and by what is popularly known as the Manitoba Act[2] the power of the provincial legislature in reference to education is defined:

22. In and for the province, the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons by law *or practice* in the province at the Union:

(2) An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education:

(3) In case any such provincial law, as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws

[1] *Maher* v. *Portland*, 2 Cart. 486 (n). The judgment, which was delivered without calling upon the respondents, affirms the unanimous decision of the Supreme Court of New Brunswick, in *Ex p. Renaud*, 1 Pugs. 273; 2 Cart. 445. The judgment of Ritchie, C.J., contains an exhaustive statement of the position of New Brunswick in educational matters prior to 1867.

[2] 33 Vic. c. 3, Dom., see *post*, p. 851. In Appendix.

for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

It has been held by the Privy Council that the insertion of the words "or practice" has not been effective to place Manitoba in a different position upon this question from that occupied by the Maritime Provinces and British Columbia:

"Such being the main provisions of the Public Schools Act, 1890, their Lordships have to determine whether that Act prejudicially affects any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the Union. Notwithstanding the Public Schools Act, 1890, Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the province; they are free to maintain their schools by school fees or voluntary subscriptions; they are free to conduct their schools according to their own religious tenets without molestation or interference. No child is compelled to attend a public school."[3]

It is, perhaps, matter of doubt whether the rights and privileges enumerated in the above extract as existing in Manitoba, exist to the same extent in the other provinces. The doubt which suggests itself is as to the power to prohibit denominational schools, that is, to compel universal attendance at state schools. Such a law could not be passed in Ontario, Quebec, or Manitoba: *sed quære* as to the other provinces.

Alberta and Saskatchewan.

Prior to the creation of these provinces in 1905 they formed part of the North West Territories over which the parliament of Canada had and still

[3] *Barrett's Case* (1892), A. C. 445; 61 L. J. P. C. 58. See also the statement in *Brophy's Case* (1895), A. C. 202; 64 L. J. P. C. 70.

has legislative control.[4] A subordinate legislative assembly was given a defined law making authority[5] under which in 1901 ordinances were duly passed upon the subject of education, containing provisions designed to protect the supposed interests of denominational minorities in regard thereto. These ordinances are now fixed constitutional provisions in both of the two provinces, as appears in the following section inserted in each of the Acts creating those provinces:[6]

17. Section 93 of The British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:—

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances."

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.

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[4] See *post*, Chap. XLIV.
[5] R. S. C. (1886), c. 50; 55 Vict., c. 22 (Dom.). See *post*.
[6] 4 & 5 Edw. VII., c. 3 (Alberta); c. 42 (Saskatchewan).

It is beyond the scope of this work to discuss in detail the provisions of these ordinances.[7] Stated shortly, "The School Ordinance" (chap. 29) permitted the establishment of a separate school by the minority of the ratepayers in any district, whether Protestant or Roman Catholic. The ratepayers establishing such a separate school were to pay rates for its support only. After the establishment of such a separate school district, the school was to be governed by a board which should have the same powers and perform the same duties and pursue the same method of government as the boards of public school districts. "The School Assessment Ordinance" (chap. 30) made provision for the assessment and collection of school taxes, both for public schools and separate schools. Amongst other provisions was one as to the taxation for school purposes of the lands of companies, and out of the attempted amendment of this provision by the legislature of Saskatchewan has arisen a somewhat notable dispute, in which, however, the larger issues involved remain still undecided owing to the disposition of the case in the Supreme Court of Canada.[1] And in view of the marked divergence of opinion among the judges of that tribunal, it would seem advisable to do no more here than indicate briefly the questions raised and the opinions expressed thereon. The provision referred to, as it stood in the Ordinance of 1901 (chap. 30, secs. 9 and 93), was that a company might give notice requiring any part of its land to be assessed and rated for separate school purposes and the assessor was to assess accordingly. It was provided, however, that the share or portion of the land of a company which

[7] The material sections are printed in the appendix.

[1] *Regina Public School District* v. *Gratton Separate School District*, 50 S. C. R. 589; reversing 7 West. W. R. 7; 6 West. W. R. 1088.

might thus be rated for separate school support should bear the same proportion to the whole land of the company in the district as the paid-up shares of the Protestant or Roman Catholic shareholders, as the case might be, should bear to the whole paid-up capital of the company. The legislation of the province of Saskatchewan which came into question in the case referred to consisted in the addition of a clause which provided that, in the event of any company failing to give the notice specified in the earlier clause, the board of the separate school district could require the company to give the prescribed notice and that, in default, the company's school taxes upon lands in the district should be divided between the public school and the separate school. The method of division, however, varied from that indicated in the earlier section. The shares were to correspond to the total assessments for public and separate school purposes respectively in the district, exclusive of the assessments upon corporations in each case. A number of companies owning property within a separate school district in Regina gave no notice, either of their own motion or after notice from the separate school board, and thereupon the latter demanded payment in accordance with the provisions of the amendment or added section. In opposition to this demand, the broad question as to the constitutional validity of the provincial amendment was raised. The judge of first instance and the Full Court of Saskatchewan held unanimously that the rights and privileges protected by section 93 of the British North America Act and the corresponding clauses in later Acts are those of religious minorities only; that—in the words of Lamont, J.—

"The power of the legislature, therefore, is absolute in dealing with education, unless its legislation prejudicially

affects the minority, whether Protestant or Catholic, in any school district."

On appeal to the Supreme Court of Canada, the Chief Justice and Mr. Justice Anglin upheld the validity of the provincial amendment; Mr. Justice Idington was strongly of opinion to the contrary; while Mr. Justice Davies and Mr. Justice Duff pronounced no opinion on the constitutional question. In the result, the appeal was allowed, the Chief Justice and Mr. Justice Anglin dissenting. In the Court below, Newlands, J., had taken the view that the original provision could apply only in the case of companies having a divided body of shareholders, some Protestant and some Roman Catholic, and that the amendment was of like limited application. In the Supreme Court of Canada, Mr. Justice Davies and Mr. Justice Duff agreed in this view, and as the companies concerned were not shewn to have been in that category, the separate school board's claim to a share of their taxes must fail. And Mr. Justice Idington's view that the amendment was *ultra vires* gave a majority in favour of the allowance of the appeal.

The North-West Territories:

The parliament of Canada having power (subject always to the paramount legislative supremacy of the Imperial parliament) to pass laws for the "peace, order, and good government" of these territories, not as yet elevated to provincial dignity, the position of affairs there is as yet embryonic. After the two new provinces were carved out of the territories in 1905, the remainder was placed under the control of a Commissioner in Council whose authority in this matter is thus defined:[10]

[10] R. S. C. (1906), c. 62, sec. 10. The same clause appears in the Yukon Territory Act: R. S. C. (1906), c. 63, sec. 14.

10. The Commissioner in Council, if authorized to make ordinances respecting education, shall pass all necessary ordinances in respect thereto; but in the laws or ordinances relating to education it shall always be provided that a majority of the ratepayers of any district or portion of the Territories, or of any less portion or subdivision thereof, by whatever name the same is known, may establish such schools therein as they think fit and make the necessary assessment and collection of rates therefor; and also that the minority of the ratepayers therein, whether Protestant or Roman Catholic, may establish separate schools therein, and in such case, the ratepayers establishing such Protestant or Roman Catholic separate schools shall be liable only to assessments of such rates as they impose upon themselves in respect thereof.

Appeals to the Governor-General in Council: Remedial legislation:

The functions of the Governor-General in Council are not of a judicial character, that is to say, it does not properly devolve upon the Dominion executive to consider the constitutionality of provincial enactments, or of the decision of the "provincial authority" (whatever that may be taken to mean) mentioned in the sub-section. The appeal, therefore, would seem to be limited to supervising and suggesting alterations to provincial enactments, "affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." In the event of the ruling, decision, or whatever it may be called, of the Dominion executive not being duly executed by the provincial authorities, the provisions of sub-section 4 may be invoked. But, as a condition precedent to any right to interfere with provincial legislation, one must be able to predicate that in the province concerned there exists under either pre-confederation or post-confederation law any "right or privilege" enjoyed by the

Protestant or Roman Catholic minority in such province, and that the provincial legislation complained of affects such right or privilege. The word "prejudicially" does not occur in this sub-section, and interference on the part of the Dominion authorities can properly take place only in connection with valid provincial legislation. Legislation *prejudicially* affecting such right or privilege is void. Legislation affecting it otherwise than prejudicially is valid but may be unjust or clumsy and unworkable. Such defects the parliament of Canada can remedy.[1]

[1] The whole question is exhaustively discussed in *Brophy's Case* (1895), A. C. 202; 64 L. J. P. C. 70.

CHAPTER XXXIX.

Municipal Institutions.

Shortly after Confederation there was much discussion in Canadian cases[1] as to the scope to be allowed to provincial legislation under class No. 8 of section 92, "municipal institutions in the province." Municipal by-laws in regulation of the liquor traffic, passed pursuant to provincial Acts, were upheld as falling within this class as distinct and apart from any other class of section 92. It was considered that the power to create municipal institutions necessarily implied the right to endow those institutions with all the administrative functions which had been ordinarily possessed and exercised by them before the union. This view has since been rejected by the Privy Council, substantially for the reasons advanced in the first edition of this book. It may not be out of place to shortly repeat them here.

It must not be forgotten that the pre-Confederation provinces had all the powers of colonial self-government. Their legislatures could make laws in relation to all matters not of Imperial concern, or governed by Imperial legislation. There was then no subdivision of the field between co-ordinate legislative bodies within the colony, and upon the principle of *The Queen* v. *Burah*[2] and subsequent cases these pre-Confederation legislatures could, from time to time, invest municipal bodies with such of their own powers as to them seemed fit.

[1] E.g., *Slavin* v. *Orillia*, 36 U. C. Q. B. 159; *Sulte* v. *Three Rivers*, 5 Leg. News, 330; *Keefe* v. *McLennan*, 2 Russ. & Ches. 5; *R.* v. *Justices of Kings*, 2 Pugs. 535.

[2] See *ante*, p. 381 *et seq.*

The municipal institutions in the various pre-Confederation provinces were widely dissimilar, ranging from the (for those days) very complete system of Upper Canada to the very incomplete and primitive methods of local government in vogue in New Brunswick. In fact, the maritime provinces can hardly be said to have had any system of municipal government, and the systems of Upper and Lower Canada were by no means identical. Even if the term 'municipal institutions' were to be construed according to the meaning attached to it in the minds, not of those *by* whom but of those *for* whom it was passed,[3] it is not conceivable that this Imperial Act should receive a construction geographically variable. The decisions above noted, therefore, put the Imperial parliament in the peculiar position of having used, as to all the provinces, a phrase which, at the date of Confederation, had a different meaning in the different provinces, intending, without expressly saying so, that the phrase should bear the meaning attached to it in one particular province, without indicating which. Such an interpretation must be put upon this sub-section as will obviate these difficulties.[4] 'Municipal institutions' is but another form of expression for local self-government by boards or corporate bodies entrusted with powers of administration and, to some extent, of legislation—but *delegated* powers merely. Irrespective of detail this was a familiar phase of political organization. The essentials of a municipality would appear to be, first, territorial limitation; and, secondly, the organization therein of the executive and legislative machinery and staff for the administration of local affairs. Under a legislative

[3] See *per* Idington, J., in *Toronto* v. *Grand Trunk Ry.*, 37 S. C. R. at p. 257.

[4] See *Severn* v. *R.*, 2 S. C. R. 70; *per* Ritchie, J., at p. 99.

union power all flows from the one legislature, but under a federal form of government power over any given subject matter must come from, and the mode of its exercise be regulated by, that legislature which has itself power over the particular subject matter. Given the municipalities instituted under provincial legislation, the Dominion parliament as well as the provincial legislatures can confer on such municipalities powers of local self-government, each in relation to matters within its own competence. The difficulties above referred to were felt by many of the judges, but the view prevailed that while there might be no inherent connection between drink regulations and municipal institutions there was, nevertheless, a constitutional connection.[5] And accordingly such regulations by provincial legislation were upheld under class No. 8 of s. 92. But, by the judgment of the Privy Council in that case[6] such regulations, even to the extent of provincial prohibition, are grounded solely upon No. 16 of s. 92, "matters of a merely local or private nature in the province."

The view which to some extent, as above intimated, had been countenanced in Canadian cases, particularly in Ontario, was thus dealt with:

"Their Lordships can find nothing to support that contention in the language of section 92, No. 8, which according to its natural meaning simply gives provincial legislatures the right to create a legal body for the management of municipal affairs. Until Confederation the legislature of each province as then constituted could if it choose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the parliament of Canada. Since its date a provincial legislature cannot delegate any power which it does not possess: and the extent

[5] See *per* Burton, J.A., in the *Local Prohibition Case*, 18 O. A. R. at p. 586.

[6] (1896), A. C. 348; 65 L. J. P. C. 25.

and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of section 92 other than No. 8."

It has been suggested that there is a distinction to be drawn between the capacity and the powers of a municipal body just as such a distinction has been sometimes drawn in the case of an incorporated company;[7] but there is no case which has really turned on any such distinction. Municipalities instituted under provincial law seem to exhibit a close analogy in a constitutional sense to provincial Courts. Just as the latter were intended to administer justice under both federal and provincial law,[8] so the former were designed to administer municipal or local affairs whether those affairs fell within the sphere of federal or provincial authority. In other words the object of municipal incorporation, namely, local self-government, is constitutionally related to both spheres of authority, and while the field of municipal government in by far the most numerous of its aspects is covered by section 92, No. 16, "matters of a merely local or private nature," nevertheless there are federal subjects, notably 'the criminal law,' which require local attention and touch municipal life. And in regard to these the broad proposition referred to on a previous page obtains, namely, that the parliament of Canada, as well as a provincial legislature, may take advantage of the existence within the territorial limits of its jurisdiction of any person or body of persons or of any corporate body however created to confer upon such person or persons, natural or artificial, such powers or impose such duties connected with subjects within its jurisdiction as to it may seem

[7] *Grand Trunk Ry.* v. *Toronto*, 32 Ont. R. 129. See *ante*, p. 732.
[8] See *ante*, p. 510 *et seq.*

meet.[9] Applying this proposition to the municipal entity created by provincial legislation, it would seem clear that the powers and duties of a municipal body, like those of the individual, are such as may be conferred and imposed by both federal and provincial legislation, each in its sphere. And this, it is conceived, is the clear result of the judgment of the Privy Council above noted.

The creation of municipal institutions rests with the provincial legislatures. The principle of popular election very largely if not entirely obtains throughout Canada, and no serious question has been raised as to the power of the provincial legislatures to provide for such elections in all their details, as also to determine the mode of trying municipal elections cases, to name the tribunal, and to regulate the procedure.[10] In the view of the Privy Council these matters do not plainly fall within "the administration of justice in the province" but they do fall clearly into the category of laws relating to municipal institutions.

As already intimated the work of municipal government is very largely concerned with matters of a merely local or private nature and therefore the powers of municipal bodies are to be looked for in the main, in provincial enactment. But such an enactment cannot confer power in relation to matters as to which a provincial legislature cannot itself directly legislate.[1] Thus, power cannot be given by provincial legislation to a municipal body to pass by-laws for the enforcement of Sabbath observance as that, speaking generally, is a matter touching the criminal law;[2] though in so far

[9] See *ante* p. 531 *et seq.*

[10] *Crowe* v. *McCurdy* (1885), 18 N. S. 301; *R. ex rel. McGuire* v. *Birkett*, 21 Ont. R. 162; *Clarke* v. *Jacques*, Que. R. 9 Q. B. 238.

[1] *Local Prohibition Case*, extract, *ante*, p. 432.

[2] *R.* v. *Walden*, 19 B. C. 539; see *ante*, p. 578 *et seq.*

as provincial law may regulate particular trades by licensing requirements or otherwise,[3] the power of regulation may be delegated to municipal bodies and may, it would appear, include the right to enforce Sunday closing.[4]

The extent to which powers may be conferred upon municipalities by provincial legislation, validly enacted, is really without limit.[5] In a recent case the power to delegate to municipalities the right to acquire and control public utilities was affirmed in the broadest way in connection with the Ontario hydro-electric undertaking;[6] and municipal ownership of waterworks, gas and electric light and power plants, etc., is common throughout Canada.

The power of the Dominion parliament to impose duties upon municipalities involving pecuniary outlay and thus necessitating the exercise of the municipalities' powers of taxation was affirmed in an early case by the Supreme Court of Canada in relation to the calling out of the militia to quell civic disturbance;[7] and the Privy Council has, as already pointed out, upheld the validity of those provisions of federal railway legislation which empower the Board of Railway Commissioners to direct municipalities to contribute to the cost of protective measures at railway crossings.[8] The Canada Temperance Act is another notable exam-

[3] See *ante*, p. 690.

[4] See *ante*, p. 586.

[5] *Hodge's Case:* extract, *ante*, p. 381.

[6] *Smith* v. *London*, 20 Ont. L. R. 133; *Beardmore* v. *Toronto*, 21 Ont. L. R. 505.

[7] *Montreal* v. *Gordon*, Coutlee's Supreme Ct. Cases, 343; and see *Atty.-Gen. of Can.* v. *Sydney* (1914), 49 S. C. R. 148.

[8] *Toronto* v. *Can. Pac. Ry.* (1907), A. C. 54; 77 L. J. P. C. 29; and see *ante*, p. 752 *et seq.*

ple of powers conferred and duties imposed upon municipalities by federal legislation.[9]

Federal law, competently enacted, binds municipalities just as it does individuals.[10] This proposition is clearly enunciated in the judgment of Osler, J.A., affirming the power of the parliament of Canada to force contribution from municipalities toward the cost of protective measures as above indicated:

> "If the legislation is *intra vires*, municipal corporations are in no different position from natural persons; and there is no more difficulty in enforcing compliance with the order of the Railway Committee than in enforcing a judgment obtained against them in an ordinary action."[11]

The power of the provincial legislatures to create municipal institutions cannot operate of course to prevent the parliament of Canada from establishing local boards or bodies for the better administration of federal law, as has been done in many instances.[12] In this respect, the analogy between the constitutional position of municipalities and that of provincial Courts, suggested above, would seem to be manifestly presented. If the local machinery provided by provincial legislation is not deemed satisfactory as a medium through which the local administration of federal law is to be carried out, machinery purely federal may be provided by federal enactment.

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[9] *Local Prohibition Case*, 24 S. C. R. at p. 247, *per* Sedgewick, J.; *Cooey* v. *Brome*, 21 Lower Can. Jur. at p. 186, *per* Dunkin, J.

[10] *Cent. Vermont Ry.* v. *St. John*, 14 S. C. R. 288; and see *ante*, p. 371.

[11] *Re Can. Pac. Ry. and York County*, 25 Ont. App. R. 65, at p. 73; quoted with approval by Girouard, J., in *Toronto* v. *Grand Trunk Ry.*, 37 S. C. R. at pp. 237-8.

[12] *E.g.*, Harbour Commissions, Dominion Boards of Health, &c., with power to make local regulations which, conceivably, a municipal council might in many instances be empowered to make.

CHAPTER XL.

Commercial Law.

The parliament of Canada is given exclusive jurisdiction by section 91 of the British North America Act over all matters coming within the following enumerated classes of subjects which touch directly the commercial life of Canada, namely:

2. The regulation of trade and commerce.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings banks.
17. Weights and measures.
18. Bills of Exchange and promissory notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and insolvency.
22. Patents of invention and discovery.
23. Copyright.

To these might be added such subjects as navigation and shipping, international and interprovincial ferries, sea coast and inland fisheries, and federal works and undertakings, but these topics have received separate treatment in other chapters.

On the other hand, the only classes of section 92 which can be considered as referring directly to commercial matters are: No. 9, "shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local, or municipal purposes"; No. 10, "local works and undertakings," and No. 11, "the incorporation of

companies with provincial objects"; and all of these, again, have been discussed elsewhere.

Of the federal classes specifically enumerated above it may be said that they have no specific competing provincial class; but that they themselves are all in the nature of exceptions carved out of the large provincial class No. 13 "property and civil rights in the province."[1] At the same time they are to be interpreted in the light of that large principle of allotment which, as suggested in an earlier chapter,[2] underlies the distribution of legislative powers effected by the British North America Act, namely, that the federal classes all describe matters of common concern to all the provinces. This has been notably the case in regard to the first of the classes above specified, namely, "the regulation of trade and commerce," already dealt with in a previous chapter;[3] but the same principle applies to the more specific classes mentioned. While therefore the parliament of Canada as a sovereign legislature may exercise the utmost discretion of enactment in reference to these specified subjects and may by so doing override and put into abeyance many provincial laws touching property and civil rights which in the absence of federal legislation would properly have full effect, nevertheless, on the other hand, provincial legislation upon local or private matters in the province is not to be taken as infringing upon a federal class merely because in some larger Canadian aspect those same matters might fall to be dealt with by federal enactment. These, it is conceived, are the general principles chiefly exemplified by the various cases which have arisen under the classes particularly dealt with in this chapter.

[1] See *ante*, p. 481.
[2] Chap. XXII., *ante*, p. 448.
[3] *Ante*, p. 683.

Banking, Incorporation of Banks, and the Issue of Paper Money.

In the leading case under this class its scope is thus indicated by the Privy Council:

> The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers; it extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the province does not and cannot attach to it. It also comprehends 'banking,' an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker."[4]

The Board's decision was in affirmance of an earlier decision of the Supreme Court of Canada in which the provision in the Dominion Banking Act empowering banks to hold warehouse receipts as collateral security for the re-payment of monies advanced to holders of such receipts was held to be *intra vires*, and no interference with property and civil rights further than the fair requirements of a banking Act would warrant.[5] The particular provision in question in these cases was afterwards repealed, allowing fuller scope for the operation of provincial legislation.[6]

Provincial power to tax banks is now authoritatively established.[7]

The difference of view which is possible as to the classification of a given enactment is exhibited in a case arising out of the winding-up of the defunct Bank of Upper Canada. The Court of

[4] *Tennant* v. *Union Bank* (1894), A. C. 31; 63 L. J. P. C. 25. See fuller extract *ante*, p. 429.

[5] *Merchants Bank* v. *Smith*, 8 S. C. R. 512.

[6] *Beard* v. *Steele*, 34 U. C. Q. B. 43, referred to *ante*, p. 467.

[7] *Lambe's Case*, 12 App. Cas. 575; 56 L. J. P. C. 87; *Windsor* v. *Commercial Bank*, 3 Russ. & Geld. 420. See *ante*, p. 653.

Appeal for Ontario was equally divided upon the constitutional point involved—the validity of a Dominion Act specially providing for certain matters in connection with the winding-up. In the Supreme Court, Ritchie, C.J., was alone in upholding the legislation as within this class, No. 15.[8]

Weights and Measures.

The establishment of Canadian standards was apparently all that was contemplated by this class.[9] It was held in New Brunswick not to prevent provincial legislation in reference to the stamping upon bread offered for sale the weight of the loaf;[10] and in the Court of Appeal for Ontario the Bread Sales Act of that province containing similar provision was treated as *intra vires*, though Meredith, J.A., was apparently in doubt upon the point. The matter came before the Court upon a reference from the Lieutenant-Governor in Council merely asking for the Court's opinion as to the construction of the Act and not as to its validity.[1]

Bills of Exchange and Promissory Notes.

No question has been raised as to the scope of this class or as to the validity of any of the provisions of the federal Bills of Exchange Act.[2] There has been some discussion *obiter*, as noted on a previous page,[3] as to the power of the Dominion

[8] *Quirt* v. *R.*, 19 S. C. R. 510; (*sub nom. R.* v. *Wellington*), 17 O. A. R. 421; see *ante*, pp. 414, 646.
[9] See R. S. C. (1906), c. 52 (Weights and Measures Act); *ib.* c. 53 (Electrical Units Act).
[10] *R.* v. *Kay*, 39 N. B. 278.
[1] *Re Bread Sales Act* (1911), 23 Ont. L. R. 238.
[2] R. S. C. (1906), c. 119.
[3] See *ante*, p. 535 *et seq.*

Parliament to confer exclusive jurisdiction on a particular or special court in cases upon negotiable instruments.

Interest.

The view taken by the federal government as to the intended scope of this class is indicated by the existing Dominion Acts upon the subject.[4] The clause in the Interest Act which allows a mortgagee to pay off his mortgage upon certain terms at any time after the expiration of six years from the date of the loan, no matter for how long the mortgage may have been drawn, was upheld in Ontario in 1903[5] and that case has not been subsequently doubted. The general scope of the class was thus discussed in a case in the Supreme Court of Canada in which it was held that provincial legislation imposing an additional percentage upon over-due taxes does not fall within this class:[6]

> It is obvious that the matter of interest which was intended to be dealt with by the Dominion parliament was in connection with debts originating in contract, and that it was never intended in any way to conflict with the right of the local legislature to deal with municipal institutions in the matter of assessments or taxation, either in the manner or extent to which the local legislature should authorize such assessments to be made; but the intention was to prevent individuals under certain circumstances from contracting for more than a certain rate of interest and fixing a certain rate when interest was payable by law without a rate having been named. . . . Does not the collocation of No. 19 with the

[4] R. S. C. (1906), c. 120 (Interest Act); *ib.* c. 121 (Pawnbrokers Act); *ib.*, c. 122 (Money Lenders Act).

[5] *Bradburn* v. *Edinburgh Life Co.* (1903), 5 Ont. L. R. 657; Britton, J.

[6] *Lynch* v. *Can. N. W. Land Co.*, 19 S. C. R. 204; overruling *Ross* v. *Torrance*, 2 Leg. News (Mont.), 186; 2 Cart. 352; *Marne* v. *Morrison*, 1 B. C. (pt. 2), 120; and *Schultz* v. *Winnipeg*, 6 Man. L. R. 35.

classes of subjects as numbered 18 and 20 afford a strong indication that the interest referred to was connected in the mind of the legislature with regulations as to the rate of interest in mercantile transactions and other dealings and contracts between individuals, and not with taxation under municipal institutions and matters incident thereto? The present case does not deal directly or indirectly with matters of contract. The Dominion Act expressly deals with interest on contracts and agreements as the first section conclusively shews."[1]

Mr. Justice Taschereau characterizes the addition as a "penalty," and Mr. Justice Patterson says:

"We find that article associated with others numbered from 14 to 21, all of which relate to the regulation of the general commercial and financial system of the country at large. . . . We must see what the thing really is. It is clearly something which the Manitoba taxpayer who does not pay his taxes when due is made liable to pay as an addition to the amount originally assessed against him or his property. It is a direct tax within the province in order to raise a revenue for provincial purposes, and as such is indisputably within the legislative authority of the province. . . . The imposition may, not improperly, be regarded as a penalty for enforcing the law relative to municipal taxation, and in that character it comes directly under article 15 of section 92."

The question whether such an imposition can in any sense be properly called interest is referred to, and it is pointed out that under the impugned Act the addition is of an arbitrary percentage not accruing *de die in diem;* but, without expressing a decisive opinion upon this point, the opinion of the Court, Mr. Justice Gwynne dissenting, was that such an imposition does not, at all events, fall within the scope of this class No. 19.

[1] *Per* Ritchie, C.J. Following a number of American authorities, quoted in the judgment, the chief justice points out that municipal taxes are not, *per se*, debts or contractual obligations.

A provincial legislature may empower a provincial company to borrow money at any legal rate of interest.[8]

Bankruptcy and Insolvency.

In one of the earliest cases to come before the Privy Council under the British North America Act the question was as to the validity of an Act of the Quebec legislature which, in view of the embarrassed state of the finances of a certain society, provided for a forced commutation of the annuities payable out of its funds. This was attacked as legislation relating to insolvency; but it was held not to be within that class but to relate to a matter of a merely local or private nature in the province (No. 16 of section 92). What was contemplated by the federal class No. 21 of section 91, "bankruptcy and insolvency," is stated thus:

> "The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, *according to rules and definitions prescribed by law*, including of course the conditions on which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation."[9]

The phrase in italics indicates that bankruptcy or insolvency—for the terms are really synonymous—is a purely legal concept which the Dominion parliament alone can create. In the absence of a federal law establishing such a system for the administration of the estate of a person who has acquired the status of a bankrupt or insolvent person, it is difficult to see on what ground provincial

[8] *Royal Canadian Ins. Co.* v. *Montreal Warehousing Co.*, 3 Leg. News (Mont.), 155; 2 Cart. 361.

[9] *L'Union St. Jacques* v. *Belisle*, L. R. 6 P. C. 31.

legislation, making provision for the distribution of a man's estate among his creditors and for his discharge from liability upon his contractual obligations could be impugned. The Privy Council, however, has declared that a provincial legislature cannot pass a bankruptcy Act,[10] and stress has been laid on the absence of compulsory provisions in provincial Acts which have been upheld as competent legislation touching "property and civil rights in the province" (No. 13 of section 92), although the distribution was in reality *in invitum*, as under the various Creditors' Relief Acts now in force in the various provinces. What is the really essential feature in insolvency legislation, the presence of which in a provincial Act would render the Act *ultra vires*, is a difficult question which has not been yet clearly answered.

The extent to which the Dominion parliament may by such legislation interfere with "property and civil rights" (No. 13 of section 92), or with "procedure" (No. 14 of section 92) is indicated by the judgment of the same tribunal in a later case:

"It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some special mode of procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the

[10] *Fisheries Case:* extract *ante*, p. 436.

provinces, so far as a general law relating to those subjects might affect them."[1]

There is now no such general law in force in Canada, except the Dominion Winding-up Acts relating exclusively to companies, and the extent of provincial power in reference to matters which might properly form the subject of such a law has been much discussed. "An Act respecting assignments and preferences by insolvent persons" passed by the legislature of Ontario was considered finally by the Privy Council[2] and held *intra vires*, for reasons thus stated:

"Their Lordships proceed now to consider the nature of the enactment said to be *ultra vires*. It postpones judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act.

[1] *Cushing* v. *Dupuy*, 5 App. Cas. 409; 49 L. J. P. C. 63. The general rule is discussed *post*, p. 818 *et seq.* The decision supports *Crombie* v. *Jackson*, 34 U. C. Q. B. 575. Reference may also be had to *Kinney* v. *Dudman*, 2 Russ. & Geld. 19; 2 Cart. 412, upholding the validity of s. 59 of the Insolvent Act of 1869, which provided that a judgment not completely executed should create no lien or privilege upon an insolvent's property as against an assignment under the Act; and to *Peak* v. *Shields*, 8 S. C. R. 579; 6 O. A. R. 639; 31 U. C. C. P. 112, which involved the question as to the validity of the 136th section of the Insolvent Act of 1875, which provided that a debtor fraudulently obtaining goods on credit with knowledge of his insolvency might be subjected under the Act to imprisonment. The opinions delivered were very conflicting, some of the judges regarding the clause as one relating to procedure in civil cases (No. 14 of s. 92), others as criminal legislation (No. 27 of s. 91), and others as insolvency legislation proper under this class, No. 21. The larger question, also involved in this case, as to the power of a colonial legislature to legislate as to acts committed abroad is discussed *ante*, p. 114. See also *Quirt* v. *R.*, 19 S. C. R. 510, referred to *ante*, pp. 800-1.

[2] *Voluntary Assignments Case* (1894), A. C. 189; 63 L. J. P. C. 59. It came before their lordships upon direct appeal from the Ontario Court of Appeal; 20 O. A. R. 489. See also *Clarkson* v. *Ont. Bank*, 15 O. A. R. 166; *Union Bank* v. *Neville*, 21 O. R. 152; *Bleasdell* v. *Townsend*, 3 Can. Law Times, 509 (Man.); *Re Killam* (1878), 14 C. L. J. N. S. 242.

Now there can be no doubt that the effect to be given to judgments and executions, and the manner and extent to which they may be made available for the recovery of debts are *prima facie* within the legislative powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff or to any priority in respect of such levy. The execution is a mere creature of the law, which may determine and regulate the rights to which it gives rise. The Act of 1887 [3] which abolished priority as amongst execution creditors provided a simple means by which every creditor might obtain a share in the distribution of moneys levied under an execution by any particular creditor. The other Act of the same year containing the section which is impeached goes a step further and gives to all creditors under an assignment for their general benefit a right to a rateable share of the assets of the debtor including those which have been seized in execution."

"But it is argued that, inasmuch as this assignment contemplates the insolvency of the debtor and would only be made if he were insolvent, such a provision purports to deal with insolvency and therefore is a matter exclusively within the jurisdiction of the Dominion parliament. Now it is to be observed that an assignment for the general benefit of creditors has long been known to the jurisprudence of this country and also of Canada, and has its force and effect at common law quite independently of any system of bankruptcy or insolvency or any legislation relating thereto. So far from being regarded as an essential part of the bankruptcy law, such an assignment was made an act of bankruptcy on which an adjudication might be founded, and by the law of the province of Canada which prevailed at the time the Dominion Act [4] was passed it was one of the grounds for an adjudication of insolvency.

"It is to be observed that the word 'bankruptcy' was apparently not used in Canadian legislation, but the insolvency law of the province of Canada was precisely analogous to what was known in England as the bankruptcy law.

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[3] The Ontario "Creditors' Relief Act."

[4] *I.e.*, the Dominion Insolvent Act, 1869.

"Moreover, the operation of an assignment for the benefit of creditors was precisely the same whether the assignor was or was not in fact insolvent. . . .

"It is not necessary, in their Lordships' opinion, nor would it be expedient, to attempt to define what is covered by the words 'bankruptcy' and 'insolvency' in section 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors, whether he is willing that they shall be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent's estate.[5]

"In their Lordships' opinion, these considerations must be borne in mind when interpreting the words 'bankruptcy' and 'insolvency' in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation.

[5] See *ante*, p. 805. It was held in *Dupont* v. *La Cie de Moulin* (1888), 11 L. N. 225, by the Superior Court at Montreal, that provision for an insolvent's discharge upon a full compliance with the terms of the insolvency law is not an essential feature of insolvency legislation.

inasmuch as such interference would affect the bankruptcy law of the Dominion parliament. But it does not follow that such subjects as might properly be treated as ancillary to such a law, and therefore within the powers of the Dominion parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion parliament in existence."

Winding-up of Companies.

The Dominion Winding-up Acts are insolvency legislation, and are properly made applicable to companies incorporated under provincial legislation.[6] They also apply to Imperial companies, the power in such case being limited, of course, to dealing with the realization and distribution of the assets in Canada.[7] But the Dominion parliament cannot pass an Act for the liquidation of all building societies in a province, whether solvent or not.[8] Provincial Winding-up Acts are *intra vires* so long as they are not true "bankruptcy and insolvency" legislation.[9]

In a comparatively recent case in Ontario it was held by Mr. Justice Mabee that a provincial

[6] *Re Eldorado Union Store Co.*, 6 Russ. & Geld. 514; *Shoolbred v. Clark*, 17 S. C. R. 265.

[7] *Allen* v. *Hanson*, 18 S. C. R. 667. In the earlier case of *Merchants Bank* v. *Gillespie*, 10 S. C. R. 312, it was held that the Winding-up Act then in force did not, upon its proper construction, apply to such an imperial company. See also *Re Briton Medical and Gen. Life Ass'n.*, 12 O. R. 441. The deposit required by the Act to be made by all companies desiring to do business in Canada was held to be a special fund applicable, in case of insolvency, for the benefit of Canadian policy holders only.

[8] *McClanaghan* v. *St. Ann's Mut. Bldg. Soc.*, 24 L. C. Jur. 162; 2 Cart. 237.

[9] This would seem to be a proper deduction from the decision in the *Voluntary Assignments Case, supra.* See *Re Wallace-Heustis Grey Stone Co.*, Russ. Eq. Rep. N. B. 461; 3 Cart. 374; *In re Dom. Prov. B. & E. Ass'n.*, 25 O. R. 619; *Re Iron Clay Brick Co.*, 19 O. R. 119; *Re Florida Mining Co.*, 9 B. C. 108.

company cannot be wound up under the Dominion Winding-up Act except in case of its insolvency.[10] The capital of the company had been largely impaired and the company itself was in course of voluntary liquidation, but as there were no creditors a state of insolvency could not be said to exist. The application which was made by shareholders was therefore dismissed, not being made under the provincial Winding-up Act. But in a later case before the Court of Appeal for Manitoba a different view was taken.[1] In the opinion of the majority of the Court (Howell, C.J.M., *diss.*) it is within the power of the Dominion parliament to determine what shall constitute an act or acts of bankruptcy or the condition of insolvency; and the various clauses of the Dominion Winding-up Act which define the cases in which an order may be made are, in effect, definitions of bankruptcy or insolvency. It seems difficult, however, to reconcile this view with the principle underlying the judgment of the Privy Council in the *Through Traffic Case*.[2] The parliament of Canada cannot at its own will enlarge its jurisdiction by giving an artificial or statutory meaning to the words used in an imperial Act to describe competing classes.[3] If a provincial company's shareholders are creditors, then a provincial company which has suffered loss but still has enough to pay all its ordinary creditors as their claims mature, or which may have no ordinary creditors, may be said to be insolvent; but that seems to be an unnatural meaning to be given to the words "bankruptcy and insolvency," and the judgment of the Court of Appeal for Manitoba does not, apparently, proceed on such a view.

[10] *Re Cramp Steel Co.*, 16 Ont. L. R. 230.
[1] *Re Colonial Investment Co.* (1913), 23 Man. L. R. 87.
[2] (1912), A. C. 333; 81 L. J. P. C. 145. See *ante*, p. 378.
[3] See *ante*, p. 500 *et seq.*

The compulsory character of insolvency proceedings does not really touch the question, which is: do the provisions contained in the Act constitute legislation relating to bankruptcy or insolvency?

Provincial Legislation Touching Insolvency.

It was early held[4] by the Supreme Court of New Brunswick that those provisions, in what are commonly known as Indigent Debtors Acts, providing for the examination of a confined debtor and for his discharge from imprisonment upon proof of indigence and of the absence of fraudulent dealings with his property, cannot be passed by provincial legislatures. The judgment of the Court was founded upon views as to the wide scope of this class which cannot in view of the later authorities be now considered a correct exposition of the law. The words "bankruptcy and insolvency" were interpreted as covering all legislation as to impecunious debtors even entirely apart from any system of bankruptcy and insolvency legislation, and, in this view, the Act in question was held to be an insolvent Act.[5] In subsequent cases in New Brunswick this wide view has evidently and necessarily been modified. Prior to the union, the New Brunswick legislature had passed an Act extending the gaol limits—an Act affecting confined debtors. This Act was not to come into operation until April 1st, 1868, but before that date, and after Confederation, it was repealed by a subsequent enactment. The New Brunswick Supreme Court intimated that there was nothing in the point that the Act was one relating to insolvency: the provincial legislature was therefore within its powers in

[4] *R.* v. *Chandler* (1868), 1 Hannay 556; 2 Cart. 421.

[5] See the remarks of Burton, J.A., in *Clarkson* v. *Ont. Bank*, *ubi supra*.

repealing it.[6] An Act of the legislature of that province abolishing imprisonment for debt was held not *ultra vires* as to a party not shown to be a trader subject to the Dominion Insolvent Act.[7]

Again, an Act of the New Brunswick legislature providing that, as against an assignee of the grantor under any law relating to insolvency, a bill of sale should only take effect from the date of its filing was held to be *intra vires*.[8] It was held by the Nova Scotia Courts that a provincial legislature could confer upon a newly created provincial Court jurisdiction to entertain an application for the discharge of an insolvent debtor under a provincial Act passed prior to Confederation, such legislation, it was held, not coming within this class;[9] while, on the other hand, the Supreme Court of Prince Edward Island held to be *ultra vires* a provision in the Judgment Debtors Act of that province providing for the discharge of an insolvent debtor.[10]

The decision of the Privy Council in the *Voluntary Assignments' Case* would seem to cover the various matters discussed in the above cases. As relating to "civil rights in the province," or to "procedure in civil matters," a provincial legislature has full power to legislate thereon subject to

[6] *McAlmon* v. *Pine*, 2 Pug. 44; 2 Cart. 487.

[7] *Armstrong* v. *McCutchin*, 2 Pug. 381; 2 Cart. 494. See also *Ex p. Ellis*, 1 P. & B. 593; 2 Cart. 527, upholding a provincial Act authorizing imprisonment for non-payment of a judgment in certain cases; and *Quebec Bank* v. *Tozer*, 17 Que. S. C. 303, to same effect; also *Parent* v. *Trudel*, 13 Q. L. R. 139 (*capias* proceedings), and *Johnson* v. *Harris*, 1 B. C. (pt. 1) 93 (debtor's exemption law).

[8] *McLeod* v. *Vroom*, Trueman's N. B. Eq. Cas. 131; *Re De Veber*, 21 N. B. 401; 2 Cart. 552.

[9] *Johnson* v. *Poyntz*, 2 Russ. & Geld. 193.

[10] *Munn* v. *McConnell*, 2 P. E. I. 148; and see *In re Blackburn*, 2 P. E. I. 281.

the operation of any general insolvency legislation passed by the Dominion parliament.

An Act of the Nova Scotia legislature, entitled "An Act to facilitate arrangements between railway companies and their creditors," provided that the company might propose a scheme of arrangement between the company and its creditors, and file the same in Court, and that thereupon the Court might, on application by the company, restrain any action against the company, upon such terms as such Court might see fit. The Act also provided that notice of filing the scheme should be published, and that thereupon no process should be enforced against the company without leave of the Court. Mr. Justice Ritchie considered the Act as one which could have reference only to a company which was insolvent, and upon this view held it *ultra vires* as an infringement upon the powers of the Dominion parliament under this class.[1]

This decision, however, must be considered overruled by the judgment in *Re Windsor & Annapolis Railway*,[2] in which the same Act was upheld so far as it provided for the confirmation of a scheme, propounded by the company under the Act, for cancelling certain debentures, and for the allotment of new stock in lieu thereof bearing a low rate of interest. The decision, however, is placed upon the ground that the Windsor & Annapolis Railway was a local work or undertaking within the meaning of s. 92, No. 10, and that so far as any such local undertaking is concerned, the impugned Act was within the legislative competence of the provincial legislature. The scheme propounded by the company had no relation whatever to the insolvency of the company, and was

[1] *Murdoch* v. *Windsor and Ann. Ry. Co.*, Russ. Eq. Rep. 137.
[2] 4 Russ. & Geld. 312.

simply a scheme for changing the form of the stock. In this view of the case reliance was placed upon *L'Union St. Jacques* v. *Belisle*,[3] and the Act in its relation to local undertakings upheld upon the authority of that case.

Patents: Copyright.

These topics have already been sufficiently noticed. They are notable examples of classes any legislation upon which must of necessity deal with rights of property and civil rights and, in patent cases particularly, with procedure in civil matters.

[3] See *ante*, p. 414.

CHAPTER XLI.

Property and Civil Rights.

By section 92, No. 13, the provincial legislatures are given the exclusive power to make laws in relation to "property and civil rights in the province," and in *Parsons' Case*[1] it was held that the words "property and civil rights" are here used in the widest sense. The question was as to the validity of a provincial Act which prescribed certain uniform conditions to be made part of all fire insurance contracts. This, as already noticed,[2] was held not to be legislation falling within "the regulation of trade and commerce"; but it was also contended that "civil rights" should be limited to such rights only as flowed from the law, *e.g.*, the *status* of persons, and should not be interpreted to cover rights arising from contract. Had this contention prevailed, the provinces would have been driven out of the larger part of the field of activity which now, by the authoritative deliverance of the Privy Council in that case, they are undoubtedly entitled to occupy; unless, indeed, No. 16 of section 92 would have sufficed to save the situation. The contention was negatived and the general scope of the class No. 13 of section 92 indicated thus:

"Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words 'civil rights.' The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract; and such

[1] 7 App. Cas. 96; 51 L. J. P. C. 11.
[2] See chap. XXXII., *ante*, p. 683.

rights are not included in express terms in any of the enumerated classes of subjects in section 91.

"It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited. In looking at section 91, it will be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, viz.: '18.—Bills of exchange, and promissory notes,' which it would have been unnecessary to specify, if authority over all contracts, and the rights arising from them, had belonged to the Dominion parliament.

"The provision found in section 94 of the Act, which is one of the sections relating to the distribution of legislative powers, was referred to by the learned counsel on both sides, as throwing light upon the sense in which the words 'property and civil rights' are used. By that section the parliament of Canada is empowered to make provision for the uniformity of any laws relative to 'property and civil rights' in Ontario, Nova Scotia and New Brunswick, and to the procedure of the Courts in these three provinces, if the provincial legislatures choose to adopt the provisions so made. The province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is, in the main, the French law as it existed at the time of the session of Canada, and not the English law which prevails in the other provinces. The words 'property and civil rights' are, obviously, used in the same sense in this section as in No. 13 of section 92, and there seems no reason for presuming that contracts, and the rights arising from them, were not intended to be included in this provision for uniformity. If, however, the narrow construction of the words 'civil rights' contended for by the appellants were to prevail, the Dominion parliament could, under its general power, legislate in regard to contracts in all and each of the provinces, and, as a consequence of this, the province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents,

would be subject to have its law on that subject altered by the Dominion legislature, and brought into uniformity with the English law prevailing in the other three provinces, notwithstanding that Quebec had been carefully left out of the uniformity section of the Act.

"It is to be observed that the same words 'civil rights' are employed in the Act of 14 Geo. III. c. 83, which made provision for the government of the province of Quebec. Section 8 of that Act enacted 'that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights as they had before done, and that in all matters of controversy relative to *property and civil rights* resort should be had to the laws of Canada, and be determined agreeably to the said laws.' In this statute, the words 'property and civil rights' are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different or narrower one."

The Quebec Act, 1774, referred to in the last paragraph of this quotation, draws a sharp distinction between the criminal and the civil law,[3] the two branches together being treated as inclusive of the whole field of jurisprudence; and the committee, in holding that the same wide meaning should be given to the term "property and civil rights" in the British North America Act have, it may be thought, decided that the various other classes of section 92 are to be treated as unnecessary surplusage. A reference, however, to those other classes will show that, with one or two exceptions, they treat, not of civil rights as between subject and subject, but of government business, and of what may be called political rights,[4] as between the subject, on the one hand, and the provincial government and bodies organized for the

[3] See *ante*, p. 283.

[4] See *Re N. Perth*, 21 O. R. 538; *ante*, p. 523. Boyd, C., says of this class No. 13 that "it regards mainly the *meum* and *tuum* as between citizens."

purposes of local self-government throughout the various sections of the province, on the other. The judgment of the Committee does, however, indicate a very wide range of subjects as included within this class No. 13—a range subject only, as the cases show, to be cut down to the extent necessary to give proper play to the powers of the Dominion parliament under the various classes of section 91.

The warning note sounded in *Parsons' Case,* against entering more largely upon an interpretation of the British North America Act than the particular case calls for, has been lately repeated with this pointed reference to the class now under discussion:

"The wisdom of adhering to this rule appears to their Lordships to be of especial importance when putting a construction on the scope of the words 'civil rights' in particular cases. An abstract logical definition of their scope is not only, having regard to the context of the 91st and 92nd sections of the Act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases. It must be borne in mind in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them, may in a different aspect and for a different purpose fall within the other. In such cases, the nature and scope of the legislative attempt of the Dominion or the province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and in reality. This may not be difficult to determine in actual and concrete cases, but it may well be impossible to give abstract answers to general questions as to the meaning of the words, or to lay down any interpretation based on their literal scope apart from their context."[48]

Federal Legislation Touching Property and Civil Rights:—Many of the enumerated classes of

[48] *Deere Plow Co. Case* (1915). Extract *ante*, p. 444.

section 91 obviously cover certain species of property and departments of civil rights. And the power of the parliament of Canada to legislate in relation to these classes is a plenary paramount power, exerciseable to the full as parliament sees fit and overriding all inconsistent provincial legislation.[5] And the same is true, it is conceived, of federal legislation properly passed under the opening, 'peace, order, and good government' clause of section 91.[6] What is legislation falling properly within the class-enumerations of section 91 or within its opening clause, and what is the distinction, if any, between substantive legislation falling strictly within a given class and ancillary or necessarily incidental legislation in connection therewith, are subjects which have been already fully treated of. And sufficient attention has already been paid to the general question how far, in the absence of federal legislation, provincial legislatures may make laws touching subjects which in other aspects and in different environments might properly be dealt with by the parliament of Canada.[7] Here it will suffice to draw attention to the decided cases in which, on the one hand, federal enactments have been upheld notwithstanding their operation upon property and civil rights in one or more or all of the individual provinces, and in which, on the other, provincial enactments have been held valid as relating to property and civil rights in the province, notwithstanding their effect upon subjects within the general jurisdiction of the parliament of Canada.

Prior to *Parsons' Case* the Privy Council had dealt specially in *Cushing* v. *Dupuy*[8] with the ques-

[5] See *ante* p. 468, *et seq.*
[6] See *ante*, p. 469, *et seq.*
[7] See *ante*, p. 485, *et seq.*
[8] 5 App. Cas. 409; 49 L. J. P. C. 63; extract *ante*, p. 418.

tion as to the scope of the federal class "bankruptcy and insolvency" and had affirmed the power of the parliament of Canada to deal under that head with rights of property and civil rights which ordinarily would fall within provincial jurisdiction. A few years later in *Russell's Case*,[9] the Board affirmed the validity of the Canada Temperance Act, a federal enactment based—as later cases show—solely upon the opening clause of section 91, notwithstanding its obvious effect upon property and civil rights in the various provinces. Still later in *Tennants' Case*,[10] the Board had to consider the scope of federal jurisdiction under the head "banking" and a clause in the Bank Act empowering banks to accept and hold warehouse receipts as collateral security for loans made to the holders thereof was upheld as a legitimate exercise of federal legislative power under that class. In that case the question is treated as one of principle applicable to all the class-enumerations of section 91. 'Patents of invention and discovery' and 'copyright' are specially instanced as subjects upon which it would be practically impossible to legislate without affecting the property and civil rights of individuals in the provinces; and the decision in *Cushing* v. *Dupuy* touching "bankruptcy and insolvency" legislation is cited as based on the same general principle.

And in the *Fisheries Case*, and the *Contracting-out Case*, the same principle was laid down as to federal legislation concerning fisheries and federal railways respectively. In the various chapters of this book dealing with the different federal classes numerous examples will be found of the application of the same principle by Canadian Courts.

[9] 7 App. Cas. 829; 51 L. J. P. C. 77; extract *ante*, p. 424.
[10] (1894), A. C. 31; 63 L. J. P. C. 25; extract *ante*, p. 429.

Provincial Legislation: *How Far Incompetent*:—A provincial legislature cannot deal with subjects which are *prima facie* within a federal class in those aspects of them which are really within the class; that is to say, for example, a provincial legislature cannot pass a Bankruptcy Act, a Patent Act, a Copyright Act, a Divorce Act, a Merchants Shipping Act, or enact fishery regulations. In this connection the true nature and character, the pith and substance, of the impugned Act must be considered. An Act which does in a large sense deal with property and civil rights may, on close inspection, be found to have been passed *alio intuitu;* as, for example, to curtail the civil rights of aliens,[1] to create offences with a view to their punishment in the public interest,[2] to regulate the structural arrangement of federal railways;[3] in other words, it may appear, that the primary object dealt with is some matter falling within federal jurisdiction. In all such cases, provincial legislation would be held invalid. This, however, is a matter which has already been sufficiently dealt with, both as a matter of general principle[4] and in individual cases under the various classes of section 91.

How Far Competent:—Short of offending in the way indicated in the last paragraph and subject always to the paramount authority of federal law validly enacted, provincial legislation relating to property and civil rights in the fullest sense is permissible; and an inspection of the provincial statute books discloses that a great part of the statute law of the different provinces is based upon the authority conferred by No. 13 of section 92. It

[1] See *ante* p. 486.
[2] See *ante*, p. 563 *et seq.*
[3] See *ante*, p. 759 *et seq.*
[4] See *ante*, p. 486 *et seq.*

would seem, indeed, that this class really throws the largest *residuum* to the provinces; but that the field comprised within it is one which may from time to time grow narrower as the necessity for federal legislation upon the various classes of s. 91 increases. For example, the field now occupied by provincial legislation of the kind upheld in the *Voluntary Assignments Case*,[5] would no doubt be largely covered by any Insolvency Act the federal parliament might see fit to pass.

Some Examples:—It is not considered necessary to refer again here to all the cases in which provincial legislation has been upheld as falling properly within this class rather than within some federal class apparently touched by it. The competing or apparently competing federal class is usually plainly discernible and reference may be had to that part of this book in which the scope of the particular federal class is discussed. Just by way of illustration, however, a short statement of some of the fields of legislative activity open to provincial legislatures under this head may be given:

The regulation of particular trades and commercial transactions: *Held* not to be a regulation of trade and commerce within the meaning of No. 2 of section 91,[6] nor, when penalties are attached to

[5] See extract *ante*, p. 430.

[6] *Parsons' Case* (insurance contracts); *Beard* v. *Steele* (warehouse receipts); 34 U. C. Q. B. 43; see *ante*, p. 800; *R.* v. *Robertson* (game laws): 3 Man. L. R. 613; *ante*, p. 691; *Gower* v. *Joyner* (master and servant): 32 Can. Law Jour. 492; *R.* v. *Wason* (contracts with cheese factories), 17 O. A. R. 221; *ante*, p. 572, *Quong Wing* v. *R.*, 49 S. C. R. 440 (employment). It should be noted that the local regulation of particular trades with a view to suppressing or preventing local evils though touching civil rights falls more obviously within No. 16 of section 92. No. 13 touches the rights and duties of individuals *inter se* rather than in relation to the public. See *ante* p. 817, note.

a breach of the law, to be "criminal law" legislation.[7]

"Creditors' Relief" Acts and Acts providing for the enforcement of judgments against debtors solvent or insolvent: provincial winding-up Acts: *Held* not to be insolvency legislation[8] nor to fall within the domain of criminal law even when imprisonment might be awarded in certain events.[9]

Legislation as to proprietary rights, provincial or private, in fisheries;[10] as to Dominion companies and corporations[1] and federal railways;[2] and as to aliens.[3]

"In the Province."

The doctrine of exterritoriality in its application to colonial legislation generally was examined at some length in an earlier chapter.[4] And in reference to provincial legislation the subject was again discussed in dealing with the phrase "within the province" as a territorial limitation upon provincial powers of taxation.[5] In reference to provincial legislation touching property and civil rights the effect of the added phrase "in the province" has been of late the subject of much discussion following the decision of the Privy Council holding invalid certain legislation of the legislative assembly of Alberta as relating to property and civil rights without that province.[6] Apart

[7] *R.* v. *Robertson*, *R.* v. *Wason*, *Quong Wing* v. *R.*, all *ubi supra*.
[8] *Voluntary Assignments Case* and cases noted in chapter XL.
[9] *Ex p. Ellis*, and other cases noted *ante*, p. 589.
[10] See the extract from the *Fisheries Case*, *ante*, p. 714.
[1] See *ante*, p. 741.
[2] See *ante*, p. 759.
[3] See *ante*, p. 671, *et seq.*
[4] Chap. VII., *ante*, p. 65, *et seq.*
[5] *Ante*, p. 648, *et seq.*
[6] *Royal Bank* v. *R.* (1913), A. C. 283; 82 L. J. P. C. 33; reversing 4 Alberta L. R. 929.

from the question immediately involved, the case presents many features of extra-provincial results following upon provincial legislation. Three non-residents of the province were incorporated under a provincial Act for the avowed object of building and operating a railway to be situate wholly within the province. The company was authorized to borrow money upon its bonds and these bonds were to a defined extent guaranteed by the government of the province pursuant to authority conferred by another Act of the same session. Under this Act and certain Orders-in-Council passed under it, arrangements were made for the sale of the company's bonds in England through the branch there of a New York banking-house. To secure the purchasers of the bonds the company mortgaged its assets and undertaking to a trust company incorporated under a Manitoba statute and having its head office in Winnipeg in that province. In order to keep proper control of the moneys realized upon the sale of the railway company's bonds, the government of the province of Alberta, as it was entitled to do under the provincial Act, named certain banks as custodians of the proceeds of the sale of the bonds, which proceeds were to be placed to the credit of the provincial treasurer and paid out from time to time as the work of construction progressed. The moneys realized in England were transmitted to New York and there paid over to the banks named by the Alberta government, amongst others to the Royal Bank of Canada, a bank incorporated under federal Act and having its head office in Montreal in the province of Quebec. No part of the moneys so received by the Royal Bank was sent in specie to Alberta, but an account was opened at a branch of the bank at Edmonton, the capital of the province, to the credit of the provincial treasurer, the amount credited

being the entire amount received by the bank. The special account so opened was subject to the immediate instructions of the bank's head office at Montreal. Before any moneys had been paid out the enterprise apparently collapsed, the railway company made default in payment of the interest upon its bonds, and the legislative assembly of Alberta thereupon passed an Act which, while ratifying and confirming the provincial guarantee, directed that "the proceeds of the sale of the said bonds"—to quote the words of the Act—should be paid over by the various banks, including the Royal Bank, to the provincial treasurer and be held as part of the general revenue fund of the province. The Royal Bank declined to pay over the amount standing to the credit of the special account above mentioned and the province accordingly brought suit to compel payment. The Supreme Court of Alberta was of opinion that the proceeds of the sale of the bonds were within the province and that the Act therefore was *intra vires* as relating to "property and civil rights in the province" (No. 13 of section 92) but upon appeal to the Privy Council this decision was reversed and the Act held invalid as legislation relating to property and civil rights without the province. The view of their Lordships was apparently that the fund, "the proceeds of the sale of the said bonds," which had come into existence under the earlier legislation had its situs at the head office of the Bank at Montreal and that at that city the bondholders had the right to demand and receive back the moneys they had paid as paid upon a consideration which had failed. The provincial Act therefore was an Act relating directly to property situate without the province of Alberta and directly destructive of rights in regard to that property not only capable of enforcement but also properly

enforceable in the province of Quebec. The power of the legislative assembly of Alberta to repeal the earlier guarantee Act was not doubted, but it was considered that the later impugned Act attempted to deal with an ear-marked fund not situate in the province and to affect rights to that fund existing elsewhere than and not in the province. This, it is conceived, is the ground taken in the judgment:

"The money claimed in the action was paid to the appellant bank as one of those designated to act in carrying out the scheme. The bank received the money at its branch in New York, and its general manager then gave instructions from the head-office in Montreal to the manager of one of its local branches, that at Edmonton, in the province of Alberta, for the opening of the credit for the special account. The local manager was told that he was to act on instructions from the head-office, which retained control. It appears to their Lordships that the special account was opened solely for the purposes of the scheme, and that, when the action of the government in 1910 altered its conditions, the lenders in London were entitled to claim from the bank, at its head-office in Montreal, the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province; and the legislature of the province could not legislate validly in derogation of that right. These circumstances distinguish the case from that of *R.* v. *Lovitt*,[1] where the point decided was in reality quite a different one.

In the opinion of their Lordships the effect of the statute of 1910, if validly enacted, would have been to preclude the bank from fulfilling its legal obligation *to return their money to the bondholders,* whose right to this return was a civil right which had arisen and remained enforceable outside the province. The statute was on this ground beyond the powers

[1] (1912), A. C. 212; 81 L. J. P. C. 140. A deposit made in a branch at St. John, New Brunswick, of the Bank of British North America, whose head office was in England, was held to be situate in New Brunswick and therefore subject to the succession duties Act of that province. The depositor had his domicile in Nova Scotia and died so domiciled. See *ante* p. 656.

of the legislature of Alberta inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of a merely local or private nature within it."

In other words, the bank was directed by the impugned Act to pay over to the provincial treasurer a fund held by the bank outside the province. In this view, the decision simply overruled the holding of the Alberta Courts that the fund was clearly intended by the earlier legislation to be, and had in fact been, deposited in the province of Alberta. If such had been the intention of the Guarantee Act, the bank or the bond-holders had managed to evade compliance with the statute, and the bond-holders' money remained at Montreal and could not be appropriated by the province of Alberta. This, it is conceived, is all that is covered by the Board's decision, and, if so, there is nothing in the decision to indicate a territorial limitation in the phrase "in the province" different from or greater than the essential territorial limitation which exists in the case of any modern state. The words do not connote any dividing line between federal and provincial authority. It could not be contended that the parliament of Canada had power to legislate in the premises.

Earlier cases touching the exterritorial operation of provincial legislation may be noted. In an early case in Ontario a provincial Act which purported to provide for the devolution and distribution of the estate of a testator, who had died domiciled in the province, in a way not (as held by the Courts) in conformity with the testator's will, was upheld as within provincial competence notwithstanding the fact that some of the parties entitled under the will lived, and some of the property was situate, outside the province; although, on the Act

as construed by the Courts, the legislation fell short of the full effect contended for.[8]

In an action brought by an English bond-holder against a provincial railway, the plea was advanced that by a provincial statute, passed after the sale of the bond sued on, the right of the bond-holders to receive payment had been commuted into a right to receive a prescribed number of new shares on a re-organization of the company. The plea was held good by Mr. Justice Osler on grounds thus stated:

"I am of opinion that where debts and other obligations arise out of, or are authorized to be contracted under, a local Act which is passed in relation to a matter within the powers of the local legislature, such debts or obligations may be dealt with or affected by subsequent Acts of the same legislature in relation to the same matter, and this notwithstanding that by a fiction of law such debts may be domiciled out of the province."[9]

This decision, it should be noted, was based upon the view that the Act there impugned was valid legislation in relation to a provincial railway (No. 10 of section 92) rather than in relation to property and civil rights in the province. The bond-holder's right of action, however, upon his bond was manifestly a civil right in the province, and in relation to this right the legislation was validly passed. The effect of a contrary holding in crippling the operations of provincial undertakings is strongly put in Mr. Justice Osler's judgment, which is not, it is conceived, in any way weakened by the recent decision of the Privy Council above discussed.

[8] *Re Goodhue*, 19 Grant. 366; 1 Cart. 560. Gwynne, J., alone dissented on the constitutional point.

[9] *Jones* v. *Can. Central Ry.*, 46 L. C. Q. B. 250. And see *Clarkson* v. *Ont. Bank*, 15 O. A. R. at p. 190, 4 Cart. at p. 527; *Re Windsor & Ann. Ry.*, 4 R. & G. 322; 3 Cart. 399, referred to *ante*, p. 813.

CHAPTER XLII.

The Provincial Residuum — "Generally, all Matters of a Merely Local or Private Nature in the Province."

In the last chapter the field covered by the provincial class No. 13 of section 92, "property and civil rights in the province," was spoken of as comprising the largest residuum of legislative power. The use of the term 'residuum' was not perhaps quite accurate. The real provincial residuum is that embraced within the scope of class No. 16 of section 92 as quoted at the head of this chapter. The subject has already been largely discussed;[1] and it will suffice here to repeat the language of the Privy Council in the *Local Prohibition Case*,[2] assigning to this class the position it must now be taken to occupy in the scheme of distribution effected by the British North America Act, and then to indicate various instances of provincial legislation which have been avowedly upheld as falling within the class.

This is the language of their Lordships of the Privy Council above referred to:

> "In section 92, No. 16 appears to them to have the same office which the general enactment with respect to matters concerning the peace, order, and good government of Canada, so far as supplementary of the enumerated subjects, fulfils in section 91. It assigns to the provincial legislature all matters, in a provincial sense local or private, which have been omitted from the preceding enumeration; and, although its terms are wide enough to cover, they were obviously not meant to include, provincial legislation in relation to the classes of subjects already enumerated."

[1] See *ante*, p. 452.

[2] (1896), A. C. 348; 65 L. J. P. C. 26. Extract *ante*, p. 432.

Their Lordships had held in an earlier part of the same judgment that the parliament of Canada does not derive jurisdiction from the "peace, order, and good government" clause of section 91 to deal with any matter which is in substance local or provincial and does not truly affect the interest of the Dominion as a whole; to which they added:

"Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion and to justify the Canadian parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial and has become matter of national concern in such sense as to bring it within the jurisdiction of the parliament of Canada."

The views expressed in the above case were carried to their logical conclusion in the *Manitoba Liquor Act Case*,[3] and provincial power to prohibit the traffic in liquor upheld under this class No. 16 of section 92. All provincial Acts regulating or prohibiting the traffic in particular commodities, so long as it is dealt with in its local or provincial aspect, are *intra vires*. If licensed for purposes of provincial revenue the regulation is good under No. 9 of section 92, "shop, saloon, tavern, auctioneer, and other licenses, etc.;"[4] if simply subjected to regulation or prohibited under penalty the legislation is valid under this class No. 16. These two aspects of the question cover all the cases on the subject of the liquor traffic. The pronouncement of the Privy Council in the *Manitoba Liquor Act Case* as to the present position of the question renders

[3] (1902), A. C. 73; 71 L. J. P. C. 28.
[4] See *ante*, p. 685, note.

it unnecessary to refer to the long list of earlier cases upon it.

Whether a matter is of a merely local or private nature from a provincial standpoint, or whether it has developed into national or extra-provincial magnitude, must, it seems, be determined by the courts.[5] In an early case, the Privy Council held that the *onus* is on those who assert that any matter, of itself of a local or private nature, does also come within one or more of the classes of subjects specially enumerated in the 91st section;[6] and the *onus* would, it is submitted, be still more hard to satisfy if such a matter were sought to be placed under the "peace, order, and good government" clause of section 91.[7]

Other matters which have been held to fall within this class.[8]

An Act of the Quebec legislature, passed in aid of a society in financial straits, forcing commutation upon certain annuitants.[9]

An Act of the New Brunswick legislature authorizing a levy to pay a *bonus* to a railway company operating a line to connect with a railway in Maine.[10]

Provincial Acts respecting nuisances.[1]

Provincial game laws.[2]

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[5] See *ante*, p. 376.

[6] *L'Union St. Jacques* v. *Belisle*, L. R. 6 P. C. 31; referred to with approval in *Dow* v. *Black*, L. R. 6 P. C. 272; 44 L. J. P. C. 52.

[7] *Local Prohibition Case, Man. Liquor Act Case, ubi supra.* "Vastly more difficult," is Mr. Justice Anglin's phrase in *Re Insurance Act*, 1910, 48 S. C. R. at p. 307.

[8] In many of these cases other classes were also indicated which would uphold the impugned Act; but in all of them it was intimated that at all events No. 16 would cover the legislation.

[9] *L'Union St. Jacques* v. *Belisle*, L. R. 6 P. C. 31. See *ante*, p. 414.

[10] *Dow* v. *Black*, *ubi supra.*

[1] *Ex p. Pillow*, 27 L. C. Jur. 216; 3 Cart. 357.

[2] *R.* v. *Robertson*, 3 Man. L. R. 613.

A territorial ordinance relating to ferries.[3]

A provincial Act validating an agreement between a municipality and an electric light company.[4]

A provincial Act authorizing municipalities to pass by-laws regulating the storage of explosives;[5] requiring bread to be stamped with the weight of the loaf;[6] regulating the closing of shops;[7] for Sunday closing.[8]

A provincial Act prohibiting employment of white girls in restaurants, etc., owned or managed by Chinamen.[9]

Suppression of Local Evils:—As intimated on a previous page,[10] it may now be taken as settled law that a provincial legislature may validly enact laws looking to the prevention or suppression of local evils—local, that is, either in a large provincial sense or in reference to smaller or municipal areas within a province—even though the evils are such as might in other aspects of them be proper subjects for federal legislation, even to the extent of being made crimes. For example, in the *Local Prohibition Case*,[1] it was said that

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[3] *Dinner* v. *Humberstone*, 26 S. C. R. 252; and see *Cleveland* v. *Melbourne*, 2 Cart. 241; 4 Leg. News, 277 (tollbridge case).

[4] *Hull Elec.* v. *Ottawa Elec.* (1902), A. C. 237; 71 L. J. P. C. 58; and see also *Smith* v. *London*, 20 Ont. L. R. 133; *Beardmore* v. *Toronto* (1910), 21 Ont. L. R. 505. See *ante*, p. 693.

[5] *R.* v. *McGregor* (1902), 4 Ont. L. R. 198.

[6] *R.* v. *Kay* (1909), 39 N. B. 278; *Re Bread Sales Act* (1911), 23 Ont. L. R. 238.

[7] *Montreal* v. *Beauvais* (1909), 42 S. C. R. 211; *Stark* v. *Schuster* (1904), 14 Man. L. R. 672.

[8] *Re Fisher & Carman* (1905), 16 Man. L. R. 560. As to Sabbath observance legislation, see *ante*, p. 578 *et seq.*

[9] *Quong Wing* v. *R.*, 49 S. C. R. 440. See *ante*, p. 486.

[10] See *ante*, p. 486.

[1] (1896), A. C. 348; 65 L. J. P. C. 26.

"[1]An Act restricting the right to carry weapons of offence, or their sale to young persons, would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes or against a foreign state, are matters which, their Lordships conceive, might be competently dealt with by the parliament of the Dominion."

And in this passage, it is to be borne in mind, the Board was not discussing what might be permissible federal legislation under "the criminal law," but was distinguishing between the authority of the federal parliament under the opening residuary clause of section 91, namely, over matters touching the peace, order, and good government of the Dominion as a whole and the authority of provincial legislatures under the residuary clause, No. 16, of section 92, namely, over "all matters of a merely local or private nature in the province." The decision of the Committee in the *Manitoba Liquor Act Case*[2] settled that the liquor traffic, viewed as a possible evil, might be the subject of both federal and provincial legislation. And the question was further considered in the recent decision of the Supreme Court of Canada in regard to the provincial prohibition of white girl labour in establishments under Chinese control.[3]

In all such cases, of course, provincial laws may not be repugnant to federal laws upon the same subject;[4] but the question has arisen as to how far federal occupation of the field by legislation which may possibly be construed as intended to be exhaustive should close the door to provincial legislation, either upon phases of the subject not specifically dealt with by the federal law or by way of

[2] (1902), A. C. 73; 71 L. J. P. C. 28.
[3] *Quong Wing* v. *R.*, 49 S. C. R. 440.
[4] *Ante*, p. 468, *et seq.*

implementing provisions making the law, perhaps, locally more stringent. Lord Herschell is reported to have intimated such an opinion upon the argument of the *Local Prohibition Case*,[5] but the judgment of the Board does not embody any such view, merely holding that where the Canada Temperance Act might be brought into force, the provincial local option law would be superseded.

It has been held, however, in Ontario that the legislative assembly was within its powers in providing for the appointment of local officers to see to the proper enforcement of the Canada Temperance Act and for their payment by local municipalities;[6] and similar provincial legislation in New Brunswick has been upheld by the Supreme Court of that province.[7] These decisions, it is conceived, are of doubtful authority, but they do not really touch the larger question of the right of a province to pass such laws as it may see fit for the suppression of local evils, subject always to such laws being put into abeyance by similar or repugnant federal laws. Conceding this right fully, it would not support provincial laws providing for the execution of federal laws. Executive action upon federal laws must be based upon those laws.[8]

In Quebec, it has been held that the provincial legislature was within its powers in enacting provisions looking to the restraint of abuses in connection with the sale of liquor for medicinal pur-

[5] *Supra.*

[6] *License Commrs.* v. *Prince Edward* (1879), 26 Grant, 452—Spragge, C.; *License Commrs.* v. *Frontenac* (1887), 14 Ont. R. 741—Boyd, C.

[7] *Ex p. Whalen* (1891), 30 N. B. 586.

[8] See *ante*, p. 359. It may be argued, possibly, that the Act above noted had relation to "the administration of justice in the province" (No. 14 of sec. 92), as the officers' duties were chiefly to institute prosecutions. See Chap. XXVIII., *ante*, p. 511.

poses under the Canada Temperance Act;[9] a decision entirely in line, apparently, with the opinion of Lord Herschell, noted above.

Occupation of the Field by Federal Law:—In a case in British Columbia, the question was as to the validity of certain regulations passed by the Lieutenant-Governor in Council, under the provincial Health Act, fixing a standard of purity for milk offered for sale.[10] The federal Adulteration Act provided that the Governor-General in Council should fix the standard of quality and the limits of variability in the constituent parts of any article of food, including milk. The defendant had been convicted under the provincial regulations. It was erroneously assumed before the judge of first instance that the Governor-General in Council had fixed the standard in the case of milk and upon that assumption the provincial regulations were held inoperative; but the opinion was expressed *obiter* that, as the federal parliament had placed the duty of fixing such a standard upon the Governor-General in Council, such duty could not be undertaken by or under the authority of provincial legislation and that, therefore, the local regulations were *ultra vires*. Upon appeal, this view was apparently doubted, but the order quashing the conviction was upheld on other grounds. A somewhat similar point—though not touching class No. 16 of section 92—had arisen in the same province as to the validity of a provincial Immigration Act which purported to deny entrance to the province of a

[9] *Matthieu* v. *Wentworth* (1895), Que. L. R. 4 Q. B. 343—Archibald, J. See also *R.* v. *McGregor*, 4 Ont. L. R. 198, in which a provincial Act regarding the storage of explosives was held not repugnant to federal legislation upon the same subject; also *R.* v. *Stone*, referred to *ante*, p. 571.

[10] *R.* v. *Garvin* (1908), 14 B. C. 260.

class of persons not excluded by the federal Immigration Act. That Act provided for the exclusion of certain classes and gave power to the Governor-General in Council to make regulations as to all others; and this was held to constitute an occupation of the entire field, with the result that the provincial Act was held *ultra vires* as repugnant to existing federal law.[1] The question, it is conceived, is, in all cases, really one as to the repugnancy of provincial legislation to federal enactment; but whether a delegation by the parliament of Canada of power to make regulations of itself operates as an occupation of the field, so as to debar local regulation, is very debatable. Mr. Justice Idington has, in one case, expressed an opinion to the contrary.[2]

[1] *Re Narain Singh* (1908), 13 B. C. 477.

[2] *Can. Pac. Ry.* v. *R.* (1907), 39 S. C. R. 476, at p. 490. The opinion was expressed in a dissenting judgment; but the point is not touched by the judgment of the Court.

CHAPTER XLIII.

Executive Government.

The Crown's headship in the government of Canada and its various provinces;[1] the necessary connection which, under a system of responsible parliamentary government such as obtains throughout the Dominion, must exist between the legislative and executive departments of government;[2] the consequent right of the federal and provincial executives to exercise those prerogatives of the Crown which appertain to the subjects of federal and provincial legislative cognizance respectively;[3] all these topics have already been discussed in earlier chapters. The executive government of the Dominion is very largely provided for in Acts of the parliament of Canada, while provincial legislation covers in the main the details of executive government in the respective provinces. It remains here to draw attention to certain specific provisions of the British North America Act dealing with the position and powers of the Governor-General of Canada and the provincial Lieutenant-Governors respectively. There are no Imperial Acts conferring powers, authorities, and functions on colonial governors generally.[4] As to Canada, all the statutory powers, etc., conferred by the Constitutional Act, 1791, and the Union Act, 1840, are included in the British North America Act, which at the present time is the only Imperial statute which in any way defines the duties of the Governor-General or of the Lieutenant-Governors of the various provinces.

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[1] See *ante*, p. 18, *et seq.*
[2] See *ante*, p. 320, *et seq.*
[3] See *ante*, p. 359.
[4] See *ante*, p. 148.

The Governor-General.

The Act, in addition to authorizing many specific acts on the part of the Governor-General, describes him in section 10 as an officer "carrying on the government of Canada on behalf of and in the name of the Queen." This would seem sufficiently wide language to entitle him to exercise all the Crown's prerogatives in relation to Canada's sphere of self-government upon the advice, of course, of the council appointed to "aid and advise in the government of Canada" (sec. 11), i.e., the Canadian ministry. No instructions from Imperial authorities would warrant a contravention of an Imperial statute.[5] Such instructions should, therefore, if the above interpretation be sound, be limited to matters of Imperial concern.[6] Obviously the Governor-General occupies a dual position. He is one of the Imperial executive staff, as well as executive head of the Dominion. In the former capacity, he is subject to Imperial executive authority extending to all those subject matters which are within the category of matters of Imperial concern, controlled by Imperial legislation, and—from the other point of view—uncontrollable by colonial legislation. In regard to such matters, his actions are regulated by instructions, general or specific, received from his official superior at home or by Imperial statutes. In his capacity as executive head of the Dominion, he acts by and with the advice of the Queen's Privy Council for Canada, and

[5] Mr. *Lefroy's* 12th Proposition ("Leg. Power in Can.," 232), might very properly be extended to a denial of the right of imperial officers to interfere in the executive as well as the legislative department of Canadian government under the British North America Act. As he says in relation to the latter, so it might be said as to the former: the proposition is "too obvious to need enunciation."

[6] See the emphatic judgment of Higinbotham, C.J., in *Musgrove's Case*, 5 Cart. at p. 578 *et seq.*; 14 Vic. L. R. at p. 379, *et seq.*

is, in the exercise of his executive authority in relation to matters within the legislative competence of the Dominion parliament, subject to the control of that body.

The Act, as already noted,[7] makes no express provision for the appointment of a Governor-General; but in 1878, Letters Patent, under the Great Seal of the United Kingdom were issued, and are still in force, "making effectual and permanent provision for the office of Governor-General" of Canada. They provide for the appointment, from time to time, by commission under the Sign Manual and Signet, "of the person who shall fill the said office," and enumerate the powers and duties which should devolve upon him.[8] He is authorized and commanded to do and execute in due manner all things that belong to his command and trust according:

I. To the several powers and authorities granted or appointed him by virtue of:

(a) The British North America Act, 1867.
(b) The Letters Patent (now being recited).
(c) His Commission.

II. To such instructions as may from time to time be given to him,

(a) Under the Sign Manual and Signet.
(b) By order of Her Majesty's Privy Council.
(c) Through one of the Secretaries of State.

III. To such laws as are or shall hereafter be in force in Canada.

By the Act itself, the Governor-General is entrusted with the following prerogatives, the manner of their exercise being to some extent defined:—

[7] See *ante*, p. 27.

[8] The Letters Patent and the general "instructions" accompanying them are printed in Appendix. For an account of the correspondence which lead up to their issue, see *Todd*, "Parl. Gov't in Brit. Col." (1st ed.), 77, *et seq.*

Appointments to Office.

The vast majority of offices in connection with the government of Canada are filled by persons appointed under statutory authority, by the Governor-General in Council; but there are still a few offices to which the Governor may legally make appointments without, or even contrary to, the advice of the Queen's Privy Council for Canada, although, of course, the making of such appointments *mero ipsius motu* would be a flagrant subversion of the right of local self-government long since fully accorded to Canada. But, confining attention to the British North America Act, the only officer therein mentioned in whose appointment the Governor-General and the Privy Council must concur is the Lieutenant-Governor of a Province.[9] Of the few officers whose appointment, under the Act, is in the hands of the Governor-General personally, the following is a complete list:

1. Members of the Queen's Privy Council for Canada.—section 11. In various Acts of the parliament of Canada, provisions are contained as to the appointment of the ministers (or other officers) who shall preside over the various departments of state. In all, the appointment is left in the hands of the Governor-General personally. This is *ex necessitate* in the case of a change in the entire administration, but the position is the same in every case—the appointment is, *legally considered*, the act of the Governor-General alone.
2. Senators.—s. 24.
3. Speaker of the Senate.—s. 34.

[9] Sec. 58.

4. Judges.—As enumerated in s. 96.
5. Deputy Governor-General.—s. 14, and Letters Patent, clause VI.[10]

The Summoning of Parliament.

38. The Governor-General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon and call together the House of Commons.

This section would seem to carry the governor's powers no further than the Letters Patent [1] alone would have carried them, and, therefore, as said by Sir John Bourinot: "The summoning, prorogation, and dissolution of parliament in Canada are governed by English constitutional usage. Parliament can only be legally summoned by authority of the Crown." After the expiry of the House of Commons by lapse of time or dissolution, there must be a new House elected by the people according to law before there can be an effective exercise of the prerogative right to summon parliament; and it is worthy of note that in connection with such election certain powers are vested in the Governor-General and certain duties imposed upon him by Canadian legislation in the exercise of which he, in contemplation of law, acts personally. Upon him devolves the duty of fixing the date for the holding of such election—the rule is the same as to bye-elections—and by him the returning officer of each electoral district is appointed.[2] This, however, by the way. The House of Commons being so elected, parliament can meet together for the despatch of business only upon the summons of the Governor-General. The word "summon" is also used in the Act (sec. 24) in reference to the appointment of senators.

[10] See *R.* v. *Amer*, 42 U. C. Q. B. 391; referred to *ante*, p. 121.
[1] See *infra*.
[2] R. S. C. (1906), c. 6.

THE EXERCISE OF THE PREROGATIVE RIGHTS OF THE CROWN AS A CONSTITUENT BRANCH OF THE PARLIAMENT OF CANADA.[3]

THE DISALLOWANCE OF PROVINCIAL ACTS.[4]

By the Letters Patent, constituting the office of Governor-General, he is authorized and empowered:

"III. . . . To constitute and appoint in our name, and on our behalf, all such judges, commissioners, justices of the peace, and other necessary officers and ministers of our said Dominion, as may be lawfully constituted or appointed by us.

"IV. . . . So far as we lawfully may, upon sufficient cause to him appearing, to remove from his office or to suspend from the exercise of the same, any person exercising any office. . . ."

The exercise of the prerogative right of the Crown in the appointment to and removal from office in Canada, is now (with the exception of this one office of Governor-General) entirely regulated by statutes, Imperial and Colonial.[5]

"V. . . . To exercise all powers lawfully belonging to us, in respect of the summoning, proroguing or dissolving of the parliament of our said Dominion."

The exercise of the power of *summoning* has been the subject of legislative regulation;[6] the other two—of *proroguing* and *dissolving*—exist as at common law. The "conventional" limitations are many, the legal right is absolute.

[3] Section 55. See *ante*, p. 25 *et seq.*

[4] Section 90. See *ante*, p. 149 *et seq.*

[5] See the opinion of Sir James Scarlett (Lord Abinger) and Sir N. C. Tindal (C.J., C.P.), on the power of the Crown to create the office of Master of the Rolls in Canada (1827)—*Forsyth*, 172.

[6] B. N. A. Act, 1867, ss. 20 and 38. See above.

By his "instructions"[7]:—

Attention need only be drawn to the 5th clause making provision as to the exercise of the prerogative of *pardon*. The Governor-General is debarred from exercising this prerogative without first receiving the advice, in capital cases, of the Privy Council for Canada; in other cases, of one at least of his ministers; except in cases where the interests of the Empire or of some country other than Canada might be directly affected; in which exceptional cases, the Governor-General shall "take those interests specially into his own personal consideration, in conjunction with such advice as aforesaid." In other words, in those exceptional cases, he may disregard the advice offered;[8] in all other cases, he must follow it.

Pre-Confederation Powers.

In so far as powers and authorities were vested by statute law in the governors of the pre-confederation provinces, they had been conferred upon the holder of a particular office. This office was now to be divided and a statutory re-allotment of powers, so to speak, had to be made. The British North America Act effects no division of these powers, but merely of the field for their exercise. By section 12 they are all vested in the Governor-General so far as capable of being exercised in relation to the government of Canada; and by section

[7] *I.e.*, the general "instructions" which accompany the Letters Patent: see Appendix. As to how far such instructions are justifiable in relation to matters within the sphere of colonial self-government: see *ante*, p. 362, and particularly *Musgrove's Case*, 5 Cart. 556, at p. 578, *et seq.*

[8] That is to say, he acts in such case as an imperial officer upon imperial considerations. On the general question of the prerogative of mercy, see the *Pardoning Power Case*, 23 S. C. R. 458; *Ex p. Armitage* (1902), 5 Can. Crim. Cas. 342.

65 they are vested in the Lieutenant-Governors of Ontario and Quebec so far as capable of exercise in relation to the government of those provinces respectively. The power of the Dominion Parliament to alter or abolish these powers is, of course, limited to their abolition or alteration so far as they are exercisable in relation to the government of Canada.[9] Section 65 confers like powers on the provincial legislative assemblies, so far as these powers are exercisable in relation to the government of the provinces of Ontario and Quebec. This subject has, however, already been sufficiently discussed.[10]

Lieutenant-Governors.

A provincial Lieutenant-Governor is described in section 62 of the British North America Act as an officer "carrying on the government of the province"; and notwithstanding the absence of the phrase "on behalf of and in the name of the Queen," which appears in section 10 in reference to the Governor-General, it is now authoritatively settled that a Lieutenant-Governor when appointed is as much the representative of the Crown for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.[1]

In each province the Lieutenant-Governor acts by and with the advice of an executive council, that is to say, the provincial ministry. The only powers which under the Act a Lieutenant-Governor may exercise otherwise than by order-in-

[9] Section 129. *Dobie* v. *Temp. Board*, 7 App. Cas. 136; 51 L. J. P. C. 26. *Local Prohibition Case* (1896), A. C. 343; 65 L. J. P. C. 26.

[10] See *ante*, p. 405 *et seq.*

[1] See *ante*, p. 359.

council are those conferred by section 63, in reference to the appointment of members of the Executive Councils of Ontario and Quebec; by section 72, in reference to the appointment of legislative councillors in Quebec; by sections 82 and 85, in reference to the summoning and dissolving of the provincial legislative assembly; and by section 90, the giving or withholding of the assent of the Crown to bills passed by the legislative assembly. But, with regard to all of these, with the exception of the last named, constitutional usage requires that all such acts must be done upon the advice of ministers having the confidence of the legislature of the province. As to the appointment of members of the Executive Council, the Lieutenant-Governor must *ex necessitate*, so far as the legal position is concerned, appoint, without advice, the new members upon the defeat and resignation of an entire administration; but, even in such cases, the incoming ministry or Executive Council must accept entire responsibility for the acts of the Lieutenant-Governor in connection with the formation of the new Executive Council. With regard to the giving or withholding of the assent of the Crown to bills passed by the legislative assembly of a province, a Lieutenant-Governor acts, it is conceived, as a member of the Dominion executive staff, subject to instructions from the Governor-General, although, in practice, the supervision of provincial legislation entrusted to the Dominion executive is exercised after the event, by disallowance, rather than before the event, by instructions to withhold the Crown's assent. The relation, indeed, which exists between the Dominion government and a provincial Lieutenant-Governor is somewhat uncertain. The Privy Council has spoken of the Governor-General in Council as a body having no powers

and no functions in regard to a Lieutenant-Governor except to act as representatives of the Crown in appointing him.[2]

Section 14 of the Act (coupled with the Letters Patent) empowers the Governor-General to appoint a Deputy Governor-General. No section, it will be noticed, conveys such power to a Lieutenant-Governor, and as to him, therefore, the maxim *delegatus non potest delegari* applies. Section 67 confers power upon the Governor-General in Council to appoint an administrator to execute the office and functions of a Lieutenant-Governor in case of absence or illness; and section 92 expressly prohibits a provincial legislature from amending the provincial constitution "as regards the office of Lieutenant-Governor." A provincial legislature may, it has been held, confer upon a Lieutenant-Governor power to execute functions "germane to the office,"[3] but any general delegation by him of the duties of his office would seem contrary to the spirit of the Federation Act.

[2] See *ante*, p. 27.

[3] *Per* Boyd, C., in the *Pardoning Power Case*, 20 O. R. 222; and see the Q. C. Case (1898), A. C. 247; 67 L. J. P. C. 17.

CHAPTER XLIV.

The North-West Territories.

The future extension of the Dominion of Canada so as ultimately to embrace the whole of British North America from ocean to ocean was anticipated by the framers of the British North America Act.[1] After its passage the Dominion government lost no time in setting to work to secure control of the vast territories lying between Ontario and British Columbia. At the very first session of the parliament of Canada an address[2] was passed by both Houses representing the expediency, both from a Canadian and an Imperial point of view, of an early extension of the Dominion to the shores of the Pacific. This address pointed out the necessity for a stable government and the establishment of institutions analogous to those of the older provinces, in order to the development of the agricultural, mineral, and commercial resources of the Great Lone Land, and prayed that Her Majesty might be pleased (pursuant to section 146 of the Act) "to unite Rupert's Land and the North-West Territory with this Dominion, and to grant to the parliament of Canada authority to legislate for their future welfare and good government."

That part of these territories[3] known as Rupert's Land had been under the control of the Hudson's Bay Company ever since, in 1670, King

[1] Sections 146 and 147; in appendix. See *ante*, p. 305.

[2] See Dom. Stat., 1872, p. lxiii.

[3] See a very interesting article in Western Law Times, Vol. I., June, 1890, which contains in brief an account of the early organization of these territories under the H. B. Co.; also the author's "History of Canada."

Charles II. granted his charter to those "adventurers trading into Hudson's Bay." As lords-proprietors the company had full right of government and administration therein subject to the sovereignty of England. The boundaries of Rupert's Land were never accurately determined. Speaking roughly, the country known by that name comprised the territory watered by streams flowing into Hudson's Bay; but the company had extended their operations and assumed jurisdiction over other parts of the North-Western Territory.

The existence of the Hudson Bay Company's charter rendered it necessary, in the view of the home government, that terms should first be settled with that company for a surrender of "all the rights of government" and other rights, privileges, etc., in Rupert's Land enjoyed by the company under their charter, other than their trading and commercial privileges. To this end, the Rupert's Land Act, 1868,[4] was passed by the Imperial parliament, empowering Her Majesty to accept such surrender on terms to be agreed upon —"subject to the approval of Her Majesty in council of the terms and conditions to be proposed by the Dominion parliament for the admission of Rupert's Land and embodied in an address." The 5th section of this Act provided:

"5. It shall be competent to Her Majesty by any such order or orders in council as aforesaid on address from the Houses of the parliament of Canada, to declare that Rupert's Land shall, from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada; and thereupon it shall be lawful for the parliament of Canada from the date aforesaid to make, ordain, and establish within the land and territory so admitted as aforesaid all such laws, institutions, and ordinances, and to constitute such courts and

[4] 31-32 Vict., c. 105 (Imp.).

officers as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein; provided that until otherwise enacted by the said parliament of Canada all the powers, authorities and jurisdiction of the several courts of justice now established in Rupert's Land and of the several officers thereof and of all magistrates and justices now acting within the said limits, shall continue in full force and effect therein."

This Act, it will be noticed, is confined to Rupert's Land, but, under the terms agreed upon by the Hudson's Bay Company and the Canadian delegates, the company surrendered all their rights of government and other rights, privileges, etc., etc., not only in Rupert's Land but also in any other part of British North America (other than Canada and British Columbia) and all lands and territories therein, save some 50,000 acres reserved to them by the agreement. The terms of surrender as embodied in the Imperial order in council finally passed were simply the price paid by the Dominion for the surrender, and are not here material.[5] The order in Council—23rd June, 1870—which finally admitted Rupert's Land and the North-West Territory to the union provided that from and after the 15th day of July, 1870, those vast areas should form part of Canada, and that as to the North-Western Territory "the parliament of Canada shall from the day aforesaid have full power and authority to legislate for the future welfare and good government" thereof; but it made no further provision as to legislation for Rupert's Land, because that was provided for by the section of the Rupert's Land Act, 1868, already quoted. As to the North-Western Territory proper, therefore,

[5] As to the company's exemption from "exceptional" taxation, see *McGowan* v. *H. B. Co.*, 5 Terr. L. R 147; *H. B. Co.* v. *Atty.-Gen. of Manitoba*, Man. R. *temp.* Wood, 209.

the legislative power was conferred by the order in Council of 23rd June, 1870, operating as an Imperial Act by virtue of section 146 of the British North America Act; while as to Rupert's Land the legislative power was conferred by the Rupert's Land Act, 1868. Nothing, however, turns upon this distinction, for by the British North America Act, 1871,[6] full legislative power was given to the parliament of Canada over all territories not included within the boundaries of any province, so that any possible distinction which might have been urged as arising from the difference in the phraseology of the two earlier enactments entirely disappeared.

Anticipating the admission of these territories, the Dominion parliament in 1869 passed "An Act for the temporary government of Rupert's Land and the North-Western Territory, when united with Canada"[7] providing for the appointment of a Lieutenant-Governor to administer the government of these territories under instructions from the Governor-General in Council. By order in Council the Lieutenant-Governor might be empowered (subject to such conditions and restrictions as might be imposed by such order in council), "to make provision for the administration of justice therein, and generally to make, ordain, and establish all such laws, institutions, and ordinances as may be necessary for the peace, order, and good government of Her Majesty's subjects and others therein." The Lieutenant-Governor was to be aided by a council, not exceeding fifteen, nor less than seven persons, to be appointed by the Governor-General in Council. The powers of this council were to be from time to time as defined by

[6] 34 & 35 Vict., c. 28 (Imp.). In appendix.
[7] 32-33 Vict., c. 3 (Dom.).

order in council, *i.e.*, by the Dominion government. By the 5th and 6th sections of this Act, it was provided:

"All the laws in force in Rupert's Land and the North-Western Territory at the time of their admission to the union shall so far as they are consistent with 'the British North America Act, 1867'—with the terms and conditions of such admission approved of by the Queen under the 146th section thereof—and with this Act—remain in force until altered by the parliament of Canada, or by the Lieutenant-Governor under the authority of this Act.

"6. All public officers and functionaries holding office in Rupert's Land and the North-Western Territory at the time of their admission into the union, excepting the public officer or functionary at the head of the administration of affairs, shall continue to be public officers and functionaries of the North-West Territories with the same duties and powers as before, until otherwise ordered by the Lieutenant-Governor under the authority of this Act."

Again, in 1870 (the admission not having yet taken place) the parliament of Canada passed "An Act to amend and continue the Act 32-33 Vic. c. 3; and to establish and provide for the government of the province of Manitoba."[8] This Act was validated by the British North America Act, 1871.[9] As to the remaining portions of the territories about to become part of the Dominion, the only amendment of the Act of the previous session was in the provision that the Lieutenant-Governor of Manitoba should also be commissioned as Lieutenant-Governor of the North-West Territories—as such remaining portions were now to be called. With this amendment, the Act of 1869 was continued to the end of the session of 1871.

Confining attention, then, to the North-West Territories; when next the parliament of Canada

[8] "The Manitoba Act." 33 Vict., c. 3 (Dom.). In appendix.
[9] 34 & 35 Vict., c. 28 (Imp.). In appendix.

met, these territories were part of the Dominion, and much of the legislation of that session applied to them equally with the other parts of Canada. From that time until the creation of the provinces of Alberta and Saskatchewan in 1905 [10] the Dominion parliament had the power to legislate for the North-West Territories in reference to all matters within the ken of a colonial legislature; and although, as will appear, large powers of local self-government were from time to time conceded to the inhabitants of these Territories, they were held at the will of the parliament of Canada. And as cases may arise in which the rights of litigants will depend on the law as it stood at some particular time since 1870, it may be well to state shortly the changes which have been made from time to time up to the present, in order that the proper sources of legislation at any given period, and in relation to any given matter, may be consulted.

On the 15th of July, 1870, these Territories became part of Canada. The Acts of the two previous sessions expiring at the end of the session of 1871, a permanent Act was passed,[1] containing the same provisions as had been made by those Acts; and the British North America Act, 1871, made the general provision above noted that "the parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any province"[2]—a provision which, of course, still stands good as to the present North-West Territories, the Yukon Territory and Keewatin.

[10] See *ante*, p. 19.

[1] 34 Vict. c. 16 (Dom.).

[2] See *ante*, p. 850.

Period from 15th July, 1870, to 1st November, 1873.

During this period, then, legislative authority over the North-West Territories was exercised or exercisable—in the order of efficacy—

(a) By the Imperial parliament:

(b) By the parliament of Canada:

(c) By the Lieutenant-Governor of Manitoba in relation only to such matters as were designated by order of the Governor-General in Council. Nothing, however, was done toward the government of the North-West Territories by local authority, until December, 1872, when Lieutenant-Governor Morris of Manitoba was commissioned to act as Lieutenant-Governor of these Territories, with a council of eleven members [3] to aid him in the administration of affairs there. By order in council of date 12th February, 1873, it was ordered:

"1. That the Lieutenant-Governor of the North-West Territories, by and with the advice of the said council, shall be, and he is hereby authorized to make provision for the administration of justice in the said territories, and generally to make and establish such ordinances as may be necessary for the peace, order, and good government of the said North-West Territories and of Her Majesty's subjects and others therein. Provided, first, that no such ordinance shall deal with or affect any subjects which are beyond the jurisdiction of a provincial legislature, under the 'British North-America Act, 1867,' and provided, second, that all such ordinances shall be made to come into force only after they have been approved by the Governor-General in Council, unless and in case of urgency, and in that case the urgency shall be stated on the face of the ordinance."

[3] By 36 Vict., c. 5, the membership of the council was increased to a maximum of 21 instead of 15, the minimum remaining at 7.

With further provision for the transmission of all ordinances to the Governor-General, who should be at liberty to disallow any of them at any time within two years from their passage.

Period from 1st November, 1873, to 7th October, 1876.

On the 1st of November, 1873, the Act 36 Vic. c. 34, came into force. It provided—probably to remove doubts—that the local legislation on the various subjects which by order in council to that date had been committed to the legislative ken of the Lieutenant-Governor and his council, should thereafter be passed by the Lieutenant-Governor, *by and with the advice and consent* of the council. In relation to all matters not so committed, legislative power was by the Act conferred on the Governor-General in Council. The legislative power of both the Dominion cabinet and the Lieutenant-Governor in Council—each within its respective sphere—might be exercised in the way of extending to the Territories general Acts of the parliament of Canada with such modification as might be thought desirable, or in the way of repealing such general Acts so far as they might apply to the Territories; with this proviso, however, that no law to be passed by either of these bodies should (1) be inconsistent with any Act of the parliament of Canada of express application to the Territories; (2) alter the punishment provided for any crime or the legal description or character of the crime itself; (3) impose any tax or any duty of customs or excise or any penalty exceeding one hundred dollars; or (4) appropriate any monies or property of the Dominion without the authority of the Dominion parliament. All local legislation was to be subject to disallowance within two years after its passage.

During this period, therefore, legislative power was exercisable—in the order of its efficacy—

(a) By the Imperial parliament:

(b) By the parliament of Canada:

(c) By the Governor-General in Council in relation to all matters not committed to the Lieutenant-Governor and his council; which in reality placed the entire legislative power (subject to the foregoing) in the hands of the Dominion government if it had chosen to exercise it, for the powers of the Lieutenant-Governor were themselves defined by the order in council referred to above[4] and could, of course, be at any time curtailed:

(d) By the Lieutenant-Governor in Council in relation to all matters from time to time committed to them for legislative action.

During this period, however, no further orders in council were passed relative to the powers of the Lieutenant-Governor in Council, nor was the legislative power of the Governor-General in Council exercised, so that this and the earlier period are practically one. Dominion legislation of a general character passed during this period would *prima facie* apply to the North-West Territories.[5]

Period from 7th October, 1876, to 28th April, 1877.

In 1875 was passed "The North-West Territories Act, 1875," which came into force, however, only on the 7th of October, 1876. It amended and consolidated previous legislation, and under it the first resident Lieutenant-Governor was appointed, and the first legislative session took place in the Territories. The council was reduced in number

[4] *Ante*, p. 852.

[5] See particularly 36 Vict., c. 35, as to the Administration of Justice.

—so far as appointed members were concerned—to five persons, with powers as defined in the Act, and with such further powers not inconsistent therewith as might from time to time be conferred by order in Council. As, however, the section of the Act defining the legislative powers of the Lieutenant-Governor in Council,[6] was in force for only some six months, and as a reference to the ordinances passed at the session held while it was so in force discloses that nothing was done in the way of legislation which was not fully justified by the powers conferred by the Act, it is not thought necessary to quote the section. By the 6th section of this Act all laws and ordinances then in force in the Territories were to continue until altered or repealed by competent authority. The Governor-General in Council was empowered[7] to apply any Act, or part of any Act of the Dominion parliament to the Territories generally or to any part thereof. The Lieutenant-Governor was empowered to establish, as population increased, electoral districts, and it was provided that so soon as the number of elected members of the council should reach 21, the council should cease to exist and a legislative assembly take its place. In the electoral districts the Lieutenant-Governor in Council might impose direct taxation and license fees for raising a revenue for the local and municipal purposes of each district. Power was also given to establish municipalities in the electoral districts, with powers of municipal taxation to be prescribed by ordinance of the Lieutenant-Governor in Council. In reference to education, it was provided that any legislation should be subject to the right of the minority in any district, whether Protestant or Roman Catholic, to establish separate schools, the supporters

[6] 38 Vict., c. 49, s. 7; repealed by 40 Vict., c. 7.
[7] Section 8.

of which should be exempt from taxation for the support of the schools established by the majority. The Act also contained much legislation upon such general topics as real estate and its descent, wills, married women, registration of deeds, etc. Provision was made for the administration of justice through the medium of local Courts presided over by stipendiary magistrates, who in more serious criminal cases were to be associated with the chief justice or one of the judges of the Court of Queen's Bench of Manitoba. In capital cases an appeal lay to the full Court of Queen's Bench of that province.

Period from 28th April, 1877, to 18th February, 1887.[7a]

The North-West Territories Act, 1875, was, as above intimated, amended in a most important particular by 40 Vic. c. 7, passed about six months after the Act of 1875 came into operation. The section defining the legislative powers of the Lieutenant-Governor in Council was repealed and the following section substituted therefor:

"7. The Lieutenant-Governor in Council, or the Lieutenant-Governor by and with the advice and consent of the legislative assembly, as the case may be, shall have such powers to make ordinances for the government of the North-West Territories as the Governor in Council may, from time to time, confer upon him; Provided always that such powers shall not at any time be in excess of those conferred by the ninety-second section of 'The British North America Act, 1867,' upon the legislatures of the several provinces of the Dominion:

"2. Provided that no ordinance to be so made shall,—(1) be inconsistent with or alter or repeal any provision of any Act of the Parliament of Canada in schedule B. of this Act, or of any Act of the parliament of Canada, which may now, or at any time hereafter, expressly refer to the said Territories, or which or any part of which may be at any time

[7a] See note on p. 860, *post*.

made by the Governor in Council, applicable to or declared to be in force, in the said Territories, or,—(2) impose any fine or penalty exceeding one hundred dollars:

"(3) And provided that a copy of every such ordinance shall be mailed for transmission to the Secretary of State, within ten days after its passing, and it may be disallowed by the Governor in Council at any time within two years after its receipt by the Secretary of State; Provided, also, that all ordinances so made, and all Orders in Council disallowing any ordinances so made, shall be laid before both Houses of Parliament, as soon as conveniently may be after the making and enactment thereof respectively."

On the 11th of May, 1877, an order in council was passed which, after reciting the statutes of 1875 and 1877, ran thus:

"Now, in pursuance of the powers by the said statute conferred, his Excellency, by and with the advice of the Privy Council, has been pleased further to order, and it is hereby ordered, that the Lieutenant-Governor in Council shall be and is hereby empowered to make ordinances in relation to the following subjects, that is to say:

1. The establishment and tenure of territorial offices, and the appointment and payment of territorial officers;

2. The establishment, maintenance and management of prisons in and for the North-West Territories;

3. The establishment of municipal institutions in the Territories, in accordance with the provisions of the "North-West Territories Acts, 1875 and 1877."

4. The issue of shop, auctioneer and other licenses, in order to the raising of a revenue for territorial or municipal purposes;

5. The solemnization of marriages in the Territories;

6. The administration of justice, including the constitution, organization and maintenance of territorial courts of civil jurisdiction;

7. The imposition of punishment by fine, penalty or imprisonment for enforcing any territorial ordinance;

8. Property and civil rights in the Territories, subject to any legislation by the parliament of Canada upon these subjects, and—

9. Generally on matters of a merely local or private nature in the Territories.

These Acts were from time to time amended, consolidated and revised, but, substantially, the legislative power of the Lieutenant-Governor in Council continued to be governed by the above section and the order in council quoted until 1888—indeed, one may say, until 1891, for, upon the establishment of a legislative assembly in the former year, its powers of legislation were not increased beyond those exercisable before its creation by the Lieutenant-Governor in Council.

In 1880, by 43 Vic. c. 25, previous Acts were amended and consolidated. The time for disallowing territorial ordinances was shortened to one year, and the clauses of the Act of 1875 relating to municipalities eliminated, being deemed, no doubt, to be covered by the order in council above quoted.[8] The participation of Manitoba judges in the administration of justice in the Territories was abolished except in the matter of appeals in capital cases.[9]

On June 26th, 1883, a new order in council was promulgated defining the powers of the Lieutenant-Governor, whether acting in council or by and with the advice and consent of the legislative assembly;[10] the only amendment, however, of the order in council of 1877 above quoted being in items 3 and 4, which were made to read as follows:

"3. Municipal institutions in the Territories, subject to any legislation by the parliament of Canada heretofore or hereafter enacted:

[8] See 45 Vict., c. 28, and 47 Vict., c. 23.
[9] See also 48-49 Vict., c. 51.
[10] No assembly was constituted until 1888; see *post*.

"4. The issue of shop, auctioneer, and other licenses, except licenses for the sale of intoxicating liquors, in order to the raising of a revenue for territorial or municipal purposes."

In 1886, important legislation was enacted (49 Vic. c. 25), but it was carried at once into the Revised Statutes of that year.[1]

From that time until 1905 the position of these territories was defined by "The North-West Territories Act" (R. S. C. 1886, c. 50), and amendments thereto.[2] The Yukon Territory was carved out of the North-West Territories in 1898, and special provision has from time to time been made for the administration of affairs there.

Alberta and Saskatchewan.

The British North America Act, 1871, which validated the Manitoba Act[3] by which the parliament of Canada had purported to create the province of that name, contained this further provision:

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

Acting under this authority the parliament of Canada in 1905 established the provinces of

[1] It was proclaimed 18th February, 1887; the R. S. C. (1886) took effect 1st March, 1887.

[2] The council was replaced by a legislative assembly in 1888—54-55 Vict., c. 22. Section 6 of that Act defines the assembly's jurisdiction.

[3] *Ante*, p. 851.

Alberta and Saskatchewan.[4] In the same session the North-West Territories Act was largely remodelled, what was left of those Territories being placed under the local control of a Commissioner and Council.[5] It is not thought necessary to go further into detail as the statute is readily accessible.

Upon the establishment of the two new provinces the existing laws were, of course, continued. The Ordinances of the North-West Territories thus became two bodies of provincial law, each having no different or more extensive effect than if it were made up of Acts of the legislatures of each of the new provinces respectively.[6]

In discussing the position of Alberta and Saskatchewan, the question has been suggested as to the power of the parliament of Canada to establish a province with a sphere of authority smaller than or different from that indicated for a province by the original British North America Act, 1867. By the Act of 1886 all the Acts so entitled are to be read together. By section 6 of the Act of 1871 it is provided:

> **6.** Except as provided by the third section of this Act,[7] it shall not be competent for the Parliament of Canada to alter the provisions of the last mentioned Act of the said Parliament, in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

[4] 4 & 5 Edw. VII., c. 3 (Alberta); *ib.* c. 42 (Saskatchewan). These Acts will be found in the appendix.

[5] See R. S. C. (1906) c. 62. See also c. 63 as to the Yukon Territory.

[6] *Jones* v. *Twohey*, 1 Alberta L. R. 267.

[7] This section relates to alterations of boundary by consent. See appendix.

In other words, an Act of the parliament of Canada establishing a province becomes in effect an Imperial Act or, at least, an Act which can be altered only by imperial legislation. No question can arise as to the Manitoba Act as that was expressly validated by the British North America Act, 1871, from which sections 2 and 6 are above quoted; but as to Alberta and Saskatchewan the question is perhaps debatable, as to the validity of the restrictive clauses. The wording of section 2, however, indicates a very wide power in the Dominion parliament in moulding the constitutional form of government in a new province. *Sit lux!*

APPENDICES.

A. CONSTITUTIONAL STATUTES, ORDERS IN COUNCIL, &c.

1. THE BRITISH NORTH AMERICA ACT, 1867.

IMPERIAL ACT 30-31 VICT. CAP. 3.

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for purposes connected therewith.

[*29th March, 1867.*]

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick, have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom;

And whereas such a Union would conduce to the welfare of the Provinces and promote the interests of the British Empire;

And whereas on the establishment of the Union by authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the nature of the Executive Government therein be declared;

And whereas it is expedient that provision be made for the eventual admission into the Union of other parts of British North America;

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I.—PRELIMINARY.

1. This Act may be cited as *The British North America Act, 1867*.

2. The provisions of this Act referring to Her Majesty the Queen extend also to the heirs and successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

II.—Union.

3. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honorable Privy Council, to declare by Proclamation that on and after a day therein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be one Dominion under the name of Canada; and on and after that day those three Provinces shall form and be one Dominion under that name accordingly.

4. The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the day appointed for the Union taking effect in the Queen's Proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act.

5. Canada shall be divided into four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.

6. The parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form two separate Provinces. The part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

7. The Provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this Act.

8. In the general census of the population of Canada which is hereby required to be taken in the year one thousand eight hundred and seventy-one, and in every tenth year thereafter, the respective populations of the four Provinces shall be distinguished.

III.—Executive Power.

9. The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen.

10. The provisions of this Act referring to the Governor General extend and apply to the Governor General for the time being of Canada, or other the Chief Executive Officer or Administrator, for the time being carrying on the Government of Canada on behalf and in the name of the Queen, by whatever title he is designated.

11. There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen's Privy Council for Canada; and the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor General and sworn in as Privy Councillors, and members thereof may be from time to time removed by the Governor General.

12. All powers, authorities, and functions which under any Act 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, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable 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 continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exercisable by the Governor General, with the advice or with the advice and consent of or in conjunction with the Queen's Privy Council for Canada, or any members thereof, or by the Governor General individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

13. The provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the advice of the Queen's Privy Council for Canada.

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor General from time to time to appoint any person or any persons jointly or severally to be his Deputy or Deputies within any part or parts of Canada, and in that capacity to exercise during the pleasure of the Governor General such of the powers, authorities, and functions of the Governor General as the Governor General deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen; but the appointment of such a Deputy or Deputies shall not affect the exercise by the Governor General himself of any power, authority or function.

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

16. Until the Queen otherwise directs the seat of Government of Canada shall be Ottawa.

IV.—Legislative Power.

17. There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

[*Section 18 was repealed by Imperial Act 38 and 39 Vict. c. 38, and the following section substituted therefor.*]

18. The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons and by the members thereof respectively shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Common House of Parliament of the United Kingdom of Great Britain and Ireland and by the members thereof.]

19. The Parliament of Canada shall be called together not later than six months after the Union.

20. There shall be a Session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one Session and its first sitting in the next Session.

The Senate.

21. The Senate shall, subject to the provisions of this Act, consist of seventy-two members, who shall be styled Senators.

22. In relation to the constitution of the Senate, Canada shall be deemed to consist of three divisions—

1. Ontario;

2. Quebec:

3. The Maritime Provinces, Nova Scotia and New Brunswick; which three divisions shall (subject to the provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four Senators; Quebec by twenty-four Senators; and the Maritime Provinces by twenty-four Senators, twelve thereof representing Nova Scotia, and twelve thereof representing New Brunswick.

In the case of Quebec each of the twenty-four Senators representing that Province shall be appointed for one of the twenty-

four Electoral Divisions of Lower Canada specified in Schedule A. to chapter one of the Consolidated Statutes of Canada.

23. The qualification of a Senator shall be as follows:—

1. He shall be of the full age of thirty years.
2. He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union.
3. He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in franc-aleu or in roture, within the Province for which he is appointed, of the value of $4,000, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same.
4. His real and personal property shall be together worth $4,000 over and above his debts and liabilities.
5. He shall be resident in the Province for which he is appointed.
6. In the case of Quebec he shall have his real property qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

24. The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a Senator.

25. Such persons shall be first summoned to the Senate as the Queen by warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.

26. If at any time on the recommendation of the Governor General the Queen thinks fit to direct that three or six members be added to the Senate, the Governor General may by summons to three or six qualified persons (as the case may be), representing equally the three divisions of Canada, add to the Senate accordingly.

27. In case of such addition being at any time made the Governor General shall not summon any person to the Senate,

except on a further like direction by the Queen on the like recommendation, until each of the three divisions of Canada is represented by twenty-four Senators and no more.

28. The number of Senators shall not at any time exceed seventy-eight.

29. A Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

30. A Senator may by writing under his hand addressed to the Governor General resign his place in the Senate, and thereupon the same shall be vacant.

31. The place of a Senator shall become vacant in any of the following cases:

1. If for two consecutive Sessions of the Parliament he fails to give his attendance in the Senate.
2. If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a foreign power, or does an act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen, of a foreign power.
3. If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter.
4. If he is attainted of treason or convicted of felony or of any infamous crime.
5. If he ceases to be qualified in respect of property or of residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the seat of the Government of Canada while holding an office under that Government requiring his presence there.

32. When a vacancy happens in the Senate by resignation, death, or otherwise, the Governor General shall by summons to a fit and qualified person fill the vacancy.

33. If any question arises respecting the qualification of a Senator or a vacancy in the Senate the same shall be heard and determined by the Senate.

34. The Governor General may from time to time, by instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead.

35. Until the Parliament of Canada otherwise provides, the presence of at least fifteen Senators, including the Speaker, shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

36. Questions arising in the Senate shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

The House of Commons.

37. The House of Commons shall, subject to the provisions of this Act, consist of one hundred and eighty-one members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick.

38. The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon and call together the House of Commons.

39. A Senator shall not be capable of being elected or of sitting or voting as a member of the House of Commons.

40. Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the purposes of the election of members to serve in the House of Commons, be divided into Electoral Districts as follows:—

1.—ONTARIO.

Ontario shall be divided into the Counties, Ridings of Counties, Cities, parts of Cities, and Towns enumerated in the first Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return one member.

2.—QUEBEC.

Quebec shall be divided into sixty-five Electoral Districts, composed of the sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under chapter two of the Consolidated Statutes of Canada, chapter seventy-five of the Consolidated Statutes of Lower Canada, and the Act of the Province of Canada of the twenty-third year of the Queen, chapter one, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the purposes of this Act an Electoral District entitled to return one member.

3.—NOVA SCOTIA.

Each of the eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return two members, and each of the other Counties one member.

4.—NEW BRUNSWICK.

Each of the fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an

Electoral District; the City of St. John shall also be a separate Electoral District. Each of those fifteen Electoral Districts shall be entitled to return one member.

41. Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union relative to the following matters or any of them, namely,—the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the several Provinces, the voters at elections of such members, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which elections may be continued, the trial of controverted elections, and proceedings incident thereto, the vacating of seats of members, and the execution of new writs in case of seats vacated otherwise than by dissolution,—shall respectively apply to elections of members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any election for a Member of the House of Commons for the District of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject aged twenty-one years or upwards, being a householder, shall have a vote.

42. For the first election of members to serve in the House of Commons the Governor-General shall cause writs to be issued by such person, in such form, and addressed to such Returning Officers as he thinks fit.

The person issuing writs under this section shall have the like powers as are possessed at the Union by the officers charged with the issuing of writs for the election of members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia, or New Brunswick; and the Returning Officers to whom writs are directed under this section shall have the like powers as are possessed at the Union by the officers charged with the returning of writs for the election of members to serve in the same respective House of Assembly or Legislative Assembly.

43. In case a vacancy in the representation in the House of Commons of any Electoral District happens before the meeting of the Parliament, or after the meeting of the Parliament before provision is made by the Parliament in this behalf, the provisions of the last foregoing section of this Act shall extend and apply to the issuing and returning of a writ in respect of such vacant District.

44. The House of Commons on its first assembling after a general election shall proceed with all practicable speed to elect one of its members to be Speaker.

45. In case of a vacancy happening in the office of Speaker by death, resignation or otherwise, the House of Commons shall with all practicable speed proceed to elect another of its members to be Speaker.

46. The Speaker shall preside at all meetings of the House of Commons.

47. Until the Parliament of Canada otherwise provides, in case of the absence for any reason of the Speaker from the chair of the House of Commons for a period of forty-eight consecutive hours, the House may elect another of its members to act as Speaker, and the member so elected shall during the continuance of such absence of the Speaker have and execute all the powers, privileges, and duties of Speaker.

48. The presence of at least twenty members of the House of Commons shall be necessary to constitute a meeting of the House for the exercise of its powers, and for that purpose the Speaker shall be reckoned as a member.

49. Questions arising in the House of Commons shall be decided by a majority of voices other than that of the Speaker and when the voices are equal, but not otherwise, the Speaker shall have a vote.

50. Every House of Commons shall continue for five years from the day of the return of the writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.

51. On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four Provinces shall be re-adjusted by such authority, in such manner and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:—

1. Quebec shall have the fixed number of sixty-five members:
2. There shall be assigned to each of the other Provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained):
3. In the computation of the number of members for a Province a fractional part not exceeding one-half of the whole number requisite for entitling the Province

to a member shall be disregarded; but a fractional part exceeding one-half of that number shall be equivalent to the whole number:

4. On any such re-adjustment the number of members for a Province shall not be reduced unless the proportion which the number of the population of the Province bore to the number of the aggregate population of Canada at the then last preceding re-adjustment of the number of members for the Province is ascertained at the then latest census to be diminished by one-twentieth part or upwards:

5. Such re-adjustment shall not take effect until the termination of the then existing Parliament.

52. The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the Provinces prescribed by this Act is not thereby disturbed.

Money Votes; Royal Assent.

53. Bills for expropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons.

54. It shall not be lawful for the House of Commons 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 to that House by message of the Governor-General in the Session in which such vote, resolution, address, or bill is proposed.

55. Where a bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's assent, he shall declare according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure.

56. Where the Governor General assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State; and if the Queen in Council within two years after the receipt thereof by the Secretary of State thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor General, by speech or message to each of the Houses of Parliament, or by

proclamation, shall annul the Act from and after the day of such signification.

57. A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until within two years' from the day on which it was presented to the Governor General for the Queen's assent, the Governor General signifies, by speech or message to each of the Houses of the Parliament or by proclamation, that it has received the assent of the Queen in Council.

An entry of every such speech, message, or proclamation shall be made in the Journal of each House, and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the Records of Canada.

V.—Provincial Constitutions.

Executive Power.

58. For each Province there shall be an officer, styled the Lieutenant Governor, appointed by the Governor General in Council by instrument under the Great Seal of Canada.

59. A Lieutenant Governor shall hold office during the pleasure of the Governor General; but any Lieutenant Governor appointed after the commencement of the first Session of the Parliament of Canada shall not be removable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message to the Senate and to the House of Commons within one week thereafter if the Parliament is then sitting, and if not then within one week after the commencement of the next Session of the Parliament.

60. The salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of Canada.

61. Every Lieutenant Governor shall, before assuming the duties of his office, make and subscribe before the Governor General or some person authorized by him, oaths of allegiance and office similar to those taken by the Governor General.

62. The provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the time being of each Province or other the chief executive officer or administrator for the time being carrying on the government of the Province, by whatever title he is designated.

63. The Executive Council of Ontario and of Quebec shall be composed of such persons as the Lieutenant Governor from time to time thinks fit, and in the first instance of the following

officers, namely:—The Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, within Quebec, the Speaker of the Legislative Council and the Solicitor General.

64. The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act.

65. All powers, authorities, and functions which under any Act 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 exercisable 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 Governor 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 the 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.

66. The provisions of this Act referring to the Lieutenant Governor in Council shall be construed as referring to the Lieutenant Governor of the Province acting by and with the advice of the Executive Council thereof.

67. The Governor General in Council may from time to time appoint an administrator to execute the office and functions of Lieutenant Governor during his absence, illness, or other inability.

68. Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the seats of Government of the Provinces shall be as follows, namely,—of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

Legislative Power.

1.—ONTARIO.

69. There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of one House, styled the Legislative Assembly of Ontario.

70. The Legislative Assembly of Ontario shall be composed of eighty-two members, to be elected to represent the eighty-two Electoral Districts set forth in the first Schedule to this Act.

2.—QUEBEC.

71. There shall be a Legislature for Quebec consisting of the Lieutenant Governor and of two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

72. The Legislative Council of Quebec shall be composed of twenty-four members, to be appointed by the Lieutenant Governor in the Queen's name, by instrument under the Great Seal of Quebec, one being appointed to represent each of the twenty-four electoral divisions of Lower Canada in this Act referred to, and each holding office for the term of his life, unless the Legislature of Quebec otherwise provides under the provisions of this Act.

73. The qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

74. The place of a Legislative Councillor of Quebec shall become vacant in the cases *mutatis mutandis*, in which the place of Senator becomes vacant.

75. When a vacancy happens in the Legislative Council of Quebec, by resignation, death, or otherwise, the Lieutenant Governor, in the Queen's name by instrument under the Great Seal of Quebec, shall appoint a fit and qualified person to fill the vacancy.

76. If any question arises respecting the qualification of a Legislative Councillor of Quebec, or a vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

77. The Lieutenant Governor may from time to time, by instrument under the Great Seal of Quebec, appoint a member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his stead.

78. Until the Legislature of Quebec otherwise provides, the presence of at least ten members of the Legislative Council, including the Speaker, shall be necessary to constitute a meeting for the exercise of its powers.

79. Questions arising in the Legislative Council of Quebec shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

80. The Legislative Assembly of Quebec shall be composed of sixty-five members, to be elected to represent the sixty-five electoral divisions or districts of Lower Canada in this Act referred to, subject to alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant Governor of Quebec for assent any bill for altering the limits of any of the Electoral Divisions or Districts mentioned in the second Schedule to this Act, unless the second and third readings of such bill have been passed in the Legislative Assembly with the concurrence of the majority of the members representing all those Electoral Divisions or Districts and the assent shall not be given to such bills unless an address has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed.

3.—Ontario and Quebec.

81. The Legislatures of Ontario and Quebec respectively shall be called together not later than six months after the Union.

82. The Lieutenant Governor of Ontario and of Quebec shall from time to time, in the Queen's name, by instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

83. Until the Legislature of Ontario or of Quebec otherwise provides, a person accepting or holding in Ontario or in Quebec any office, commission, or employment permanent or temporary, at the nomination of the Lieutenant Governor, to which an annual salary, or any fee, allowance, emolument, or profit of any kind or amount whatever from the Province is attached, shall not be eligible as a member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this section shall make ineligible any person being a member of the Executive Council of the respective Province, or holding any of the following offices, that is to say, the offices of Attorney General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and, in Quebec, Solicitor General, or shall disqualify him to sit or vote in the House for which he is elected provided he is elected while holding such office.

84. Until the Legislatures of Ontario and Quebec respectively otherwise provide, all laws which at the Union are in force in

those Provinces respectively, relative to the following matters, or any of them, namely,—the qualifications and disqualifications of persons to be elected or to sit or vote as members of the Assembly of Canada, the qualifications or disqualifications of voters, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which such elections may be continued, and the trial of controverted elections and the proceedings incident thereto, the vacating of the seats of members and the issuing and execution of new writs in case of seats vacated otherwise than by dissolution, shall respectively apply to elections of members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that until the Legislature of Ontario otherwise provides, at any election for a member of the Legislative Assembly of Ontario for the District of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject, aged twenty-one years or upwards, being a householder, shall have a vote.

85. Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for four years from the day of the return of the writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant Governor of the Province), and no longer.

86. There shall be a session of the Legislature of Ontario and of that of Quebec once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in each Province in one session and its first sitting in the next session.

87. The following provision of this Act respecting the House of Commons of Canada, shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say,—the provisions relating to the election of a Speaker originally and on vacancies, the duties of the Speaker, the absence of the Speaker, the quorum, and the mode of voting, as if those provisions were here re-enacted and made applicable in terms to each such Legislative Assembly.

4.—Nova Scotia and New Brunswick.

88. The constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act; and the House of Assembly of New Brunswick existing at the passing of this

Act shall, unless sooner dissolved, continue for the period for which it was elected.

5.—Ontario, Quebec and Nova Scotia.

89. Each of the Lieutenant Governors of Ontario, Quebec, and Nova Scotia shall cause writs to be issued for the first election of members of the Legislative Assembly thereof in such form and by such person as he thinks fit, and at such time and addressed to such Returning Officer as the Governor General directs, and so that the first election of member of Assembly for any Electoral District or any subdivision thereof shall be held at the same time and at the same places as the election for a member to serve in the House of Commons of Canada for that Electoral District.

6.—The Four Provinces.

90. The following provisions of this Act respecting the Parliament of Canada, namely,—the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of Acts, and the signification of pleasure on bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of one year for two years, and of the Province of Canada.

VI.—Distribution of Legislative Powers.

Powers of the Parliament.

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, 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:—

1. The Public Debt and Property.
2. The regulation of Trade and Commerce.
3. The raising of money by any mode or system of Taxation.

4. The borrowing of money on the public credit.
5. Postal service.
6. The Census and Statistics.
7. Militia, Military and Naval Service and Defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the establishment and maintenance of Marine Hospitals.
12. Sea coast and inland Fisheries.
13. Ferries between a Province and any British or Foreign country or between two Provinces.
14. Currency and Coinage.
15. Banking, incorporation of Banks, and the issue of paper money.
16. Savings' Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and Insolvency.
22. Patents of invention and discovery.
23. Copyrights.
24. Indians, and lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—

1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes.
3. The borrowing of money on the sole credit of the Province.
4. The establishment and tenure of Provincial offices and the appointment and payment of Provincial officers.
5. The management and sale of the Public Lands belonging to the Province and of the timber and wood thereon.
6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province.
7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals.
8. Municipal institutions in the Province.
9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for Provincial, local, or municipal purposes.
10. Local works and undertakings other than such as are of the following classes,—
    a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province:
    b. Lines of steam ships between the Province and any British or foreign country:
    c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.
11. The incorporation of companies with Provincial objects.
12. The solemnization of marriage in the Province.
13. Property and civil rights in the Province.

14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

16. Generally all matters of a merely local or private nature in the Province.

Education.

93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union.

2. All the powers, privileges, and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

3. Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

4. In case any such Provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor General in Council under this section.

Uniformity of Laws in Ontario, Nova Scotia and New Brunswick.

94. Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the Courts in those three Provinces; and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof.

Agriculture and Immigration.

95. In each Province the Legislature may make laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

VII.—JUDICATURE.

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

97. Until the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and the procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

98. The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

99. The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

100. The salaries, allowances and pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the

Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the Laws of Canada.

VIII.—Revenues; Debts; Assets; Taxation.

102. All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided.

103. The Consolidated Revenue Fund of Canada shall be permanently charged with the costs, charges, and expenses incident to the collection, management, and receipt thereof, and the same shall form the first charge thereon, subject to be reviewed and audited in such manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.

104. The annual interest of the public debts of the several Provinces of Canada, Nova Scotia and New Brunswick at the Union shall form the second charge on the Consolidated Revenue Fund of Canada.

105. Unless altered by the Parliament of Canada, the salary of the Governor General shall be ten thousand pounds sterling money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the third charge thereon.

106. Subject to the several payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the public service.

107. All stocks, cash, banker's balances, and securities for money belonging to each Province at the time of the Union, except as in this Act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the Provinces at the Union.

108. The public works and property of each Province, enumerated in the third schedule to this Act, shall be the property of Canada.

109. All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

110. All assets connected with such portions of the public debt of each Province as are assumed by that Province shall belong to that Province.

111. Canada shall be liable for the debts and liabilities of each Province existing at the Union.

112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the Union $62,500,000, and shall be charged with interest at the rate of five per centum per annum thereon.

113. The assets enumerated in the fourth Schedule to this Act belonging at the Union to the Province of Canada shall be the property of Ontario and Quebec conjointly.

114. Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union $8,000,000, and shall be charged with interest at the rate of five per centum per annum thereon.

115. New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union $7,000,000, and shall be charged with interest at the rate of five per centum per annum thereon.

116. In case the public debt of Nova Scotia and New Brunswick do not at the Union amount to $8,000,000 and $7,000,000 respectively, they shall respectively receive by half-yearly payments in advance from the Government of Canada interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts.

117. The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.

118. The following sums shall be paid yearly by Canada to the several Provinces for the support of their Governments and Legislatures:—

Ontario	Eighty thousand
Quebec	Seventy thousand
Nova Scotia	Sixty thousand
New Brunswick	Fifty thousand
	Two hundred and sixty thousand.

and an annual grant in aid of each Province shall be made, equal to eighty cents per head of the population as ascertained by the Census of 1861, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial census until the population of each of those two Provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such grants, as against any Province, all sums chargeable as interest on the Public Debt of that Province in excess of the several amounts stipulated in this Act.

119. New Brunswick shall receive by half-yearly payments in advance from Canada, for the period of ten years from the Union an additional allowance of $63,000 per annum; but as long as the Public Debt of that Province remains under $7,000,000, a deduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of $63,000.

120. All payments to be made under this Act, or in discharge of liabilities created under any Act of the Provinces of Canada, Nova Scotia and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Canada otherwise directs, be made in such form and manner as may from time to time be ordered by the Governor General in Council.

121. All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

122. The Customs and Excise Laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada.

123. Where Customs duties are, at the Union, leviable on any goods, wares and merchandises in any two Provinces, those goods, wares and merchandises may, from and after the Union,

be imported from one of those Provinces into the other of them on proof of payment of the Customs duty leviable thereon in the Province of exportation, and on payment of such further amount (if any) of Customs duty as is leviable thereon in the Province of importation.

124. Nothing in this Act shall affect the right of New Brunswick to levy the lumber dues provided in chapter fifteen, of title three, of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the amount of such dues; but the lumber of any of the Provinces other than New Brunswick shall not be subject to such dues.

125. No lands or property belonging to Canada or any Province shall be liable to taxation.

126. Such portions of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick had before the Union power of appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each Province form one Consolidated Revenue Fund to be appropriated for the public service of the Province.

IX.—Miscellaneous Provisions.

General.

127. If any person being at the passing of this Act a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a place in the Senate is offered, does not within thirty days thereafter, by writing under his hand, addressed to the Governor General of the Province of Canada, or to the Lieutenant Governor of Nova Scotia or New Brunswick (as the case may be), accept the same, he shall be deemed to have declined the same; and any person who, being at the passing of this Act a member of the Legislative Council of Nova Scotia or New Brunswick, accepts a place in the Senate, shall thereby vacate his seat in such Legislative Council.

128. Every member of the Senate or House of Commons of Canada shall before taking his seat therein, take and subscribe before the Governor General or some person authorized by him, and every member of a Legislative Council or Legislative Assembly of any Province shall before taking his seat therein, take and subscribe before the Lieutenant Governor of the Province or some person authorized by him, the oath of allegiance

contained in the fifth Schedule to this Act; and every member of the Senate of Canada and every member of the Legislative Council of Quebec shall also, before taking his seat therein, take and subscribe before the Governor General or some person authorized by him, the declaration of qualification contained in the same Schedule.

129. Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act.

130. Until the Parliament of Canada otherwise provides, all officers of the several provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities and penalties as if the Union had not been made.

131. Until the Parliament of Canada otherwise provides, the Governor General in Council may from time to time appoint such officers as the Governor General in Council deems necessary or proper for the effectual execution of this Act.

132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

133. Either the English or the French language may be used by any person in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective records and journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

Ontario and Quebec.

134. Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following officers, to hold office during pleasure, that is to say:—the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the case of Quebec the Solicitor General; and may, by order of the Lieutenant Governor in Council, from time to time prescribe the duties of those officers and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof; and may also appoint other and additional officers to hold office during pleasure, and may from time to time prescribe the duties of those officers, and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof.

135. Until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities or authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any law, statute or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant Governor for the discharge of the same of any of them; and the Commissioner of Agriculture and Public Works shall perform the duties and functions of the office of Minister of Agriculture at the passing of this Act imposed by the law of the Province of Canada, as well as those of the Commissioner of Public Works.

136. Until altered by the Lieutenant Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the some design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

137. The words "and from thence to the end of the then next ensuing Session of the Legislature," or words to the same effect, used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and

apply to the next Session of the Parliament of Canada, if the subject matter of the Act is within the powers of the same, as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively, if the subject matter of the Act is within the powers of the same as defined by this Act.

138. From and after the Union, the use of the words "Upper Canada" instead of "Ontario," or "Lower Canada" instead of "Quebec," in any deed, writ, process, pleading, document, matter or thing, shall not invalidate the same.

139. Any Proclamation under the Great Seal of the Province of Canada issued before the Union to take effect at a time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several matters and things therein proclaimed shall be and continue of like force and effect as if the Union had not been made.

140. Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada, to be issued under the Great Seal of the Province of Canada, whether relating to that Province, or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant Governor of Ontario or of Quebec, as its subject matter requires, under the Great Seal thereof; and from and after the issue of such Proclamation the same and the several matters and things therein proclaimed shall be and continue of the like force and effect in Ontario or Quebec as if the Union had not been made.

141. The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.

142. The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada; and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec.

143. The Governor General in Council may from time to time order that such and so many of the records, books, and documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and

the same shall thenceforth be the property of that Province; and any copy thereof or extract therefrom, duly certified by the officer having charge of the original thereof, shall be admitted as evidence.

144. The Lieutenant Governor of Quebec may from time to time, by Proclamation under the Great Seal of the Province, to take effect from a day to be appointed therein, constitute townships in those parts of the Province of Quebec in which townships are not then already constituted, and fix the metes and bounds thereof.

X.—Intercolonial Railway.

145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a declaration that the construction of the Intercolonial Railway is essential to the consolidation of the Union of British North America, and to the assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that provision should be made for its immediate construction by the Government of Canada: Therefore, in order to give effect to that agreement, it shall be the duty of the Government and Parliament of Canada to provide for the commencement within six months after the Union, of a railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the construction thereof without intermission, and the completion thereof with all practicable speed.

XI.—Admission of other Colonies.

146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the Northwestern Territory, or either of them, into the Union, on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

147. In case of the admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a representation in the Senate of Canada of four members, and (notwithstanding anything in this Act) in case of the admission

of Newfoundland the normal number of Senators shall be seventy-six and their maximum number shall be eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the three divisions into which Canada is, in relation to the constitution of the Senate, divided by this Act, and accordingly, after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the representation of Nova Scotia and New Brunswick in the Senate shall, as vacancies occur, be reduced from twelve to ten members respectively, and the representation of each of those Provinces shall not be increased at any time beyond ten, except under the provisions of this Act for the appointment of three or six additional Senators under the direction of the Queen.

SCHEDULE.

The First Schedule.

Electoral Districts of Ontario.

[*This Schedule is omitted as the division of Ontario into Electoral Districts has been altered by the subsequent Dominion and Provincal legislation.*]

The Second Schedule.

Electoral Districts of Quebec specially fixed.

[*See Section 80.*]

Counties of—

Pontiac.	Missisquoi.	Compton.
Ottawa.	Brome.	Wolfe and Richmond.
Argenteuil.	Shefford.	Megantic.
Huntingdon.	Stanstead.	
	Town of Sherbrooke	

The Third Schedule.

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.

7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general public purposes.

THE FOURTH SCHEDULE.

Assets to be the Property of Ontario and Quebec conjointly.

Upper Canada Building Fund.
Lunatic Asylums.
Normal School.
Court Houses, in Aylmer, Montreal, Kamouraska. } Lower Canada.
Law Society, Upper Canada.
Montreal Turnpike Trust.
University Permanent Fund.
Royal Institution.
Consolidated Municipal Loan Fund, Upper Canada.
Consolidated Municipal Loan Fund, Lower Canada.
Agricultural Society, Upper Canada.
Lower Canada Legislative Grant.
Quebec Fire Loan.
Temiscouata Advance Account.
Quebec Turnpike Trust.
Education—East.
Building and Jury Fund, Lower Canada.
Municipalities Fund.
Lower Canada Superior Education Income Fund.

THE FIFTH SCHEDULE.

Oath of Allegiance.

I. *A.B.* do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

NOTE.—*The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time, with proper terms of reference thereto.*

DECLARATION OF QUALIFICATION.

I, *A.B.* do declare and testify, That I am by law duly qualified to be appointed a Member of the Senate of Canada [*or as the case may be*], and that I am legally or equitably seised as of freehold for my own use and benefit of lands or tenements held in free and common socage [*or* seised or possessed for my own use and benefit of lands or tenements held in franc-alleu or in roture (*as the case may be*),] in the Province of Nova Scotia [*or as the case may be*] of the value of four thousand dollars over and above all rents, dues, debts, mortgages, charges, and incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a title to or become possessed of the said lands and tenements or any part thereof for the purpose of enabling me to become a member of the Senate of Canada [*or as the case may be*], and that my real and personal property are together worth four thousand dollars over and above my debts and liabilities.

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2. ORDER OF HER MAJESTY IN COUNCIL ADMITTING RUPERT'S LAND AND THE NORTH-WESTERN TERRITORY INTO THE UNION.

At the Court at Windsor, the 23rd day of June, 1870.[1]

Present: The Queen's Most Excellent Majesty, Lord President, Lord Privy Seal, Lord Chamberlain and Mr. Gladstone.

Whereas by the British North America Act, 1867, "It was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Address from the Houses of the Parliament of Canada, to admit Rupert's Land and the North-Western Territory, or either of them, into the Union on such terms and conditions in each case as should be in the Addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act. And it was further enacted that the provisions of any Order in Council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland:

And whereas by an Address from the Houses of the Parliament of Canada, of which Address a copy is contained in the Schedule to this Order annexed, marked A, Her Majesty was prayed, by and with the advice of Her Most Honourable Privy Council, to unite Rupert's Land and the North-Western Territory with the Dominion of Canada, and to grant to the Parliament

[1] Dominion Statutes 1872, pp. lxiii-lxvii.

of Canada authority to legislate for their future welfare and good government upon the terms and conditions therein stated:

And whereas by the "Rupert's Land Act, 1868," it was (among other things) enacted that it should be competent for the Governor and Company of Adventurers of England trading into Hudson's Bay (hereinafter called the Company) to surrender to Her Majesty, and for Her Majesty, by any Instrument under Her Sign Manual and Signet to accept a surrender of all or any of the lands, territories, rights, privileges, liberties, franchises, powers, and authorities whatsoever, granted or purported to be granted by certain Letters Patent therein recited to the said Company within Rupert's Land, upon such terms and conditions as should be agreed upon by and between Her Majesty and the said Company; provided, however, that such surrender should not be accepted by Her Majesty until the terms and conditions upon which Rupert's Land should be admitted into the said Dominion of Canada should have been approved of by Her Majesty and embodied in an Address to Her Majesty from both the Houses of the Parliament of Canada, in pursuance of the 146th Section of the British North America Act, 1867:

And it was by the same Act further enacted that it should be competent to Her Majesty, by Order or Orders in Council, on Addresses from the Houses of the Parliament of Canada, to declare that Rupert's Land should, from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada:

And whereas a second address from both the Houses of the Parliament of Canada has been received by Her Majesty praying that Her Majesty will be pleased, under the provisions of the hereinbefore recited Acts, to unite Rupert's Land on the terms and conditions expressed in certain Resolutions therein referred to and approved of by Her Majesty of which said Resolutions and Addresses copies are contained in the Schedule to this Order annexed marked B. and also to unite the North-Western Territory with the Dominion of Canada as prayed for by and on the terms and conditions contained in the hereinbefore first recited Address, and also approved of by Her Majesty:

And whereas a draft surrender has been submitted to the Governor-General of Canada containing stipulations to the following effect, viz.:—

1. The sum of £300,000 (being the sum hereinafter mentioned) shall be paid by the Canadian Government into the Bank of England to the credit of the Company within six calendar months after acceptance of the surrender aforesaid, with interest on the said sum at the rate of 5 per cent. per annum, computed from the date of such acceptance until the time of such payment.

2. The size of the blocks which the Company are to select adjoining each of their forts in the Red River limits, shall be as follows:—

	Acres.
Upper Fort Garry and town of Winnipeg, including the enclosed part around shop and ground at the entrance of the town	500
Lower Fort Garry (including the farm the Company now have under cultivation)	500
White Horse Plain	500

3. The deduction to be made as hereinafter mentioned from the price of the materials of the Electric Telegraph, in respect of deterioration thereof, is to be certified within three calendar months from such acceptance as aforesaid by the agents of the Company in charge of the depots where the materials are stored. And the said price is to be paid by the Canadian Government into the Bank of England to the credit of the Company within six calendar months of such acceptance, with interest at the rate of five per cent. per annum on the amount of such price, computed from the date of such acceptance until the time of payment:

And whereas the said draft was on the fifth day of July, one thousand eight hundred and sixty-nine, approved by the said Governor-General in accordance with a Report from the Committee of the Queen's Privy Council for Canada; but it was not expedient that the said stipulations not being contained in the aforesaid second Address, should be included in the surrender by the said Company to Her Majesty of their rights aforesaid or in this Order in Council:

And whereas the said Company did by deed under the seal of the said Company and bearing date the nineteenth day of November, one thousand eight hundred and sixty-nine, of which deed a copy is contained in the Schedule to this Order annexed marked C., surrender to Her Majesty all the rights of Government and other rights, privileges, liberties, franchises, powers, and authorities granted, or purported to be granted to the said Company by the said Letters Patent herein and hereinbefore referred to, and also all similar rights which may have been exercised or assumed by the said Company in any parts of British North America not forming part of Rupert's Land, or of Canada, or of British Columbia, and all the lands and territories (except and subject as in the terms and conditions therein mentioned) granted or purported to be granted to the said Company by the said Letters Patent:

And whereas such surrender has been duly accepted by Her Majesty, by an Instrument under Her Sign Manual and Signet,

bearing date at Windsor the twenty-second day of June, one thousand eight hundred and seventy:

It is hereby Ordered and declared by Her Majesty, by and with the advice of the Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Acts of Parliament, that from and after the fifteenth day of July, one thousand eight hundred and seventy, the said North-Western Territory shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the first hereinbefore recited Address, and that the Parliament of Canada shall from the day aforesaid have full power and authority to legislate for the future welfare and good government of the said Territory. And it is further ordered that without prejud[i]ce to any obligations arising from the aforesaid approved Report, Rupert's Land shall from and after the said date be admitted into and become part of the Dominion of Canada upon the following terms and conditions, being the terms and conditions still remaining to be performed of those embodied in the said second address of the Parliament of Canada, and approved of by Her Majesty as aforesaid:—

1. Canada is to pay to the Company £300,000 when Rupert's Land is transferred to the Dominion of Canada.

2. The Company are to retain the posts they actually occupy in the North-Western Territory, and may, within twelve months of the surrender, select a block of land adjoining each of its posts within any part of British North America not comprised in Canada and British Columbia, in conformity, except as regards the Red River Territory, with a list made out by the Company and communicated to the Canadian Ministers, being the list in the Schedule of the aforesaid Deed of Surrender. The actual survey is to be proceeded with, with all convenient speed.

3. The size of each block is not to exceed (10) acres round Upper Fort Garry, (300) acres round Lower Fort Garry; in the rest of the Red River Territory a number of acres to be settled at once between the Governor in Council and the Company, but so that the aggregate extent of the blocks is not to exceed 50,000 acres.

4. So far as the configuration of the country admits, the blocks shall front the river or road by which means of access are provided, and shall be approximately in the shape of parallelograms, of which the frontage shall not be more than half the depth.

5. The company may, for fifty years after the surrender, claim in any township or district within the Fertile Belt in

which land is set out for settlement grants of land not exceeding one-twentieth part of the land so set out. The blocks so granted to be determined by lot and the Company to pay a rateable share of the survey expenses, not exceeding eight cents Canadian an acre. The Company may defer the exercise of their right of claiming the proportion of each township for not more than ten years after it is set out; but their claim must be limited to an allotment from the lands remaining unsold at the time they declare their intention to make it.

6. For the purpose of the last Article, the Fertile Belt is to be bounded as follows:—On the south by the United States boundary; on the west by the Rocky Mountains; on the north by the northern branch of the Saskatchewan; on the east by Lake Winnipeg, the Lake of the Woods and the waters connecting them.

7. If any township shall be formed abutting on the north bank of the northern branch of the Saskatchewan River, the Company may take their one-twentieth of any such township, which for the purpose of this Article shall not extend more than five miles inland from the river, giving to the Canadian Dominion an equal quantity of the portion of lands coming to them of townships established on the southern bank.

8. In laying out any public roads, canals, etc., through any block of land reserved to the Company, the Canadian Government may take, without compensation, such land as is necessary for the purpose, not exceeding one twenty-fifth of the total acreage of the block; but if the Canadian Government require any land which is actually under cultivation or which has been built upon or which is necessary for giving the Company's servants access to any river or lake, or as a frontage to any river or lake, they shall pay to the Company the fair value of the same, and shall make compensation for any injury done to the Company or their servants.

9. It is understood that the whole of the land to be appropriated in the meaning of the last preceding clause shall be appropriated for public purposes.

10. All titles to land up to the eighth day of March, one thousand eight hundred and sixty-nine, conferred by the Company, are to be confirmed.

11. The Company is to be at liberty to carry on its trade without hindrance in its corporate capacity, and no exceptional tax is to be placed on the Company's land, trade or servants, nor any import duties on goods introduced by them previous to the surrender.

12. Canada is to take over the materials of the electric telegraph at cost price,—such price including transport, but not including interest for money and subject to a deduction for ascertained deterioration.

13. The Company's claim to land under agreements of Messrs. Vankoughnet and Hopkins is to be withdrawn.

14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.

15. The Governor in Council is authorized and empowered to arrange any details that may be necessary to carry out the above terms and conditions.

And the Right Honorable Earl Granville, one of Her Majesty's principal Secretaries of State, is to give the necessary directions herein accordingly.

Schedule (not printed).*

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3. THE MANITOBA ACT.

33 VIC., CAP. 3 (CAN.).

An Act to amend and continue the Act 32 and 33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba.[1]

[Assented to 12th May, 1870.]

Whereas it is probable that Her Majesty The Queen may, pursuant to the British North America Act, 1867, be pleased to admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, before the next Session of the Parliament of Canada.[2]

And whereas it is expedient to prepare for the transfer of the said Territories to the Government of Canada at the time appointed by the Queen for such admission;

And whereas it is expedient also to provide for the organization of part of the said Territories as a Province, and for the

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* See R. S. C. 1903, Vol. 4, App. III., pp. 59-75.

[1] By sec. 5 of the B. N. A. Act, 1871 (printed *infra*), this Dominion Act, generally known as "The Manitoba Act," was validated. By sec. 6 of the same Act it is enacted that "it shall not be competent for the Parliament of Canada to alter the provisions of the Manitoba Act." Read with the B. N. A. Act, this Manitoba Act is, therefore, the constitutional charter of that province.

[2] The order-in-council bears date 23rd June, 1870, and provides for the admission of these regions to the Canadian union on 15th July, 1870.

establishment of a Government therefor, and to make provision for the Civil Government of the remaining part of the said Territories not included within the limits of the Province;

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. On, from and after the day upon which the Queen by and with the advice and consent of Her Majesty's Most Honorable Privy Council under the authority of the 146th section of the British North America Act, 1867, by Order in Council in that behalf, shall admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, there shall be formed out of the same a Province, which shall be one of the Provinces of the Dominion of Canada, and which shall be called the Province of Manitoba, and be bounded as follows:[3]

2. On, from and after the said day on which the Order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment, may be held to be specially applicable to, or only to affect one or more, but not the whole of the Provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way, and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the Provinces originally united by the said Act.

3. The said Province shall be represented in the Senate of Canada by two Members,[4] until it shall have, according to decennial census, a population of fifty thousand souls, and from thenceforth it shall be represented therein by three Members, until it shall have, according to decennial census, a population of seventy-five thousand souls, and from thenceforth it shall be represented therein by four Members.

4. The said Province shall be represented, in the first instance, in the House of Commons of Canada, by four Members,[5] and for that purpose shall be divided by proclamation of the Governor-General, into four Electoral Districts, each of which shall be represented by one Member: provided that on the completion of the census in the year 1881, and of each decennial census afterwards, the representation of the said Province shall be re-adjusted according to the provisions of the fifty-first section of the British North America Act, 1867.

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[3] The boundaries as here defined were afterwards altered, and the area of the province enlarged.

[4] Since increased to four.

[5] Since increased.

5. Until the Parliament of Canada otherwise provides, the qualification of voters at Elections[6] of Members of the House of Commons shall be the same as for the Legislative Assembly hereinafter mentioned: And no person shall be qualified to be elected, or to sit and vote as a Member for any Electoral District, unless he is a duly qualified voter within the said Province.

6. For the said Province there shall be an officer styled the Lieutenant Governor, appointed by the Governor General in Council by instrument under the Great Seal of Canada.

7. The Executive Council of the Province shall be composed of such persons and under such designations, as the Lieutenant Governor shall, from time to time, think fit; and, in the first instance, of not more than five persons.[7]

8. Unless and until the Executive Government of the Province otherwise directs, the seat of Government of the same shall be at Fort Garry,[8] or within one mile thereof.

9. There shall be a Legislature for the Province, consisting of the Lieutenant Governor, and of two Houses,[9] styled respectively, the Legislative Council of Manitoba, and the Legislative Assembly of Manitoba.

[*Sections 10-13 relate to the defunct Legislative Council.*]

14. The Legislative Assembly shall be composed of twenty-four Members, to be elected to represent the Electoral Divisions into which the said Province may be divided by the Lieutenant Governor, as hereinafter mentioned.

15. The presence of a majority of the Members of the Legislative Assembly shall be necessary to constitute a meeting of the House for the exercise of its powers; and for that purpose the Speaker shall be reckoned as a Member.

[*Sections 16 to 18 relate to first elections, electoral districts, and qualifications of voters. They are long since effete.*]

19. Every Legislative Assembly shall continue for four years from the date of the return of the writs for returning the same (subject nevertheless to being sooner dissolved by the Lieutenant Governor), and no longer; and the first Session thereof shall be called at such time as the Lieutenant Governor shall appoint.

20. There shall be a Session of the Legislature once at least in every year, so that twelve months shall not intervene between

[6] The restriction imposed by the latter part of the section has been removed.

[7] The provisions of this and the following sections, relating to the provincial constitution, have all been the subject of provincial legislation.

[8] Now "Winnipeg."

[9] Now only one. The legislative council was abolished by 39 Vict. c. 29 (Man.).

the last sitting of the Legislature in one Session and its first sitting in the next Session.

21. The following provisions of the British North America Act, 1867, respecting the House of Commons of Canada, shall extend and apply to the Legislative Assembly, that is to say:—Provisions relating to the election of a Speaker, originally, and on vacancies,—the duties of the Speaker, the absence of the Speaker and the mode of voting, as if those provisions were here re-enacted and made applicable in terms to the Legislative Assembly.

22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education,[10] subject and according to the following provisions:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union:—

(2) An appeal shall lie to the Governor General in Council from any Act or decison of the Legislature of the Province, or of any Provincial Authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education;

(3) In case any such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council or any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section.

23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

24. Inasmuch as the Province is not in debt, the said Province shall be entitled to be paid, and to receive from the Government of Canada, by half-yearly payments in advance,

[10] This matter is fully dealt with, *ante*, p. 783.

interest at the rate of five per centum per annum on the sum of four hundred and seventy-two thousand and ninety dollars.

25. The sum of thirty thousand dollars shall be paid yearly by Canada to the Province, for the support of its Government and Legislature, and an annual grant, in aid of the said Province, shall be made, equal to eighty cents per head of the population, estimated at seventeen thousand souls; and such grant of eighty cents per head shall be augmented in proportion to the increase of population, as may be shewn by the census that shall be taken thereof in the year one thousand eight hundred and eighty-one, and by each subsequent decennial census, until its population amounts to four hundred thousand souls, at which amount such grant shall remain thereafter, and such sum shall be in full settlement of all future demands on Canada, and shall be paid half-yearly, in advance, to the said Province.

26. Canada will assume and defray the charges for the following services:—

1. Salary of the Lieutenant-Governor.
2. Salaries and allowances of the Judges of the Superior and District or County Courts.
3. Charges in respect of the Department of the Customs.
4. Postal Department.
5. Protection of Fisheries.
6. Militia.
7. Geological Survey.
8. The Penitentiary.
9. And such further charges as may be incident to, and connected with the services which, by the British North America Act, 1867, appertain to the General Government, and as are or may be allowed to the other Provinces.

[*Sections 27-29 relate to customs and inland revenue and are effete.*]

30. All ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion, subject to, and except and so far as the same may be affected by, the conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty.

31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor-

General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor-General in Council may from time to time determine.

32. For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:—

1. All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.

2. All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March, aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

3. All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

4. All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian Title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.

5. The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor-General in Council, to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.

33. The Governor-General in Council shall from time to time settle and appoint the mode and form of Grants of Land from the Crown, and any Order in Council for that purpose when published in the *Canada Gazette*, shall have the same force and effect as if it were a portion of this Act.

34. Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company, as contained in the conditions under which that Company surrendered Rupert's Land to Her Majesty.

[*Sections 35 and 36 are long since effete.*]

4. THE BRITISH NORTH AMERICA ACT, 1871.

34-35 VICT. CAP. 28.

An Act respecting the establishment of Provinces in the Dominion of Canada.

[*29th June, 1871.*]

Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in Territories admitted, or which may hereafter be admitted into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited for all purposes as "The British North America Act, 1871."

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

3. The Parliament of Canada may from time to time with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

4. The Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any Province.

5. The following Acts passed by the said Parliament of Canada, and intituled respectively: "An Act for the temporary government of Rupert's Land and the North-Western Territory when united with Canada," and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three,

and to establish and provide for the 'government of the Province of Manitoba,'" shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor-General of the said Dominion of Canada.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament, in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

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5. ORDER IN COUNCIL RESPECTING THE PROVINCE OF BRITISH COLUMBIA.[1]

At the Court of Windsor, the 16th day of May, 1871.

Present: The Queen's Most Excellent Majesty, His Royal Highness Prince Arthur, Lord Privy Seal, Earl Cowper, Earl of Kimberley, Lord Chamberlain, Mr. Secretary Cardwell, and Mr. Ayrton.

Whereas by the "*British North America Act*, 1867," provision was made for the union of the Provinces of Canada, Nova Scotia and New Brunswick into the Dominion of Canada, and it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on addresses from the houses of parliament of Canada and of the legislature of the colony of British Columbia, to admit that colony into the said union, on such terms and conditions as should be in the addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act; and it was further enacted that the provisions of any order in council in that behalf should have effect as if they had been enacted by the parliament of the United Kingdom of Great Britain and Ireland:

And whereas by addresses from the houses of parliament of Canada, and from the legislative council of British Columbia respectively, of which addresses copies are contained in the schedule to this order annexed, Her Majesty was prayed, by

[1] See Dom. Stat., 1872, p. lxxxiv. See also B. N. A. Act, sec. 146.

and with the advice of Her Most Honorable Privy Council, under the one hundred and forty-sixth section of the hereinbefore recited Act, to admit British Columbia into the Dominion of Canada, on the terms and conditions set forth in the said addresses:

And whereas Her Majesty has thought fit to approve of the said terms and conditions, it is hereby declared by Her Majesty, by and with the advice of her Privy Council, in pursuance and exercise of the powers vested in Her Majesty by the said Act of parliament, that *from and after the twentieth day of July, one thousand eight hundred and seventy-one, the said colony of British Columbia shall be admitted into and become part of the Dominion of Canada*, upon the terms and conditions set forth in the hereinbefore recited addresses. And, in accordance with the terms of the said addresses relating to the electoral districts of British Columbia, for which the first election of members to serve in the House of Commons of the said Dominion shall take place, it is hereby further ordered and declared that such electoral districts shall be as follows:

[*Here follows an enumeration of those electoral districts.*]

And the Right Honorable Earl of Kimberley, one of Her Majesty's principal secretaries of state, is to give the necessary directions therein accordingly.

ARTHUR HELPS.

SCHEDULE.

Address of the Senate of Canada.[2]

To the Queen's Most Excellent Majesty.

Most Gracious Sovereign,

We, your Majesty's most dutiful and loyal subjects, the Senate of Canada in parliament assembled, humbly approach your Majesty for the purpose of representing:—

That by a despatch from the Governor of British Columbia, dated 23rd January, 1871, with other papers laid before this house, by message from His Excellency the Governor-General, of the 27th February last, this house learns that the legislative council of that colony, in council assembled, adopted, in January last, an address representing to your Majesty that British Columbia was prepared to enter into union with the Dominion

[2] The address of the House of Commons is identical in its terms.

of Canada, upon the terms and conditions mentioned in the said address, which is as follows:

To the Queen's Most Excellent Majesty.

Most Gracious Sovereign,

We, your Majesty's most dutiful and loyal subjects, the members of the legislative council of British Columbia, in council assembled, humbly approach your Majesty for the purpose of representing:—

That, during the last session of the legislative council, the subject of the admission of the colony of British Columbia into the union or Dominion of Canada was taken into consideration, and a resolution on the subject was agreed to, embodying the terms upon which it was proposed that this colony should enter the union;

That after the close of the session, delegates were sent by the government of this colony to Canada to confer with the government of the Dominion with respect to the admission of British Columbia into the union upon the terms proposed;

That after considerable discussion by the delegates with the members of the government of the Dominion of Canada, the terms and conditions hereinafter specified were adopted by a committee of the Privy Council of Canada, and were by them reported to the Governor-General for his approval;

That such terms were communicated to the government of this colony by the Governor-General of Canada, in a despatch dated July 7th, 1870, and are as follows:—

"1. Canada shall be liable for the debts and liabilities of British Columbia existing at the time of the union.

2. British Columbia not having incurred debts equal to those of the other provinces now constituting the Dominion, shall be entitled to receive, by half-yearly payments, in advance, from the general government, interest at the rate of five per cent. per annum on the difference between the actual amount of its indebtedness at the date of the union, and the indebtedness per head of the population of Nova Scotia and New Brunswick (27.77 dollars), the population of British Columbia being taken at 60,000.

3. The following sums shall be paid by Canada to British Columbia for the support of its government and legislature, to wit, an annual subsidy of 35,000 dollars, and an annual grant equal to 80 cents per head of the said population of 600,000, both half-yearly in advance, such grant of 80 cents per head to be augmented in proportion to the increase of population, as may

be shown by each subsequent decennial census, until the population amounts to 400,000, at which rate such grant shall thereafter remain, it being understood that the first census be taken in the year 1881.

4. The Dominion will provide an efficient mail service, fortnightly, by steam communication between Victoria and San Francisco, and twice a week between Victoria and Olympia; the vessels to be adapted for the conveyance of freight and passengers.

5. Canada will assume and defray the charges for the following services:

A. Salary of the Lieutenant-Governor;
B. Salaries and allowances of the judges of the Superior Courts and the County or District Courts;
C. The charges in respect to the department of customs;
D. The postal and telegraph services;
E. Protection and encouragement of fisheries;
F. Provision for the militia;
G. Lighthouses, buoys and beacons, shipwrecked crews, quarantine and marine hospitals, including a marine hospital at Victoria;
H. The geological survey;
I. The penitentiary;

And such further charges as may be incident to and connected with the services which by the "British North America Act, 1867," appertain to the general government, and as are or may be allowed to the other provinces.

6. Suitable pensions, such as shall be approved of by Her Majesty's government, shall be provided by the government of the Dominion for those of Her Majesty's servants in the colony whose position and emoluments derived therefrom would be affected by political changes on the admission of British Columbia into the Dominion of Canada.

7. It is agreed that the existing customs tariff and excise duties shall continue in force in British Columbia until the railway from the Pacific coast and the systems of railways in Canada are connected, unless the legislature of British Columbia should sooner decide to accept the tariff and excise laws of Canada.[3] When customs and excise duties are, at the time of the union of British Columbia with Canada, leviable on any goods, wares, or merchandise in British Columbia, or in the

[3] See 35 Vict. c. 37. On 27th March, 1872, British Columbia decided to accept the Canadian tariff, hence the enactment.

other provinces of the Dominion, those goods, wares, or merchandise may, from and after the union, be imported into British Columbia from the provinces now composing the Dominion, or into either of those provinces from British Columbia on proof of payment of the customs or excise duties leviable thereon in the province of exportation and on payment of such further amount (if any) of customs or excise duties as are leviable thereon in the province of importation. This arrangement to have no force or effect after the assimilation of the tariff and excise duties of British Columbia with those of the Dominion.

8. British Columbia shall be entitled to be represented in the Senate by three members, and by six members in the House of Commons. The representation to be increased under the provisions of "British North America Act, 1867."

9. The influence of the Dominion government will be used to secure the continued maintenance of the naval station at Esquimalt.

10. *The provisions of the "British North America Act, 1867," shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to and only affect one and not the whole of the provinces comprising the Dominion, and except so far as the same may be varied by this minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if the colony of British Columbia had been one of the provinces originally united by the said Act.*

11. The government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains, towards the Pacific to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the union.

And the government of British Columbia agree to convey to the Dominion government in trust, to be appropriated in such manner as the Dominion government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia (not to exceed, however, twenty (20) miles on each side of said line), as may be appropriated for the same purpose by the Dominion government from the public lands of the North-West Territories and the province of Manitoba: Provided that the quantity of land which may be

held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion government shall be made good to the Dominion from contiguous public lands; and provided further, that until the commencement, within two years, as aforesaid, from the date of the union, of the construction of the said railway, the government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion government agree to pay to British Columbia from the date of the union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

12. The Dominion government shall guarantee the interest for ten years from the date of the completion of the works, at the rate of five per centum per annum, on such sum, not exceeding £100,000 sterling, as may be required for the construction of a first-class graving dock at Esquimalt.

13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion government, and a policy as liberal as that hitherto pursued by the British Columbia government shall be continued by the Dominion government after the union.

To carry out such policy, tracts of land of such extent as has hitherto been the practice of the British Columbia government to appropriate for that purpose, shall from time to time be conveyed by the local government to the Dominion government in trust for the use and benefit of the Indians on application of the Dominion government; and in case of disagreement between the two governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the colonies.

14. *The constitution of the executive authority and of the legislature of British Columbia shall subject to the provisions of the "British North America Act, 1867" continue as existing at the time of the union until altered under the authoirty of the said Act*, it being at the same time understood that the government of the Dominion will readily consent to the introduction of responsible government when desired by the inhabitants of Britsh Columbia, and it being likewise understood that it is the intention of the Governor of British Columbia, under the authority of the Secretary of State for the colonies, to amend the

existing constitution of the legislature by providing that a majority of its members shall be elective.[6]

The union shall take effect according to the foregoing terms and conditions on such day as Her Majesty by and with the advice of Her Most Honorable Privy Council may appoint (on addresses from the legislature of the colony of British Columbia and of the Houses of Parliament of Canada in the terms of the 146th section of the "British North America Act 1867,") and British Columbia may in its address specify the electoral districts for which the first election of members to serve in the House of Commons shall take place.

That such terms have proved generally acceptable to the people of this colony.

That this council is, therefore, willing to enter into union with the Dominion of Canada upon such terms, and humbly submit that, under the circumstances, it is expedient that the admission of this colony into such union, as aforesaid, should be effected at as early a date as may be found practicable under the provisions of the 146th section of the "British North America Act 1867."

We, therefore, humbly pray that Your Majesty will be graciously pleased, by and with the advice of Your Majesty's Most Honorable Privy Council, under the provisions of the 146th section of the "British North America Act, 1867," to admit British Columbia into the union or Dominion of Canada, on the basis of the terms and conditions offered to this colony by the government of the Dominion of Canada, hereinbefore set forth; and inasmuch as by the said terms British Columbia is empowered in its address to specify the electoral districts for which the first election of members to serve in the House of Commons shall take place, we humbly pray that such electoral districts may be declared, under the Order in Council, to be as follows: (*Here follows an enumeration of such districts.*)

We further humbly represent, that the proposed terms and conditions of union of British Columbia with Canada, as stated

[6] Before the Union took effect, British Columbia had made the intended alteration referred to in item 14, above—by Act of the colonial legislature (No. 147 of 34 Vict.). This statute recites an Imperial Order in Council of 9th August, 1870, which established in the colony a legislative council, consisting of nine elective and six non-elective members, and which gave power to the Governor of the colony, with the advice and consent of the legislative council, to make laws for the peace, order and good government of the colony; it recites also the Colonial Laws Validity Act, 1865, as sufficient warrant for the contemplated change in the colonial constitution; and then proceeds to abolish the legislative council and to establish in its stead a legislative assembly of wholly elective members.

in the said address, are in conformity with those preliminarily agreed upon between delegates from British Columbia and the members of the government of the Dominion of Canada, and embodied in a report of a committee of the Privy Council, approved by His Excellency the Governor-General in Council, on the 1st July, 1870, which approved report is as follows:

Copy of a report of a committee of the Honorable the Privy Council, approved by his Excellency the Governor-General in Council, on the 1st of July, 1870.

The committee of the Privy Council have had under consideration a despatch, dated the 7th May, 1870, from the Governor of British Columbia, together with certain resolutions submitted by the government of that colony to the legislative council thereof—both hereunto annexed—on the subject of the proposed union of Britsh Columbia with the Dominion of Canada; and after several interviews between them and the Honorable Messrs. Trutch, Helmcken, and Carrall, the delegates from British Columbia, and full discussion with them of the various questions connected with that important subject, the committee now respectfully submit for Your Excellency's approval, the following terms and conditions to form the basis of a political union between British Columbia and the Dominion of Canada: (*Setting out such terms as before*).

(Certified.) WM. H. LEE,
Clerk, Privy Council.

We further humbly represent that we concur in the terms and conditions of union set forth in the said address, and approved report of the committee of the Privy Council above mentioned; and most respectfully pray that Your Majesty will be graciously pleased, by and with the advice of Your Majesty's most Honorable Privy Council, under the 146th clause of "The British North America Act, 1867," to unite British Columbia with the Dominion of Canada, on the terms and conditions above set forth.

The Senate, Wednesday, April 5th, 1871.

(Signed.) JOSEPH CAUCHON, Speaker.

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6. ORDER IN COUNCIL ADMITTING PRINCE EDWARD ISLAND.

At the Court of Windsor, the 26th day of June, 1873.

Present: The Queen's Most Excellent Majesty, Lord President, Earl Granville, Earl of Kimberley, Lord Chamberlain, and Mr. Gladstone.

Whereas by the "British North America Act, 1867," provision was made for the union of the provinces of Canada, Nova Scotia, and New Brunswick into the Dominion of Canada, and it was (amongst other things) enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's Most Honorable Privy Council, on addresses from the Houses of Parliament of Canada, and of the legislature of the colony of Prince Edward Island, to admit that colony into the said union on such terms and conditions as should be in the addresses expressed, and as the Queen should think fit to approve, subject to the provisions of the said Act; and it was further enacted that the provisions of any Order in Council in that behalf, should have effect as if they had been enacted by the parliament of the United Kingdom of Great Britain and Ireland.

And whereas by addresses from the Houses of the Parliament of Canada, and from the Legislative Council and House of Assembly of Prince Edward Island respectively, of which addresses copies are contained in the schedule to this Order annexed, Her Majesty was prayed, by and with the advice of Her Most Honorable Privy Council, under the one hundred and forty-sixth section of the hereinbefore recited Act, to admit Prince Edward Island into the Dominion of Canada, on the terms and conditions set forth in the said addresses.

And whereas Her Majesty has thought fit to approve of the said terms and conditions, it is hereby ordered and declared by Her Majesty, by and with the advice of Her Privy Council, in pursuance and exercise of the powers vested in Her Majesty, by the said Act of parliament, that from and after the first day of July, one thousand eight hundred and seventy-three, the said colony of Prince Edward Island shall be admitted into and become part of the Dominion of Canada, upon the terms and conditions set forth in the hereinbefore cited addresses.

And in accordance with the terms of the said addresses relating to the electoral districts for which, the time within which, and the laws and provisions under which the first election of members to serve in the House of Commons of Canada, for such electoral districts shall be held, it is hereby further ordered and declared that "Prince County" shall constitute one district, to be designated "Prince County District," and return two members; that "Queen's County" shall constitute one district, to be designated "Queen's County District," and return two members; that "King's County" shall constitute one district, to be designated "King's County District," and return two members; that the election of members to serve in

the House of Commons of Canada, for such electoral districts, shall be held within three calendar months from the day of the admission of the said Island into the union or Dominion of Canada; that all laws which at the date of this Order in Council relating to the qualification of any person to be elected or sit or vote as a member of the House of Assembly of the said Island, and relating to the qualifications or disqualifications of voters, and to the oaths to be taken by voters, and to returning officers and poll clerks, and their powers and duties, and relating to polling divisions within the said Island, and relating to the proceedings at elections, and to the period during which such elections may be continued, and relating to the trial of controverted elections, and the proceedings incidental thereto, and relating to the vacating of seats of the members, and to the execution of new writs, in case of any seat being vacated otherwise than by a dissolution, and to all other matters connected with or incidental to elections of members to serve in the House of Assembly of the said Island, shall apply to elections of members to serve in the House of Commons for the electoral districts situate in the said Island of Prince Edward.

And the right Honorable Earl of Kimberley, one of Her Majesty's principal secretaries of state, is to give the necessary directions herein, accordingly.

ARTHUR HELPS.

SCHEDULE.

To the QUEEN'S Most Excellent Majesty.

Most Gracious Sovereign,

We, Your Majesty's most dutiful and loyal subjects, the Commons of the Dominion of Canada in parliament assembled, humbly approach Your Majesty for the purpose of representing:—

That during the present session of parliament we have taken into consideration the subject of the admission of the colony of Prince Edward Island into the union or Dominion of Canada, and have resolved that it is expedient that such admission should be effected at as early a date as may be found practicable, under the one hundred and forty-sixth section of the "British North America Act, 1867," on the conditions hereinafter set forth, which have been agreed upon with the delegates from the said colony; that is to say:—

That Canada shall be liable for the debts and liabilities of Prince Edward Island at the time of the union;

That in consideration of the large expenditure authorized by the parliament of Canada for the construction of railways and canals, and in view of a possibility of a re-adjustment of the financial arrangements between Canada and the several provinces now embraced in the Dominion, as well as the isolated and exceptional condition of Prince Edward Island, that colony shall, on entering the union, be entitled to incur a debt equal to fifty dollars per head of its population, as shewn by the census returns of 1871, that is to say: four millions seven hundred and one thousand and fifty dollars;

That Prince Edward Island not having incurred debts equal to the sum mentioned in the next preceding resolution, shall be entitled to receive, by half-yearly payments, in advance, from the general government, interest at the rate of five per cent. per annum on the difference, from time to time, between the actual amount of its indebtedness and the amount of indebtedness authorized as aforesaid, viz., four millions seven hundred and one thousand and fifty dollars;

That Prince Edward Island shall be liable to Canada for the amount (if any) by which its public debt and liabilities at the date of the union, may exceed four millions seven hundred and one thousand and fifty dollars and shall be chargeable with interest at the rate of five per cent. per annum on such excess;

That as the government of Prince Edward Island holds no land from the Crown, and consequently enjoys no revenue from that source for the construction and maintenance of local works, the Dominion government shall pay by half-yearly instalments, in advance, to the government of Prince Edward Island, forty-five thousand dollars per annum, less interest at five per cent. per annum, upon any sum not exceeding eight hundred thousand dollars which the Dominion government may advance to the Prince Edward Island government for the purchase of lands now held by large proprietors;

That in consideration of the transfer to the parliament of Canada of the powers of taxation, the following sums shall be paid yearly by Canada to Prince Edward Island, for the support of its government and legislature, that is to say, thirty thousand dollars and an annual grant equal to eighty cents per head of the population, as shown by the census returns of 1871, viz., 94,021, both by half-yearly payments in advance, such grant of eighty cents per head to be augmented in proportion to the increase of population of the Island as may be shown by each subsequent decennial census, until the population amounts to four hundred thousand, at which rate such grant shall thereafter remain, it being understood that the next census shall be taken in the year 1881.

That the Dominion government shall assume and defray all the charges for the following services, viz.:—

The salary of the Lieutenant-Governor;

The salaries of the Judges of the Superior Court and of the District or County Courts when established;

The charges in respect of the department of customs;

The postal department;

The protection of fisheries;

The provision for the militia;

The lighthouses, shipwrecked crews, quarantine, and marine hospitals;

The geological survey;

The penitentiary:

Efficient steam service for the conveyance of mails and passengers, to be established and maintained between the Island and the mainland of the Dominion, winter and summer, thus placing the Island in continuous communication with the Intercolonial Railway and the railway system of the Dominion;

The maintenance of telegraphic communication between the Island and the mainland of the Dominion;

And such other charges as may be incident to, and connected with, the services which by the "British North America Act, 1867," appertain to the general government, and as are or may be allowed to the other provinces;

That the railways under contract and in course of construction for the government of the Island, shall be the property of Canada;

That the new building in which are held the law courts, registry office, etc., shall be transferred to Canada, on the payment of sixty-nine thousand dollars. The purchase to include the land on which the building stands, and a suitable space of ground in addition, for yard room, etc.;

That the steam dredge boat in course of construction shall be taken by the Dominion, at a cost not exceeding twenty-two thousand dollars;

That the steam ferry boat owned by the government of the Island and used as such shall remain the property of the Island;

That the population of Prince Edward Island having been increased by fifteen thousand or upwards since the year 1861, the Island shall be represented in the House of Commons of Canada by six members; the representation to be re-adjusted, from time to time, under the provisions of the "British North America Act, 1867;"

That the constitution of the executive authority and of the legislature of Prince Edward Island, shall, subject to the provisions of the "British North America Act, 1867," continue as at the time of the union, until altered under the authority of the said Act, and the House of Assembly of Prince Edward Island existing at the date of the union shall, unless sooner dissolved, continue for the period for which it was elected;

That the provisions in the "British North America Act, 1867," shall, except those parts thereof which are in terms made, or by reasonable intendment may be held to be specially applicable to, and only to affect one and not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by these resolutions, be applicable to Prince Edward Island, in the same way and to the same extent as they apply to the other provinces of the Dominion, and as if the colony of Prince Edward Island had been one of the provinces originally united by the said Act.

That the union shall take place on such day as Her Majesty may direct by Order in Council, on addresses to that effect from the Houses of Parliament of Canada and of the legislature of the colony of Prince Edward Island, under the one hundred and forty-sixth section of the "British North America Act, 1867," and that the electoral districts for which, the time within which, and the laws and provisions under which, the first election of members to serve in the House of Commons of Canada for such electoral districts shall be held, shall be such as the said houses of the legislature of the said colony of Prince Edward Island may specify in their said addresses.

We, therefore, humbly pray that Your Majesty will be graciously pleased, by and with the advice of Your Majesty's Most Honorable Privy Council, under the provisions of the one hundred and forty-sixth section of the "British North America Act, 1867," to admit Prince Edward Island into the union or Dominion of Canada, on the terms and conditions hereinbefore set forth.

(Signed.) JAMES COCKBURN,
Speaker.

House of Commons,
20th May, 1873.

A similar address was voted by the Senate of the Dominion, and by the two houses of the Prince Edward Island legislature, the latter specifying the electoral districts as set out in the Order in Council.

7. THE BRITISH NORTH AMERICA ACT, 1886.

49-50 VICTORIA (IMP.), CHAPTER 35.

An Act respecting the Representation in the Parliament of Canada of Territories which for the time being form part of the Dominion of Canada, but are not included in any Province.

[*25th June, 1886.*]

Whereas it is expedient to empower the Parliament of Canada to provide for the representation in the Senate and House of Commons of Canada, or either of them, of any territory which for the time being forms part of the Dominion of Canada, but is not included in any Province:

Be it, therefore, enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. The Parliament of Canada may, from time to time, make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any Province thereof.

3. Any Act passed by the Parliament of Canada before the passing of this Act for the purpose mentioned in this Act shall, if not disallowed by the Queen, be, and shall be deemed to have been, valid and effectual from the date at which it received the assent, in Her Majesty's name, of the Governor-General of Canada.

It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect, notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of Members of the House of Commons specified in the last-mentioned Act is increased by the number of Senators or of Members, as the case may be, provided by any Act of the Parliament of Canada for the representation of any provinces or territories of Canada.

3. This Act may be cited as the British North America Act, 1886.

This Act and the British North America Act, 1867, and the British North America Act, 1871, shall be construed together, and may be cited together as the British North America Acts, 1867 to 1886.

8. DEPUTY-SPEAKER OF SENATE ACT.

59 Vict. cap. 3.

An Act for Removing Doubts as to the Validity of an Act passed by the Parliament of the Dominion of Canada respecting the Deputy-Speaker of the Senate.

[*5th September 1895.*]

Whereas the Parliament of Canada have passed an Act intituled "An Act respecting the Speaker of the Senate," and providing for the appointment of a deputy during the illness or absence of the Speaker of the Senate, and containing a suspending clause to the effect that the Act should not come into force until Her Majesty's pleasure thereon has been signified by proclamation in the *Canada Gazette*:

And whereas doubts have arisen as to the power of the Parliament of Canada to pass that Act, and it is expedient to remove those doubts:

Be it, therefore, enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. The Act of the Parliament of Canada passed in the session held in the fifty-seventh and fifty-eighth years of Her Majesty's reign, entitled "An Act respecting the Speaker of the Senate," shall be deemed to be valid, and to have been valid, as from the date at which the royal assent was given thereto by the Governor-General of the Dominion of Canada.

2. This Act may be cited as the Canadian Speaker (Appointment of Deputy) Act, 1895, Session 2.

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9. THE ALBERTA ACT,

4-5 Edw. VII.

CHAPTER 3.

An Act to establish and provide for the Government of the Province of Alberta.

[*Assented to 20th July, 1905.*]

Whereas in and by *The British North America Act, 1871*, being chapter 28 of the Acts of the Parliament of the United Kingdom passed in the session thereof held in the 34th and 35th years of the reign of her late Majesty Queen Victoria, it is enacted that the Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominon of Canada, but not included in any province

thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order and good government of such province and for its representation in the said Parliament of Canada;

And whereas it is expedient to establish as a province the territory hereinafter described, and to make provision for the government thereof and the representation thereof in the Parliament of Canada; Therefore, His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. This Act may be cited as *The Alberta Act.*

2. The territories comprised within the following boundaries, that is to say,—commencing at the intersection of the international boundary dividing Canada from the United States of America by the fourth meridian in the system of Dominion lands surveys; thence westerly along the said international boundary to the eastern boundary of the province of British Columbia; thence northerly along the said eastern boundary of the province of British Columbia to the north-east corner of the said province; thence easterly along the said parallel of the sixtieth degree of north latitude to the fourth meridian in the system of Dominion land surveys as the same may be hereafter defined in accordance with the said system; thence southerly along the said fourth meridian to the point of commencement —is hereby established as a province of the Dominion of Canada, to be called and known as the province of Alberta.

3. The provisions of *The British North America Acts*, 1867 to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

4. The said province shall be represented in the Senate of Canada by four members: Provided that such representation may, after the completion of the next decennial census, be from time to time increased to six by the Parliament of Canada.

5. The said province and the province of Saskatchewan shall, until the termination of the Parliament of Canada existing at the time of the first readjustment hereinafter provided for, continue to be represented in the House of Commons as provided

by chapter 60 of the statutes of 1903, each of the electoral districts defined in that part of the schedule to the said Act which relates to the North-West Territories, whether such district is wholly in one of the said provinces, or partly in one and partly in the other of them, being represented by one member.

6. Upon the completion of the next quinquennial census for the said province, the representation thereof shall forthwith be readjusted by the Parliament of Canada in such a manner that there shall be assigned to the said province such a number of members as will bear the same proportion to the number of its population ascertained at such quinquennial census as the number sixty-five bears to the number of the population of Quebec as ascertained at the then last decennial census; and in the computation of the number of members for the said province a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall be disregarded, and a fractional part exceeding one-half of that number shall be deemed equivalent to the whole number, and such readjustment shall take effect upon the termination of the Parliament then existing.

2. The representation of the said province shall thereafter be readjusted from time to time according to the provisions of section 51 of *The British North America Act*, 1867.

7. Until the Parliament of Canada otherwise provides, the qualifications of voters for the election of members of the House of Commons and the proceedings at and in connection with election of such members shall, *mutatis mutandis*, be those prescribed by law at the time this Act comes into force with respect to such elections in the North-West Territories.

8. The Executive Council of the said province shall be composed of such persons, under such designations, as the Lieutenant-Governor from time to time thinks fit.

9. Unless and until the Lieutenant-Governor in Council of the said province otherwise directs, by proclamation under the Great Seal, the seat of government of the said province shall be at Edmonton.

10. All powers, authorities and functions which under any law were before the coming into force of this Act vested in or exercisable by the Lieutenant-Governor of the North-West Territories, with the advice, or with the advice and consent, of the Executive Council thereof, or in conjunction with that Council or with any member or members thereof, or by the said Lieutenant-Governor individually, shall, so far as they are capable of

being exercised after the coming into force of this Act in relation to the government of the said province, be vested in and shall or may be exercised by the Lieutenant-Governor of the said province, with the advice or with the advice and consent of, or in conjunction with, the Executive Council of the said province or any member or members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless to be abolished or altered by the legislature of the said province.

11. The Lieutenant-Governor in Council shall, as soon as may be after this Act comes into force, adopt and provide a Great Seal of the said province, and may, from time to time, change such seal.

12. There shall be a legislature for the said province consisting of the Lieutenant-Governor and one house, to be styled the Legislative Assembly of Alberta.

13. Until the said Legislature otherwise provides, the Legislative Assembly shall be composed of twenty-five members to be elected to represent the electoral divisions defined in the Schedule to this Act.

14. Until the said Legislature otherwise determines, all the provisions of the law with regard to the constitution of the Legislative Assembly of the North-West Territories and the election of members thereof shall apply, *mutatis mutandis*, to the Legislative Assembly of the said province and the elections of members thereof respectively.

15. The writs for the election of the members of the first Legislative Assembly of the said province shall be issued by the Lieutenant-Governor and made returnable within six months after this Act comes into force.

16. All laws and all orders and regulations made thereunder, so far as they are not inconsistent with anything contained in this Act, or as to which this Act contains no provision intended as a substitute therefor and all courts of civil and criminal jurisdiction, and all commissions, powers, authorities and functions, and all officers and functionaries, judicial, administrative and ministerial, existing immediately before the coming into force of this Act in the territory hereby established as the province of Alberta, shall continue in the said province as if this Act and *The Saskatchewan Act* had not been passed; subject nevertheless, except with respect to such as are enacted by or existing under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, to be repealed, abolished or altered by the Parliament of Canada, or by the legislature of the said province, according

to the authority of the Parliament or of the said legislature: Provided that all powers, authorities and functions which under any law, order or regulation were, before the coming into force of this Act, vested in or exercisable by any public officer or functionary of the North-West Territories shall be vested in and exercisable in and for the said province by like public officers and functionaries of the said province when appointed by competent authority.

2. The legislature of the province may, for all purposes affecting or extending to the said province, abolish the Supreme Court of the North-West Territories, and the offices both judicial and ministerial thereof, and the jurisdiction, powers and authority belonging or incident to the said court: Provided that, if, upon such abolition, the Legislature constitutes a superior court of criminal jurisdiction, the procedure in criminal matters then obtaining in respect of the Supreme Court of the North-West Territories shall, until otherwise provided by competent authority, continue to apply to such superior court, and that the Governor in Council may at any time and from time to time declare all or any part of such procedure to be inapplicable to such superior court.

3. All societies or associations incorporated by or under the authority of the legislature of the North-West Territories existing at the time of the coming into force of this Act which include within their objects the regulation of the practice of, or the right to practise, any profession or trade in the North-West Territories, such as the legal or the medical profession, dentistry, pharmaceutical chemistry and the like, shall continue, subject, however, to be dissolved and abolished by order of the Governor in Council, and each of such societies shall have power to arrange for and effect the payment of its debts and liabilities, and the division, disposition or transfer of its property.

4. Every joint stock company lawfully incorporated by or under the authority of any ordinance of the North-West Territories shall be subject to the legislative authority of the Province of Alberta if—

(*a*) The head office or the registered office of such company is at the time of the coming into force of this Act situate in the Province of Alberta; and

(*b*) The powers and objects of such company are such as might be conferred by the legislature of the said province and not expressly authorized to be executed in any part of the North-West Territories beyond the limits of the said province.

17. Section 93 of *The British North America Act*, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:—

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to the separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances."

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression "at the union," is employed, in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.

18. The following amounts shall be allowed as an annual subsidy to the Province of Alberta, and shall be paid by the Government of Canada, by half-yearly instalments in advance, to the said province, that is to say:—

(*a*) For the support of the Government and Legislature, fifty thousand dollars;

(*b*) On an estimated population of two hundred and fifty thousand, at eighty cents per head, two hundred thousand dollars, subject to be increased as hereinafter mentioned, that is to say:—a census of the said province shall be taken in every fifth year reckoning from the general census of one thousand nine hundred and one, and an approximate estimate of the population shall be made at equal intervals of time between each quinquennial and decennial census; and whenever the population by any such census or estimate, exceeds two hundred and fifty thousand, which shall be the minimum on which the said allowance shall be calculated, the amount of the said allowance shall be increased accordingly, and so on until the population has reached eight hundred thousand souls.

19. Inasmuch as the said province is not in debt, it shall be entitled to be paid and to receive from the Government of Canada, by half-yearly payments in advance, an annual sum of four hundred and five thousand three hundred and seventy-

five dollars, being the equivalent of interest at the rate of five per cent. per annum on the sum of eight million one hundred and seven thousand five hundred dollars.

20. Inasmuch as the said province will not have the public land as the source of revenue, there shall be paid by Canada to the province by half-yearly payments, in advance, an annual sum based upon the population of the province as from time to time ascertained by the quinquennial census thereof, as follows:—

The population of the said province being assumed to be at present two hundred and fifty thousand, the sum payable until such population reaches four hundred thousand, shall be three hundred and seventy thousand dollars;

Thereafter, until such population reaches eight hundred thousand, the sum payable shall be five hundred and sixty-two thousand five hundred dollars;

Thereafter, until such population reaches one million two hundred thousand, the sum payable shall be seven hundred and fifty thousand dollars;

And thereafter the sum payable shall be one million one hundred and twenty-five thousand dollars.

2. As an additional allowance in lieu of public lands, there shall be paid by Canada to the province annually by half-yearly payments in advance, for five years from the time this Act comes into force, to provide for the construction of necessary public buildings, the sum of ninety-three thousand seven hundred and fifty dollars.

21. All Crown lands, mines and minerals and royalties incident thereto, and the interest of the Crown in the waters within the province under *The North-West Irrigation Act*, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the North-West Territories.

22. All properties and assets of the North-West Territories shall be divided equally between the said province and the province of Saskatchewan, and the two provinces shall be jointly and equally responsible for all debts and liabilities of the North-West Territories: Provided that, if any difference arises as to the division and adjustment of such properties, assets, debts and liabilities, such difference shall be referred to the arbitrament

of three arbitrators, one of whom shall be chosen by the Lieutenant-Governor in Council of each province and the third by the Governor in Council. The selection of such arbitrators shall not be made until the legislatures of the provinces have met, and the arbitrator chosen by Canada shall not be resident of either province.

23. Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company as contained in the conditions under which that company surrendered Rupert's Land to the Crown.

24. The powers hereby granted to the said province shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to chapter 1 of the statutes of 1881, being an Act respecting the Canadian Pacific Railway Company.

25. This Act shall come into force on the first day of September, one thousand nine hundred and five.

SCHEDULE.

(*Section 13.*)

The province of Alberta shall be divided into twenty-five electoral divisions which shall respectively comprise and consist of the parts and portions of the province hereinafter described.

In the following descriptions where "meridians between ranges" and "boundaries of townships" or "boundaries of sections" are referred to as the boundaries of electoral divisions, these expressions mean the meridians, boundaries of townships or boundaries of sections, as the case may be, in accordance with the Dominion Lands system of surveys, and include the extension thereof in accordance with the said system.

Names and Descriptions of Divisions.

(1) The electoral division of Medicine Hat, bounded as follows:—

Commencing at the intersection of the eastern boundary of the said province of Alberta by the north boundary of the 38th township; thence westerly along the north boundary of the 38th townships to the meridian between the 10th and 11th ranges, west of the 4th meridian; thence southerly along the meridian between the 10th and 11th ranges to the southern boundary of the said province of Alberta; thence easterly along the said southern boundary of the province of Alberta to the southeast corner thereof; thence northerly along the eastern boundary of the said province of Alberta to the point of commencement.

(2) The electoral division of Cardston, bounded as follows:—

Commencing at the southern boundary of the said province of Alberta where it is intersected by the meridian between the 10th and 11th ranges, west of the 4th meridian; thence northerly along the said meridian between the 10th and 11th ranges to the north boundary of the 5th township; thence westerly along the north boundary of the 5th township to the St. Mary river; thence along the St. Mary river up stream to the south boundary of the Blood Indian Reserve; thence westerly along the said south boundary of the Blood Indian Reserve to the meridian between the 27th and 28th ranges west of the 4th meridian; thence southerly along the said meridian between the 27th and 28th ranges to the north boundary of the 2nd township; thence westerly along the north boundary of the 2nd townships to the meridian between the 29th and 30th ranges west of the 4th meridian; thence southerly along the said meridian between the 29th and 30th ranges to the southern shore of the Waterton Lakes; thence in a westerly and southerly direction and following the southerly and eastern shores of the said Waterton Lakes to the southern boundary of the said province of Alberta; thence easterly along the said southern boundary of the province of Alberta to the point of commencement.

(3) The Electoral division of Lethbridge, bounded as follows:

Commencing at the meridian between the 10th and 11th ranges, west of the 4th meridian, where it is intersected by the north boundary of the 5th township; thence northerly along the said meridian between the 10th and 11th ranges to the north boundary of the 14th townships; thence westerly along the north boundary of the 14th townships to the Bow river; thence along the Bow river up stream to the north boundary of the 19th township; thence westerly along the north boundary of the 19th townships to the meridian between the 22nd and 23rd ranges, west of the 4th meridian; thence southerly along the said meridian between the 22nd and 23rd ranges to the Belly river; thence along the St. Mary river up stream to the north boundary of the 5th township, thence easterly along the north boundary of the 5th townships to the point of commencement.

(4) The electoral division of Macleod, bounded as follows:—

Commencing at the south boundary of the Blood Indian Reserve where it is intersected by the St. Mary river; thence along the said St. Mary river down stream to the Belly river; thence along the said Belly river up stream to its most northerly

intersection with the meridian between the 22nd and 23rd ranges, west of the 4th meridian; thence northerly along the said meridian between the 22nd and 23rd ranges to the north boundary of the 14th township; thence westerly along the north boundary of the 14th townships to the western boundary of the province of Alberta; thence in a southerly direction and along the said western boundary to the province of Alberta to the north boundary of the 11th township; thence easterly along the said north boundary of the 11th township to the 5th meridian; thence southerly along the said 5th meridian to the north boundary of the 10th township; thence easterly along the said north boundary of the 10th township to the meridian between the 29th and 30th ranges, west of the 4th meridian; thence southerly along the said meridian between the 29th and 30th ranges to the north boundary of the 8th township; thence easterly along the said north boundary to the 8th township to the west boundary of the Peigan Indian Reserve; thence southerly along the west boundary of the Peigan Indian Reserve to the south-west corner of the said Peigan Indian Reserve; thence easterly along the south boundary of the said Peigan Indian Reserve to the south-east corner of the said Reserve; thence in a straight line south-easterly to the north-east corner of section 14 in the 6th township in the 27th range, west of the 4th meridian; thence along the north boundary of section 13 in the said 6th township and in the 27th range to the meridian between the 26th and 27th ranges west of the 4th meridian; thence southerly along the said meridian between the 26th and 27th ranges to the Belly river; thence along the Belly river up stream to the south boundary of the said Blood Indian Reserve; thence easterly along the said south boundary of the Blood Indian Reserve to the point of commencement.

(5) The electoral division of Pincher Creek, bounded as follows:—

Commencing at the southern boundary of the said province of Alberta, where it is intersected by the eastern shore of the Waterton Lakes, thence northerly and easterly and along the said eastern shores and the southern shores of the Waterton Lakes to the meridian between the 29th and 30th ranges west of the 4th meridian; thence northerly along the said meridian between the 29th and 30th ranges to the north boundary of the 2nd township; thence easterly along the said north boundary of the 2nd townships to the meridian between the 27th and 28th ranges west of the 4th meridian; thence northerly along the said meridian between the 27th and 28th ranges to the south boundary of the Blood Indian Reserve; thence

westerly along the said south boundary of the Blood Indian Reserve to the Belly river; thence along the said Belly river down stream to the meridian between the 26th and 27th ranges west of the 4th meridian; thence northerly along the said meridian between the 26th and 27th ranges to the north-east corner of section 13 in the 6th township in the said 27th range; thence westerly along the north boundary of the said section 13 to the north-east corner of section 14 of the said 6th township in the 27th range; thence in a straight line north-westerly to the south-east corner of the Peigan Indian Reserve; thence westerly along the south boundary of the said Peigan Indian Reserve to the southwest corner of the said Indian Reserve; thence northerly along the west boundary of the said Indian Reserve to the north boundary of the 8th township; thence westerly along the said north boundary to the 8th townships to the meridian between the 29th and 30th ranges west of the 4th meridian; thence northerly along the said meridian between the 29th and 30th ranges to the north boundary of the 10th township; thence westerly along the said north boundary of the 10th township to the 5th meridian; thence northerly along the said 5th meridian to the north boundary of the 11th township; thence westerly along the said north boundary of the 11th townships to the western boundary of the said province of Alberta; thence in a southerly direction and along the said western boundary of the province of Alberta to the southern boundary of the said province of Alberta; thence easterly along the said southern boundary of the province of Alberta to the point of commencement.

(6) The electoral division of Gleichen, bounded as follows:—

Commencing at the meridian between the 10th and 11th ranges, west of the 4th meridian, where it is intersected by the northern boundary of the 14th township; thence northerly along the said meridian between the 10th and 11th ranges to the north boundary of the 28th township; thence westerly along the said north boundary of the 28th townships to the meridian between the 2nd and 3rd ranges, west of the 5th meridian; thence southerly along the said meridian between the 2nd and 3rd ranges, to the north boundary of the 22nd township; thence easterly along the said north boundary of the 22nd townships to Bow river; thence along the said Bow river down stream to the north boundary of the 14th townships thence easterly along the said north boundary of the 14th townships to the point of commencement. Excepting and reserving out of the said electoral division the city of Calgary, as incorporated by ordinances of the North-West Territories.

(7) The electoral division of Calgary City, comprising the city of Calgary as incorporated by ordinance of the North-West Territories.

(8) The electoral division of Rosebud, bounded as follows:—

Commencing at the meridian between the 10th and 11th ranges, west of the 4th meridian, where it is intersected by the north boundary of the 28th township; thence northerly along the said meridian between the 10th and 11th ranges to the north boundary of the 33rd township; thence westerly along the said north boundary of the 33rd townships to the western boundary of the province of Alberta; thence in a southerly direction and along the said western boundary of the province of Alberta to the north boundary of the 28th township; thence easterly along the said north boundary of the 28th townships to the point of commencement.

(9) The electoral division of High River, bounded as follows:—

Commencing at the meridian between the 22nd and 23rd ranges, west of the 4th meridian, where it is intersected by the north boundary of the 14th township; thence northerly along the said meridian between the 22nd and 23rd ranges to the north boundary of the 19th township; thence easterly along the said north boundary of the 19th townships to the Bow river; thence along the said Bow river up stream to the north boundary of the 22nd township; thence westerly along the said north boundary of the 22nd townships to the western boundary of the province of Alberta; thence in a southerly direction and along the said western boundary of the province of Alberta to the north boundary of the 14th township; thence easterly along the said north boundary of the 14th townships to the point of commencement.

(10) The electoral division of Banff, bounded as follows:—

Commencing at the meridian between the 2nd and 3rd ranges, west of the 5th meridian, where it is intersected by the north boundary of the 22nd township; thence northerly along the said meridian between the 2nd and 3rd ranges to the north boundary of the 28th township; thence westerly along the said north boundary of the 28th townships to the western boundary of the province of Alberta; thence in a southerly direction and along the said western boundary of the province of Alberta to the north boundary of the 22nd township; thence easterly along the said north boundary of the 22nd townships to the point of commencement.

(11) The electoral division of Innisfail, bounded as follows:—

Commencing at the meridian between the 10th and 11th ranges, west of the 4th meridian, where it is intersected by the north boundary of the 33rd township; thence northerly along the said meridian between the 10th and 11th ranges to the north boundary of section twenty-four in the 36th township; thence westerly along the section line which bounds on the north the section comprising the most southerly two-thirds of the 36th townships to the Red Deer river, in the 28th range, west of the 4th meridian; thence along the said Red Deer river down stream to the north boundary of section twenty-two, in the 37th township; thence westerly along the section line which bounds on the north the sections comprising the most southerly two-thirds of the 37th townships to the western boundary of the province of Alberta; thence in a southerly direction and along the said western boundary of the province of Alberta to the north boundary of the 33rd township; thence easterly along the north boundary of the 33rd townships to the point of commencement.

(12) The electoral division of Red Deer, bounded as follows:

Commencing at the meridian between the 10th and 11th ranges, west of the 4th meridian, where it is intersected by the north boundary of section 24, in the 36th township; thence northerly along the said meridian between the 10th and 11th ranges to the said north boundary of the 38th township; thence westerly along the said north boundary of the 38th townships to where the said north boundary of the 38th townships is intersected by the Red Deer river in the 26th range, west of the 4th meridian; thence along the said Red Deer river up stream to the Blindman river; thence along the said Blindman river up stream to the north boundary of the 39th township; thence westerly along the said north boundary of the 39th townships to the North Saskatchewan river; thence along the North Saskatchewan river up stream to the section line which bounds on the north the sections comprising the most southerly two-thirds of the 37th townships; thence easterly along the said section line which bounds on the north the sections comprising the most southerly two-thirds of the 37th townships to the Red Deer river; thence along the Red Deer river up stream to the north boundary of section twenty, in the 36th township; thence easterly along the section line which bounds on the north the sections comprising the most southerly two-thirds of the said 36th townships to the point of commencement.

(13) The electoral division of Vermilion, bounded as follows:—

Commencing at the eastern boundary of the province of Alberta where it is intersected by the north boundary of the 38th township; thence northerly along the said eastern boundary of the province of Alberta to the North Saskatchewan river; thence along the North Saskatchewan river up stream to the meridian between the 10th and 11th ranges, west of the 4th meridian; thence southerly along the said meridian between the 10th and 11th ranges to the north boundary of the 54th township; thence westerly along the said north boundary of the 54th townships to the meridian between the 19th and 20th ranges, west of the 4th meridian; thence southerly along the said meridian between the 19th and 20th ranges to the north boundary of section twenty-four, in the 47th township; thence easterly along the section line which bounds on the north the sections comprising the most southerly two-thirds of the 47th townships to the meridian between the 10th and 11th ranges, west of the 4th meridian; thence southerly along the said meridian between the 10th and 11th ranges to the north boundary of the 38th township; thence easterly along the said north boundary of the 38th township to the point of commencement.

(14) The electoral division of Lacombe, bounded as follows:

Commencing at the meridian between the 10th and 11th ranges, west of the 4th meridian, where it is intersected by the north boundary of the 38th township; thence northerly along the said meridian between the 10th and 11th ranges to the north boundary of the 41st township; thence westerly along the said north boundary of the 41st townships to the North Saskatchewan river; thence along the said North Saskatchewan river up stream to the north boundary of the 39th township; thence easterly along the said north boundary of the 39th townships to the Blindman river; thence along the said Blindman river down stream to the Red Deer river; thence along the said Red Deer river down stream to the north boundary of the 38th township; thence easterly along the said north boundary of the 38th townships to the point of commencement.

(15) The electoral division of Ponoka, bounded as follows:—

Commencing at the meridian between the 10th and 11th ranges, west of the 4th meridian, where it is intersected by the north boundary of the 41st township; thence northerly along the said meridian between the 10th and 11th ranges to the north boundary of the 44th township; thence westerly along the north boundary of the 44th townships to the North Saskatchewan river thence along the said North Saskatchewan river up stream to the north boundary of the 41st township; thence

easterly along the said north boundary of the 41st townships to the point of commencement.

(16) The electoral division of Wetaskiwin, bounded as follows:—

Commencing at the meridian between the 10th and 11th ranges, west of the 4th meridian, where it is intersected by the north boundary of the 44th township; thence northerly along the said meridian between the 10th and 11th ranges to the section line which bounds on the north the sections comprising the most southerly two-thirds of the 47th township; thence westerly along the said section line which bounds on the north the sections comprising the most southerly two-thirds of the 47th townships to the North Saskatchewan river; thence along the said North Saskatchewan river up stream to the north boundary of the 44th township; thence easterly along the said north boundary of the 44th townships to the point of commencement.

(17) The electoral division of Leduc, bounded as follows:—

Commencing at the meridian between the 19th and 20th ranges, west of the 4th meridian, where it is intersected by the section line which bounds on the north the sections comprising the most southerly two-thirds of the 47th townships; thence northerly along the said meridian between the 19th and 20th ranges to the north boundary of the 50th township; thence westerly along the said north boundary of the 50th townships to where the said north boundary of the 50th townships first intersects the North Saskatchewan river; thence along the North Saskatchewan river up stream to the section line which bounds on the north the sections comprising the most southerly two-thirds of the 47th township; thence easterly along the said section line which bounds on the north the sections comprising the most southerly two-thirds of the 47th townships to the point of commencement.

(18) The electoral division of Strathcona, bounded as follows:—

Commencing at the meridian between the 19th and 20th ranges, west of the 4th meridian, where it is intersected by the north boundary of the 50th township; thence northerly along the said meridian between the 19th and 20th ranges to the north boundary of the 53rd township; thence westerly along the said north boundary of the 53rd townships to the North Saskatchewan river; thence along the said North Saskatchewan river up stream to the north boundary of the 50th township; thence easterly along the said north boundary of the 50th townships to the point of commencement.

(19) The electoral division of Stoney Plain, bounded as follows:—

Commencing at the meridian between the 24th and 25th ranges, west of the 4th meridian, where it is intersected by the north boundary of the 53rd township; thence westerly along the said north boundary of the 53rd township to the rear line of lots fronting on the east side of the Sturgeon river in the Saint Albert Settlement; thence in a southerly and westerly direction and along the said rear line to Big Lake; thence in a westerly direction and along the southerly, westerly and northerly shores of Big Lake to the south-west corner of lot D in the Saint Albert Settlement; thence westerly and along the southerly limit of lots E, F, G, H and I in the said Saint Albert Settlement to the south-east corner of the Indian Reserve Chief Michel Calahoo; thence westerly along the south boundary of the said Indian Reserve to the south-west corner thereof; thence northerly along the west boundary of the said Indian Reserve to the north boundary of the 54th township; thence westerly along the said north boundary of the 54th townships to the 5th meridian; thence northerly along the said 5th meridian to the south boundary of the Indian Reserve Chief Alexandra; thence westerly along the south boundary of the Indian Reserve Chief Alexandra to the south-west corner of the said Reserve; thence northerly along the west boundary of the said Reserve Chief Alexandra to the north boundary of the 55th township; thence westerly along the north boundary of the 55th townships to the western boundary of the province of Alberta; thence in a southerly direction and along the said western boundary of the province of Alberta to the section line which forms the north boundary of the sections comprising the most southerly two-thirds of the 37th township; thence easterly along the said section line which forms the north boundary of the sections comprising the most southerly two-thirds of the 37th townships to the North Saskatchewan river; thence along the said North Saskatchewan river down stream to its most northerly intersection with the meridian between the 24th and 25th ranges west of the 4th meridian; thence northerly along the said meridian between the 24th and 25th ranges to the point of commencement.

(20) The electoral division of Edmonton City, comprising the city of Edmonton as incorporated by ordinance of the North-West Territories.

(21) The electoral division of Victoria, bounded as follows:—

Commencing at the 4th meridian where it is intersected by the North Saskatchewan river; thence northerly along the

said 4th meridian to the north boundary of the 70th township; thence westerly along the said north boundary of the 70th townships to the meridian between the 10th and 11th ranges west of the 4th meridian; thence southerly along the said meridian between the 10th and 11th ranges to the north boundary of the 58th township; thence westerly along the said north boundary of the 58th townships to the North Saskatchewan river; thence along the said North Saskatchewan river up stream to the north boundary of the 53rd township; thence easterly along the said north boundary of the 53rd township to the meridian between the 19th and 20th ranges, west of the 4th meridian; thence northerly along the said meridian between the 19th and 20th ranges to the north boundary of the 54th township; thence easterly along the said north boundary of the 54th townships to the meridian between the 10th and 11th ranges, west of the 4th meridian; thence northerly along the said meridian between the 10th and 11th ranges to the North Saskatchewan river; thence along the said North Saskatchewan river down stream to the point of commencement.

(22) The electoral division of Sturgeon, bounded as follows:—

Commencing at the meridian between the 10th and 11th ranges, west of the 4th meridian, where it is intersected by the north boundary of the 58th township; thence northerly along the said meridian between the 10th and 11th ranges to the north boundary of the 70th township; thence westerly along the said north boundary of the 70th townships to the meridian between the 24th and 25th ranges, west of the 4th meridian; thence southerly along the said meridian between the 24th and 25th ranges to the North Saskatchewan river; thence along the said North Saskatchewan river down stream to the north boundary of the 58th township; thence easterly along the said north boundary of the 58th townships to the point of commencement. Excepting and reserving out of the said electoral division the city of Edmonton as incorporated by ordinance of the North-West Territories.

(23) The electoral division of Saint Albert, bounded as follows:—

Commencing at the meridian between the 24th and 25th ranges, west of the 4th meridian, where it is intersected by the north boundary of the 53rd township; thence northerly along the said meridian between the 24th and 25th ranges west of the 4th meridian to the north boundary of the 70th township; thence westerly along the said north boundary of the 70th townships to the western boundary of the province of Alberta; thence in a southerly direction and along the said western

boundary of the province of Alberta to the north boundary of the 55th township; thence easterly along the said north boundary of the 55th township to the Indian Reserve Chief Alexander; thence southerly along the western boundary of the said Indian Reserve Chief Alexander to the south-west corner of the said reserve; thence easterly along the south boundary of the said Indian Reserve Chief Alexander to the 5th meridian; thence southerly along the said 5th meridian to the north boundary of the 54th township; thence easterly along the said north boundary of the 54th township to the west boundary of the Indian Reserve Chief Michel Calahoo; thence southerly along the west boundary of the said Indian Reserve Chief Michel Calahoo to the south-west corner thereof; thence easterly along the south boundary of the said Indian Reserve Chief Michel Calahoo to the south-west corner thereof; thence in an easterly direction and along the southern limit of lots I, H, G, F and E, in the Saint Albert Settlement to the south-west corner of lot D in the said Settlement; thence along the westerly and southerly shores of Big Lake in a westerly, southerly and easterly direction to the rear line of lot 55 in the said Saint Albert Settlement; thence in an easterly direction and along the rear line of lots fronting on the east side of the Sturgeon river in the said Saint Albert Settlement to the north boundary of the 53rd township; thence easterly along the north boundary of the 53rd township to the point of commencement.

(24) The electoral division of Peace River, bounded as follows:—

Commencing at the meridian between the 19th and 20th ranges, west of the 5th meridian, where it is intersected by the north boundary of the 70th township; thence northerly along the said meridian between the 19th and 20th ranges to the north boundary of the 80th township; thence easterly along the said north boundary of the 80th townships to the meridian between the 13th and 14th ranges, west of the 5th meridian; thence northerly along the said meridian between the 13th and 14th ranges to the north boundary of the 92nd township; thence easterly along the said north boundary of the 92nd townships to the meridian between the 20th and 21st ranges, west of the 4th meridian; thence northerly along the said meridian between the 20th and 21st ranges to the northern boundary of the province of Alberta; thence westerly along the said northern boundary of the province of Alberta to the north-west corner of the said province; thence in a southerly direction and along the western boundary of the said province of Alberta to the north boundary of the 70th township; thence easterly

along the said north boundary of the 70th townships to the point of commencement.

(25) The electoral division of Athabasca, bounded as follows:

Commencing at the eastern boundary of the province of Alberta where it is intersected by the north boundary of the 70th township; thence northerly along the said eastern boundary of the province of Alberta to the northern boundary of the said province; thence westerly along the said northern boundary of the province of Alberta to the meridian between the 20th and 21st ranges, west of the 4th meridian; thence southerly along the said meridian between the 20th and 21st ranges to the north boundary of the 92nd townships; thence westerly along the said north boundary of the 92nd townships to the meridian between the 13th and 14th ranges, west of the 5th meridian; thence southerly along the said meridian between the 13th and 14th ranges, west of the 5th meridian to the north boundary of the 80th township; thence westerly along the said north boundary of the 80th townships to the meridian between the 19th and 20th ranges, west of the 5th meridian; thence southerly along the said meridian between the 19th and 20th ranges to the north boundary of the 70th township; thence easterly along the said north boundary of the 70th townships to the point of commencement.

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10. THE SASKATCHEWAN ACT,

4-5 Edw. VII. cap. 42.

An Act to establish and provide for the Government of the Province of Saskatchewan.

[*Assented to July 20th, 1905.*]

Whereas in and by The British North America Act, 1871, being chapter 28 of the Acts of the Parliament of the United Kingdom passed in the session thereof held in the 34th and 35th year of the reign of her late Majesty Queen Victoria it is enacted that the Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may at the time of such establishment make provision for the constitution and administration of any such province and for the passing of laws for the peace, order and good government of such province and for its representation in the said Parliament of Canada:

And whereas it is expedient to establish as a province the territory hereinafter described and to make provision for the

government thereof and the representation thereof in the Parliament of Canada;

Therefore his Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. This Act may be cited as "*The Saskatchewan Act.*"

2. The territory comprised within the following boundaries, that is to say,—commencing at the intersection of the international boundary dividing Canada from the United States of America by the west boundary of the province of Manitoba, thence northerly along the said west boundary of the province of Manitoba to the north-west corner of the said province of Manitoba; thence continuing northerly along the centre of the road allowance between the twenty-ninth and thirtieth ranges west of the principal meridian in the system of Dominion lands surveys, as the said road allowance may hereafter be defined in accordance with the said system, to the second meridian in the said system of Dominion lands surveys as the same may hereafter be defined in accordance with the said system; thence northerly along the said second meridian to the sixtieth degree of north latitude; thence westerly along the parallel of the sixtieth degree of north latitude to the fourth meridian in the said system of Dominion lands surveys as the same may be hereafter defined in accordance with the said system; thence southerly along the said fourth meridian to the said international boundary dividing Canada from the United States of America; thence easterly along the said international boundary to the point of commencement,—is hereby established as a province of the Dominion of Canada, to be called and known as the province of Saskatchewan.

3. The provisions of The British North America Acts 1867 to 1886 shall apply to the province of Saskatchewan in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Saskatchewan had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

4. The said province shall be represented in the Senate of Canada by four members: Provided that such representation may, after the completion of the next decennial census, be from time to time increased to six by the Parliament of Canada.

5. The said province and the province of Alberta shall, until the termination of the Parliament of Canada existing

at the time of the first readjustment hereinafter provided for, continue to be represented in the House of Commons as provided by chapter 60 of the Statutes of 1903, each of the electoral districts defined in that part of the schedule to the said Act which relates to the North-West Territories, whether such district is wholly in one of the said provinces, or partly in one and partly in the other of them, being represented by one member.

6. Upon the completion of the next quinquennial census for the said province the representation thereof shall forthwith be readjusted by the Parliament of Canada in such manner that there shall be assigned to the said province such a number of members as will bear the same proportion to the number of its population ascertained at such quinquennial census as the number sixty-five bears to the number of the population of Quebec as ascertained at the then last decennial census; and in the computation of the number of members for the said province a fractional part not exceeding one-half of the whole number requisite for entitling the province to a member shall be disregarded and a fractional part exceeding one-half of that number shall be deemed equivalent to the whole number, and such readjustment shall take effect upon the termination of the Parliament then existing.

(2) The representation of the said province shall thereafter be readjusted from time to time according to the provisions of section 51 of The British North America Act, 1867.

7. Until the Parliament of Canada otherwise provides the qualifications of voters for the election of members of the House of Commons and the proceedings at and in connection with elections of such members shall, *mutatis mutandis*, be those prescribed by law at the time this Act comes into force with respect to such elections in the North-West Territories.

8. The executive council of the said province shall be composed of such persons under such designations as the Lieutenant Governor from time to time thinks fit.

9. Unless and until the Lieutenant Governor in Council of the said province otherwise directs by proclamation under the Great Seal the seat of government of the said province shall be at Regina.

10. All powers, authorities and functions which under any law were before the coming into force of this Act vested in or exercisable by the Lieutenant Governor of the North-West Territories with the advice or with the advice and consent of the executive council thereof or in conjunction with that council

or with any member or members thereof or by the said Lieutenant Governor individually shall so far as they are capable of being exercised after the coming into force of this Act in relation to the government of the said province be vested in and shall or may be exercised by the Lieutenant Governor of the said province, with the advice or with the advice and consent of or in conjunction with the executive council of the said province or any member or members thereof or by the Lieutenant Governor individually as the case requires subject nevertheless to be abolished or altered by the Legislature of the said province.

11. The Lieutenant Governor in Council shall as soon as may be after this Act comes into force adopt and provide a Great Seal of the said province and may from time to time change such seal.

12. There shall be a Legislature for the said province consisting of the Lieutenant Governor and one House to be styled the Legislative Assembly of Saskatchewan.

13. Until the said Legislature otherwise provides the Legislative Assembly shall be composed of twenty-five members to be elected to represent the electoral divisions defined in the schedule to this Act.

14. Until the said Legislature otherwise determines all the provisions of the law with regard to the constitution of the Legislative Assembly of the North-West Territories and the election of members thereof shall apply, *mutatis mutandis*, to the Legislative Assembly of the said province and the election of members thereof respectively.

15. The writs for the election of the members of the first Legislative Assembly of the said province shall be issued by the Lieutenant Governor and made returnable within six months after this Act comes into force.

16. All laws and all orders and regulations made thereunder so far as they are not inconsistent with anything contained in this Act or as to which this Act contains no provision intended as a substitute therefor and all courts of civil and criminal jurisdiction and all commissions, powers, authorities and functions and all officers and functionaries, judicial, administrative and ministerial existing immediately before the coming into force of this Act in the territory hereby established as the province of Saskatchewan shall continue in the said province as if this Act and The Alberta Act had not been passed; subject nevertheless, except with respect to such as are enacted by or existing under Acts of the Parliament of

Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland, to be repealed, abolished or altered by the Parliament of Canada or by the Legislature of the said province according to the authority of the Parliament or of the said Legislature:

Provided that all powers, authorities and functions which under any law, order or regulation were before the coming into force of this Act vested in or exercisable by any public officer or functionary of the North-West Territories shall be vested in and exercisable in and for the said province by like public officers and functionaries of the said province when appointed by competent authority.

(2) The Legislature of the province may for all purposes affecting or extending to the said province abolish the supreme court of the North-West Territories and the offices both judicial and ministerial thereof and the jurisdiction, powers and authority belonging or incident to the said court:

Provided that if upon such abolition the Legislature constitutes a superior court of criminal jurisdiction the procedure in criminal matters then obtaining in respect of the supreme court of the North-West Territories shall until otherwise provided by competent authority continue to apply to such superior court and that the Governor in Council may at any time and from time to time declare all or any part of such procedure to be inapplicable to such superior court.

(3) All societies or associations incorporated by or under the authority of the Legislature of the North-West Territories existing at the time of the coming into force of this Act which include within their objects the regulation of the practice of or the right to practice any profession or trade in the North-West Territories, such as the legal or the medical profession, dentistry, pharmaceutical chemistry and the like, shall continue subject however to be dissolved and abolished by order of the Governor in Council and each of such societies shall have power to arrange for and effect the payment of its debts and liabilities and the division, disposition or transfer of its property.

(4) Every joint stock company lawfully incorporated by or under the authority of any Ordinance of the North-West Territories shall be subject to the legislative authority of the province of Saskatchewan if:

(*a*) The head office or the registered office of such company is at the time of the coming into force of this Act situate in the province of Saskatchewan; and

(*b*) The powers and objects of such company are such as might be conferred by the Legislature of the said province and not expressly authorised to be executed in any part of the North-West Territories beyond the limits of the said province.

17. Section 93 of The British North America Act, 1867, shall apply to the said province with the substitution for paragraph (1) of the said section 93 of the following paragraph:

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-West Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said Ordinances.

(2) In the appropriation by the Legislature or distribution by the government of the province of any moneys for the support of schools organised and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

(3) Where the expression "by law" is employed in paragraph (3) of the said section 93 it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression "at the union" is employed in the said paragraph (3) it shall be held to mean the date at which this Act comes into force.

18. The following amounts shall be allowed as an annual subsidy to the province of Saskatchewan and shall be paid by the government of Canada by half-yearly instalments in advance to the said province, that is to say:

(*a*) For the support of the government and Legislature, fifty thousand dollars;

(*b*) On an estimated population of two hundred and fifty thousand, at eighty cents per head, two hundred thousand dollars, subject to be increased as hereinafter mentioned, that is to say: A census of the said province shall be taken in every fifth year reckoning from the general census of one thousand nine hundred and one and an approximate estimate of the population shall be made at equal intervals of time between each quinquennial and decennial census; and whenever the population by such census or estimate exceeds two hundred and fifty thousand, which shall be the minimum on which the said allowance shall be calculated, the amount of the said allowance

shall be increased accordingly and so on until the population has reached eight hundred thousand souls.

19. Inasmuch as the said province is not in debt it shall be entitled to be paid and to receive from the government of Canada by half-yearly payments in advance an annual sum of four hundred and five thousand three hundred and seventy-five dollars, being the equivalent of interest at the rate of five per cent. per annum on the sum of eight million one hundred and seven thousand five hundred dollars.

20. Inasmuch as the said province will not have the public land as a source of revenue, there shall be paid by Canada to the province by half-yearly payments in advance an annual sum based upon the population of the province as from time to time ascertained by the quinquennial census thereof, as follows:

The population of the said province being assumed to be at present two hundred and fifty thousand, the sum payable until such population reaches four hundred thousand shall be three hundred and seventy-five thousand dollars;

Thereafter, until such population reaches eight hundred thousand the sum payable shall be five hundred and sixty-two thousand five hundred dollars;

Thereafter, until such population reaches one million two hundred thousand the sum payable shall be seven hundred and fifty thousand dollars;

And thereafter the sum payable shall be one million one hundred and twenty-five thousand dollars.

(2) As an additional allowance in lieu of public lands there shall be paid by Canada to the province annually by half-yearly payments in advance for five years from the time this Act comes into force to provide for the construction of necessary public buildings the sum of ninety-three thousand seven hundred and fifty dollars.

21. All crown lands, mines and minerals and royalties incident thereto and the interest of the crown in the waters within the province under The North-West Irrigation Act, 1898, shall continue to be vested in the crown and administered by the government of Canada for the purposes of Canada subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the North-West Territories.

22. All properties and assets of the North-West Territories shall be divided equally between the said province and the province of Alberta and the two provinces shall be jointly and equally responsible for all debts and liabilities of the North-West Territories:

Provided that if any difference arises as to the division and adjustment of such properties, assets, debts and liabilities such difference shall be referred to the arbitrament of three arbitrators, one of whom shall be chosen by the Lieutenant Governor in Council of each province and the third by the Governor in Council. The selection of such arbitrators shall not be made until the Legislatures of the provinces have met and the arbitrator chosen by Canada shall not be a resident of either province.

23. Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company as contained in the conditions under which that company surrendered Rupert's Land to the crown.

24. The powers hereby granted to the said province shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to chapter 1 of the Statutes of 1881, being *An Act respecting the Canadian Pacific Railway Company.*

25. This Act shall come into force on the first day of September, one thousand nine hundred and five.

SCHEDULE.

(*Section 13.*)

The province of Saskatchewan shall be divided into twenty-five electoral divisions which shall respectively comprise and consist of the parts and portions of the province hereinafter described.

In the following descriptions where "meridians between ranges" and "boundaries of townships" or "boundaries of sections" are referred to as the boundaries of electoral divisions these expressions mean the meridians, boundaries of townships or boundaries of sections, as the case may be, in accordance with the Dominion lands system of surveys and include the extension thereof in accordance with the said system.

Names and Descriptions of Divisions.

(1) The electoral division of Souris, bounded as follows:—

Commencing at the south-east corner of the said province of Saskatchewan; thence northerly along the last boundary of the

said province of Saskatchewan to the north boundary of the sixth township; thence westerly along the said north boundary of the sixth townships to the meridian between the tenth and eleventh ranges west of the second meridian; thence southerly along the said meridian between the tenth and eleventh ranges to the southern boundary of the said province of Saskatchewan; thence easterly along the said southern boundary of the province of Saskatchewan to the point of commencement.

(2) The electoral division of Cannington bounded as follows:—

Commencing at the intersection of the eastern boundary of the said province of Saskatchewan by the north boundary of the sixth township; thence northerly along the said eastern boundary of the province of Saskatchewan to the north boundary of the eleventh township; thence westerly along the said north boundary of the eleventh townships to the meridian between the tenth and eleventh ranges west of the second meridian; thence southerly along the said meridian between the tenth and eleventh ranges to the north boundary of the sixth township; thence easterly along the said north boundary of the sixth townships to the point of commencement.

(3) The electoral division of Moosomin, bounded as follows:

Commencing at the intersection of the eastern boundary of the said province of Saskatchewan by the north boundary of the eleventh township; thence northerly along the said eastern boundary of the province of Saskatchewan to the north boundary of the nineteenth township; thence westerly along the said north boundary of the nineteenth townships to the second meridian; thence southerly along the said second meridian to the north boundary of the eleventh township; thence easterly along the said north boundary of the eleventh townships to the point of commencement.

(4) The electoral division of Whitewood, bounded as follows:

Commencing at the second meridian where it is intersected by the north boundary of the eleventh township; thence northerly along the said second meridian to the north boundary of the twentieth township; thence westerly along the said north boundary of the twentieth townships to the meridian between the fourth and fifth ranges west of the second meridian; thence southerly along the said meridian between the fourth and fifth ranges to the north boundary of the eleventh township; thence easterly along the said north boundary of the eleventh townships to the point of commencement.

(5) The electoral division of Grenfell, bounded as follows:

Commencing at the meridian between the fourth and fifth ranges west of the second meridian where it is intersected by the north boundary of the eleventh township; thence northerly along the said meridian between the fourth and fifth ranges to the north boundary of the twentieth township; thence westerly along the said north boundary of the twentieth townships to the meridian between the sixth and seventh ranges west of the second meridian; thence northerly along the said meridian between the sixth and seventh ranges to the north boundary of the twenty-first township thence westerly along the said north boundary of the twenty-first township to the meridian between the seventh and eighth ranges west of the second meridian; thence northerly along the said meridian between the seventh and eighth ranges to the north boundary of the twenty-second township; thence westerly along the said north boundary of the twenty-second township to the meridian between the eighth and ninth ranges west of the second meridian; thence southerly along the said meridian between the eighth and ninth ranges to the north boundary of the eleventh township; thence easterly along the said north boundary of the eleventh townships to the point of commencement.

(6) The electoral division of Wolseley, bounded as follows:

Commencing at the meridian between the eighth and ninth ranges west of the second meridian where it is intersected by the north boundary of the eleventh township; thence northerly along the said meridian between the eighth and ninth ranges to the north boundary of the twenty-second township; thence westerly along the said north boundary of the twenty-second townships to the meridian between the tenth and eleventh ranges west of the second meridian; thence southerly along the said meridian between the tenth and eleventh ranges to the north boundary of the nineteenth township; thence westerly along the said north boundary of the nineteenth township to the meridian between the eleventh and twelfth ranges west of the second meridian; thence southerly along the said meridian between the eleventh and twelfth ranges to the north boundary of the eleventh township; thence easterly along the said north boundary of the eleventh townships to the point of commencement.

(7) The electoral division of Saltcoats, bounded as follows:

Commencing at the intersection of the eastern boundary of the said province of Saskatchewan by the north boundary of the nineteenth township; thence northerly along the said eastern boundary of the province of Saskatchewan to the north

boundary of the thirty-fourth township; thence westerly along the said north boundary of the thirty-fourth townships to the meridian between the third and fourth ranges west of the second meridian; thence southerly along the said meridian between the third and fourth ranges to the north boundary of the twentieth township; thence easterly along the said north boundary of the twentieth townships to the second meridian; thence southerly along the said second meridian to the north boundary of the nineteenth township; thence easterly along the said north boundary of the nineteenth townships to the point of commencement.

(8) The electoral division of Yorkton, bounded as follows:—

Commencing at the meridian between the third and fourth ranges west of the second meridian where it is intersected by the north boundary of the twentieth township; thence northerly along the said meridian between the third and fourth ranges to the north boundary of the thirty-fourth township; thence westerly along the said north boundary of the thirty-fourth townships to the meridian between the tenth and eleventh ranges west of the second meridian; thence southerly along the said meridian between the tenth and eleventh ranges to the north boundary of the twenty-second township; thence easterly along the said north boundary of the twenty-second townships to the meridian between the seventh and eighth ranges west of the second meridian; thence southerly along the said meridian between the seventh and eighth ranges to the north boundary of the twenty-first township; thence easterly along the said north boundary of the twenty-first township to the meridian between the sixth and seventh ranges west of the second meridian; thence southerly along the said meridian between the sixth and seventh ranges to the north boundary of the twentieth township; thence easterly along the said north boundary of the twentieth townships to the point of commencement.

(9) The electoral division of South Qu'Appelle, bounded as follows:

Commencing at the meridian between the tenth and eleventh ranges west of the second meridian where it is intersected by the southern boundary of the said province of Saskatchewan; thence northerly along the said meridian between the tenth and eleventh ranges to the north boundary of the eleventh township; thence westerly along the said north boundary of the eleventh township to the meridian between the eleventh and twelfth ranges west of the second meridian; thence northerly along the said meridian between the eleventh and twelfth ranges to

the north boundary of the nineteenth township; thence westerly along the said north boundary of the nineteenth townships to the meridian between the sixteenth and seventeenth ranges west of the second meridian; thence southerly along the said meridian between the sixteenth and seventeenth ranges to the southern boundary of the said province of Saskatchewan; thence easterly along the said southern boundary of the province of Saskatchewan to the point of commencement.

(10) The electoral division of North Qu'Appelle, bounded as follows:

Commencing at the meridian between the tenth and eleventh ranges west of the second meridian where it is intersected by the north boundary of the nineteenth township; thence northerly along the said meridian between the tenth and eleventh ranges to the north boundary of the thirty-fourth township; thence westerly along the said north boundary of the thirty-fourth townships to the meridian between the sixteenth and seventeenth ranges west of the second meridian; thence southerly along the said meridian between the sixteenth and seventeenth ranges to the north boundary of the nineteenth township; thence easterly along the said north boundary of the nineteenth townships to the point of commencement.

(11) The electoral division of South Regina, bounded as follows:

Commencing at the meridian between the sixteenth and seventeenth ranges west of the second meridian where it is intersected by the southern boundary of the said province of Saskatchewan; thence northerly along the said meridian between the sixteenth and seventeenth ranges to where it is intersected by the centre of the track of the main line of the Canadian Pacific Railway; thence westerly along the said centre of the track of the main line of the Canadian Pacific Railway to where it is first intersected by the north boundary of the seventeenth township; thence westerly along the said north boundary of the seventeenth townships to the meridian between the twenty-third and twenty-fourth ranges west of the second meridian; thence southerly along the said meridian between the twenty-third and twenty-fourth ranges to the southern boundary of the said province of Saskatchewan; thence easterly along the said southern boundary of the province of Saskatchewan to the point of commencement; excepting and reserving out of the said electoral division of South Regina all that portion thereof comprised within the limits of the city of Regina as incorporated by Ordinance of the North-West Territories.

(12) The electoral division of Regina City, comprising the city of Regina as incorporated by Ordinance of the North-West Territories.

(13) The electoral division of Lumsden, bounded as follows:

Commencing at the meridian between the sixteenth and seventeenth ranges west of the second meridian where it is intersected by the centre of the track of the main line of the Canadian Pacific Railway; thence northerly along the said meridian between the sixteenth and seventeenth ranges to the north boundary of the thirty-fourth township; thence westerly along the said north boundary of the thirty-fourth townships to the meridian between the twenty-third and twenty-fourth ranges west of the second meridian; thence southerly along the said meridian between the twenty-third and twenty-fourth ranges to the point where it is first intersected by the east shore of Last Mountain lake; thence southerly along the said east shore of the said lake to its intersection with the meridian between the twenty-third and twenty-fourth ranges in township twenty-four; thence southerly along the said meridian between the twenty-third and twenty-fourth ranges to the north boundary of the seventeenth township; thence easterly along the said north boundary of the seventeenth townships to where it is first intersected by the centre of the track of the main line of the Canadian Pacific Railway; thence easterly along the said centre of the track of the main line of the Canadian Pacific Railway to the point of commencement.

(14) The electoral division of Moose Jaw, bounded as follows:

Commencing at the meridian between the twenty-third and twenty-fourth ranges west of the second meridian where it is intersected by the southern boundary of the said province of Saskatchewan; thence northerly along the said meridian between the twenty-third and twenty-fourth ranges to the point where the said meridian intersects the east shore of Last Mountain lake in township twenty-four; thence northerly along the said east shore of Last Mountain lake to its intersection with the northern boundary of township twenty-six; thence westerly along the said north boundary of the twenty-sixth townships to the meridian between the seventh and eighth ranges west of the third meridian; thence southerly along the said meridian between the seventh and eighth ranges to the southern boundary of the said province of Saskatchewan; thence easterly along the said southern boundary of the province of Saskatchewan to the point of commencement; excepting and reserving out of the said electoral division of Moose Jaw all that portion thereof comprised

within the limits of the city of Moose Jaw as incorporated by Ordinance of the North-West Territories.

(15) The electoral division of Moose Jaw City, comprising the city of Moose Jaw as incorporated by Ordinance of the North-West Territories.

(16) The electoral division of Maple Creek, bounded as follows:

Commencing at the meridian between the seventh and eighth ranges west of the third meridian where it is intersected by the southern boundary of the said province of Saskatchewan; thence northerly along the said meridian between the seventh and eighth ranges to the north boundary of the twenty-sixth township; thence westerly along the said north boundary of the twenty-sixth townships to the western boundary of the said province of Saskatchewan; thence southerly along the said western boundary of the province of Saskatchewan to the southern boundary of the said province of Saskatchewan; thence easterly along the said southern boundary of the province of Saskatchewan to the point of commencement.

(17) The electoral division of Humboldt, bounded as follows:

Commencing at the intersection of the eastern boundary of the said province of Saskatchewan by the north boundary of the thirty-fourth township; thence northerly along the said eastern boundary of the province of Saskatchewan to the north boundary of the forty-second township; thence westerly along the said north boundary of the forty-second townships to the meridian between the twenty-fourth and twenty-fifth ranges west of the second meridian; thence southerly along the said meridian between the twenty-fourth and twenty-fifth ranges to the north boundary of the thirty-fourth township; thence easterly along the said boundary of the thirty-fourth townships to the point of commencement.

(18) The electoral division of Kinistino, bounded as follows:

Commencing at the intersection of the eastern boundary of the said province of Saskatchewan by the north boundary of the forty-second township; thence northerly along the said eastern boundary of the province of Saskatchewan to the north-east corner of the said province; thence westerly along the northern boundary of the said province of Saskatchewan to the meridian between the twenty-fourth and twenty-fifth ranges west of the second meridian; thence southerly along the said meridian between the twenty-fourth and twenty-fifth ranges to the north limit of the Indian Reserve Chief Muskoday; thence easterly along the said north limit of the Indian Reserve Chief Muskoday to the South Saskatchewan river; thence along the

South Saskatchewan river up stream to the north boundary of the forty-fifth township; thence easterly along the said north boundary of the forty-fifth townships to meridian between the twenty-fourth and twenty-fifth ranges west of the second meridian; thence southerly along the said meridian between the twenty-fourth and twenty-fifth ranges to the north boundary of the forty-second township; thence easterly along the said north boundary of the forty-second townships to the point of commencement.

(19) The electoral division of Prince Albert, bounded as follows:

Commencing at the meridian between the twenty-fourth and twenty-fifth ranges west of the second meridian where it is intersected by the northern boundary of the said province of Saskatchewan; thence westerly along the said northern boundary of the province of Saskatchewan to the meridian between the fifth and sixth ranges west of the third meridian; thence southerly along the said meridian between the fifth and sixth ranges to the north boundary of the forty-seventh township; thence easterly along the said north boundary of the forty-seventh townships to the meridian between the first and second ranges west of the third meridian; thence southerly along the said meridian between the first and second ranges to the north boundary of the forty-sixth township; thence easterly along the said north boundary of the forty-sixth townships to the third meridian; thence southerly along the said third meridian to the South Saskatchewan river; thence along the said South Saskatchewan river down stream to the north limit of the Indian Reserve Chief Muskoday; thence westerly along the said north limit of the Indian Reserve Chief Muskoday to the meridian between the twenty-fourth and twenty-fifth ranges west of the second meridian; thence northerly along the said meridian between the twenty-fourth and twenty-fifth ranges to the point of commencement; excepting and reserving out of the said electoral division all those portions described as follows:

Firstly, the city of Prince Albert, as incorporated by Ordinance of the North-West Territories; and

Secondly, those portions of lots 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81 and 82 of the Prince Albert Settlement which lie to the south of the said city of Prince Albert as incorporated and that portion of the Hudson Bay reserve outside of and adjoining the said city on the east and south and which lies to the north of the production in a straight line easterly of the southern boundary of the said lot 82 in the Prince Albert Settlement; and

Thirdly, fractional sections 13 and 24 in the forty-eighth township in the twenty-sixth range west of the second meridian.

(20) The electoral division of Prince Albert City, comprising:

Firstly, the city of Prince Albert as incorporated by Ordinance of the North-West Territories; and

Secondly, those portions of lots 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81 and 82 of the Prince Albert Settlement which lie to the south of the said city of Prince Albert as incorporated and that portion of the Hudson Bay reserve outside of and adjoining the said city on the east and south and which lies to the north of the production in a straight line easterly of the southern boundary of the said lot 82 in the Prince Albert Settlement; and

Thirdly, fractional sections 13 and 24 in the forty-eighth township in the twenty-sixth range west of the second meridian.

(21) The electoral division of Batoche, bounded as follows:

Commencing at the meridian between the twenty-third and twenty-fourth ranges west of the second meridian where it is intersected by the north boundary of the twenty-sixth township; thence northerly along the said meridian between the twenty-third and twenty-fourth ranges to the north boundary of the thirty-fourth township; thence westerly along the said north boundary of the thirty-fourth township to the meridian between the twenty-fourth and twenty-fifth ranges west of the second meridian; thence northerly along the said meridian between the twenty-fourth and twenty-fifth ranges to the north boundary of the forty-fifth township; thence westerly along the said north boundary of the forty-fifth townships to where it first intersects the South Saskatchewan river; thence along the said South Saskatchewan river up stream to the north boundary of the fortieth township; thence easterly along the said north boundary at the fortieth townships to the meridian between the first and second ranges west of the third meridian; thence southerly along the said meridian between the first and second ranges to the north boundary of the twenty-sixth township; thence easterly along the said north boundary of the twenty-sixth townships to the point of commencement.

(22) The electoral division of Saskatoon, bounded as follows:

Commencing at the meridian between the first and second ranges west of the third meridian where it is intersected by the north boundary of the twenty-sixth township; thence northerly along the said meridian between the first and second ranges to the north boundary of the fortieth township; thence

westerly along the said north boundary of the fortieth township to the South Saskatchewan river; thence along the said South Saskatchewan river down stream to the north boundary of the forty-first township; thence westerly along the said north boundary of the forty-first townships to the North Saskatchewan river; thence along the said North Saskatchewan river up stream to the meridian between the thirteenth and fourteenth ranges west of the third meridian; thence southerly along the said meridian between the thirteenth and fourteenth ranges to the north boundary of the twenty-sixth township; thence easterly along the said north boundary of the twenty-sixth townships to the point of commencement.

(23) The electoral division of Rosthern, bounded as follows:

Commencing at the north boundary of the forty-first township where it is intersected by the South Saskatchewan river; thence along the said South Saskatchewan river down stream to the third meridian; thence northerly along the said third meridian to the north boundary of the forty-sixth township; thence westerly along the said north boundary of the forty-sixth township to the meridian between the first and second ranges west of the third meridian; thence northerly along the said meridian between the first and second ranges to the north boundary of the forty-seventh township; thence westerly along the said north boundary of the forty-seventh townships to the meridian between the fifth and sixth ranges west of the third meridian; thence southerly along the said meridian between the fifth and sixth ranges to the North Saskatchewan river; thence along the said North Saskatchewan river up stream to the north boundary of the forty-first township; thence easterly along the said north boundary of the forty-first townships to the point of commencement.

(24) The electoral division of Redberry, bounded as follows:

Commencing at the meridian between the fifth and sixth ranges west of the third meridian where it is intersected by the North Saskatchewan river; thence northerly along the said meridian between the fifth and sixth ranges to the northern boundary of the said province of Saskatchewan; thence westerly along the said northern boundary of the province of Saskatchewan to the meridian between the thirteenth and fourteenth ranges west of the third meridian; thence southerly along the said meridian between the thirteenth and fourteenth ranges to the North Saskatchewan river; thence along the said North Saskatchewan river down stream to the point of commencement.

(25) The electoral division of Battleford, bounded as follows:

Commencing at the meridian between the thirteenth and fourteenth ranges west of the third meridian where it is intersected by the north boundary of the twenty-sixth township; thence northerly along the said meridian between the thirteenth and fourteenth ranges, to the northern boundary of the said province of Saskatchewan; thence westerly along the said northern boundary of the province of Saskatchewan to the western boundary of the said province of Saskatchewan; thence southerly along the said western boundary of the province of Saskatchewan to the north boundary of the twenty-sixth township; thence easterly along the said north boundary of the twenty-sixth townships to the point of commencement.

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11. EXTRACTS FROM ORDINANCES OF THE NORTH-WEST TERRITORIES TOUCHING SEPARATE SCHOOLS.

(1901, cap. 29 and cap. 30.)

CHAPTER 29.

An Ordinance respecting Schools.

EDUCATIONAL COUNCIL.

* * * * * *

8. There shall be an educational council consisting of five persons at least, two of whom shall be Roman Catholics to be appointed by the Lieutenant-Governor in Council; who shall receive such remuneration as the Lieutenant-Governor in Council shall determine.

(2) On the first constitution of the council three of the members shall be appointed for three years and two for two years; and thereafter each member appointed shall hold office for two years. C. O. c. 75, s. 4.

* * * * * *

SEPARATE SCHOOLS.

41. The minority of the ratepayers in any district whether Protestant or Roman Catholic may establish a separate school therein; and in such case the ratepayers establishing such Protestant or Roman Catholic separate school shall be liable only to assessments of such rates as they impose upon themselves in respect thereof. C. O. c. 75, s. 36.

42. The petition for the erection of a separate school district shall be signed by three resident ratepayers of the religious faith indicated in the name of the proposed district; and shall be in the form prescribed by the commissioner. C. O. c. 75, s. 37.

43. The persons qualified to vote for or against the erection of a separate school district shall be the ratepayers in the district of the same religious faith, Protestant or Roman Catholic, as the petitioners. C. O. c. 75, s. 38.

44. The notice calling a meeting of the ratepayers for the purpose of taking their votes on the petition for the erection of a separate school district shall be in the form prescribed by the commissioner and the proceedings subsequent to the posting of such notice shall be the same as prescribed in the formation of public school districts. C. O. c. 75, s. 39.

45. After the establishment of a separate school district under the provisions of this Ordinance such separate school district and the board thereof shall possess and exercise all rights, powers, privileges and be subject to the same liabilities and method of government as is herein provided in respect of public school districts.

(2) Any person who is legally assessed or assessable for a public school shall not be liable to assessment for any separate school established therein. C. O. c. 75, s. 40.

* * * * * *

UNION OF PUBLIC AND SEPARATE SCHOOL DISTRICTS.

52. If in any area there exist a public school district and a separate school district and it is resolved by the ratepayers of each of such school districts at a public meeting of such ratepayers respectively called for the purpose of considering the question that it is expedient that such districts should be disorganised for the purpose of the union of the same and the erection of such area into a public school district, the commissioner may by order, notice of which shall be published in the official gazette, disorganise such existing districts and erect such area into a public school district with such name as he may decide upon; and thereafter the commissioner may make such orders, provisions and appointments as to him shall appear proper for the carrying into effect of such disorganisation and the erection of the public school district and as to all matters incident thereto and necessary for the establishment and operation of the same as a public school district and for the carrying out therein of all the provisions of this Ordinance and for the adjustment, arrangement and winding up of all the affairs of such disorganised districts and for the settlement of their liabilities and disposition of their assets.

Provided that unless the liabilities of such disorganised districts are not otherwise liquidated, the same shall be assumed by and imposed upon such newly created district and any debentures issued by the disorganised districts or either of them

shall have force and effect upon the newly established district and the property and rates thereof as they had upon the district by which they were respectively issued and its property and rates; and the trustees of such newly organised district may authorise and direct the levy and collection of such rate or rates as may from time to time be necessary for the discharging of any liability or debenture indebtedness of a disorganised district assumed by or imposed upon such new district. C. O. c. 75, s. 54.

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RELIGIOUS INSTRUCTION.

137. No religious instruction, except as hereinafter provided, shall be permitted in the school of any district from the opening of such school until one-half hour previous to its closing in the afternoon, after which time any such instruction permitted or desired by the board may be given.

(2) It shall, however, be permissible for the board of any district to direct that the school be opened by the recitation of the Lord's prayer. C. O. c. 75, s. 110.

138. Any child shall have the privilege of leaving the school room at the time at which religious instruction is commenced as provided for in the next preceding section or of remaining without taking part in any religious instruction that may be given, if the parents or guardians so desire. C. O. c. 75, s. 111.

139. No teacher, school trustee or inspector shall in any way attempt to deprive such child of any advantage that it might derive from the ordinary education given in such school and any such action on the part of any school trustee, inspector or teacher shall be held to be a disqualification for and voidance of the office held by him. C. O. c. 75, s. 112.

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CHAPTER 30.

"The School Assessment Ordinance."

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ASSESSMENT IN RURAL DISTRICTS.

3. The assessment in any village or rural district may be made by the board or any person appointed by it as assessor for the district.

(2) Any member of the board may be appointed assessor.

(3) The expression "assessor" in any part of this Ordinance relating to village or rural districts shall mean the board or the assessor accordingly as the assessment is made by the board or an assessor.

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8. In cases where separate school districts have been established whenever land is held by two or more persons as joint tenants or tenants in common the holders of such property being Protestants and Roman Catholics, they shall be assessed in proportion to their interest in the land in the district to which they respectively are ratepayers. C. O. c. 75, s. 127.

9. A company may by notice in that behalf to be given to the secretary of the board of any district in which a separate school has been established and to the secretary of the board of such separate school district, require any part of the land of which such company is the owner to be entered, rated and assessed for the purposes of said separate school and the proper assessor shall thereupon enter said company as a separate school ratepayer in the assessment roll in respect of the land specially designated in that behalf in or by said notice, and so much of the land as shall be so designated shall be assessed accordingly in the name of the company for the purposes of the separate school and not for public school purposes, but all other land of the company shall be separately entered and assessed in the name of the company as for public school purposes:

Provided always that the share or portion of the land of any company entered, rated or assessed in any district for separate school purposes under the provisions of this section shall bear the same ratio and proportion to the whole land of the company assessable within the district as the amount or proportion of the shares or stock of the company so far as the same are paid or partly paid up, held and possessed by persons who are Protestants or Roman Catholics, as the case may be, bears to the whole amount of such paid or partly paid-up shares or stock of the company.

(2) Any such notice given in pursuance of a resolution in that behalf of the directors of the company shall for all purposes be deemed to be sufficient and every such notice so given shall be taken as continuing and in force and to be acted upon unless and until the same is withdrawn, varied or cancelled by any notice subsequently given pursuant to any resolution of the company or of its directors.

(3) Every such notice so given to such secretary shall remain with and be kept by him on file in his office and shall at all convenient hours be open to inspection and examination by any person entitled to examine or inspect the assessment roll each year.

(4) False statements made in any such notice shall not relieve the company from rates, but any company fraudulently giving such notice or making false statements therein shall be

liable to a penalty not exceeding $100 and any person giving for a company such a statement fraudulently or wilfully inserting in any such notice a false statement shall be guilty of an offence and liable on summary conviction to the like penalty. C. O. c. 75, s. 128.

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VILLAGE AND TOWN DISTRICTS.

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92. In cases where separate school districts have been established whenever property is held by two or more persons as joint tenants or tenants in common, the holders of such property being Protestants and Roman Catholics, they shall be assessed in proportion to their interest in the property in the district to which they respectively are ratepayers. C. O. c. 75, s. 127.

93. A company may by notice in that behalf to be given to the secretary-treasurer of any municipality wherein a separate school district is either wholly or in part situated and to the secretary of the board of any public school district in which a separate school has been established and to the secretary of the board of such separate school district, require any part of the real property of which such company is either the owner and occupant or not being such owner is the tenant or occupant or in actual possession of and any part of the personal property if any of such company liable to assessment to be entered, rated and assessed for the purposes of said separate school, and the proper assessor shall thereupon enter said company as a separate school supporter in the assessment roll in respect of the property specially designated in that behalf in or by said notice and so much of the property as shall be so designated shall be assessed accordingly in the name of the company for the purposes of the separate school and not for public school purposes, but all other property of the company shall be separately entered and assessed in the name of the company as for public school purposes:

Provided always that the share or portion of the property of any company entered, rated or assessed in any municipality or in any school district for separate school purposes under the provisions of this section shall bear the same ratio and proportion to the whole property of the company assessable within the municipality or school district as the amount or proportion of the shares or stock of the company so far as the same are paid or partly paid up, held and possessed by persons who are Protestants or Roman Catholics, as the case may be, bears to the whole amount of such paid or partly paid-up shares or stock of the company.

(2) Any such notice given in pursuance of a resolution in that behalf of the directors of the company shall for all purposes be deemed to be sufficient and every such notice so given shall be taken as continuing and in force and to be acted upon unless and until the same is withdrawn, varied or cancelled by any notice subsequently given pursuant to any resolution of the company or of its directors.

(3) Every such notice so given to such secretary-treasurer shall remain with and be kept by him on file in his office and shall at all convenient hours be open to inspection and examination by any person entitled to examine or inspect the assessment roll and the assessor shall in each year before the completion and return of the assessment roll search for and examine all notices which may be on file in the clerk's office and shall thereupon in respect of said notices if any follow and conform thereto and to the provisions of this Ordinance in that behalf.

(4) False statements made in any such notice shall not relieve the company from rates. Any company fraudulently giving such notice or making false statements therein shall be liable to a penalty not exceeding $100. Any person giving for a company such a statement fraudulently or wilfully inserting in any such notice a false statement shall be guilty of an offence and liable on summary conviction to a like penalty. C. O. c. 75, s. 128.

MISCELLANEOUS.

94. In cases where separate school districts have been established where land is owned by a Protestant and occupied by a Roman Catholic or *vice versa*, such land shall be assessed to the owner. C. O. c. 75, s. 126.

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12. LETTERS-PATENT.

(*Passed under the Great Seal of the United Kingdom.*)

CONSTITUTING THE OFFICE OF GOVERNOR-GENERAL OF THE DOMINION OF CANADA.

Letters-Patent,
Dated 5th October, 1878.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, Empress of India;

To all to whom these Presents shall come, Greeting:

Whereas We did, by certain Letters-Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-second day of May, 1872, in the Thirty-fifth Year of Our Reign, constitute and appoint

Our Right Trusty and Right Well-beloved Cousin and Councillor, Frederick Temple, Earl of Dufferin, Knight of Our Most Illustrious Order of Saint Patrick, Knight Commander of Our Most Honorable Order of the Bath (now Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George), to be Our Governor-General in and over Our Dominion of Canada for and during Our will and pleasure:

And whereas by the 12th section of "The British North America Act, 1867," certain powers, authorities, and functions were declared to be vested in the Governor-General:

And whereas We are desirous of making effectual and permanent provision for the office of Governor-General in and over Our said Dominion of Canada, without making new Letters-Patent on each demise of the said Office:

Now know ye that We have revoked and determined, and by these presents do revoke and determine, the said recited Letters-Patent of the Twenty-second day of May, 1872, and every clause, article and thing therein contained:

And further know ye that We, of our special grace, certain knowledge, and mere motion, have thought fit to constitute, order, and declare, and do by these presents constitute, order, and declare that there shall be a Governor-General (hereinafter called Our said Governor-General) in and over Our Dominion of Canada (hereinafter called Our said Dominion), and that the person who shall fill the said Office of the Governor-General shall be from time to time appointed by Commission under our Sign-Manual and Signet. And we do hereby authorize and command Our said Governor-General to do and execute, in due manner, all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of "The British North America Act, 1867," and of these present Letters-Patent, and of such Commission as may be issued to him under Our Sign-Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign-Manual and Signet, or by Our Order in Our Privy Council, or by us through one of Our Principal Secretaries of State, and to such Laws as are or shall hereafter be in force in Our said Dominion.

II. And We do hereby authorize and empower Our said Governor-General to keep and use the Great Seal of Our said Dominion for sealing all things whatsoever that shall pass the said Great Seal.

III. And We do further authorize and empower Our said Governor-General to constitute and appoint, in Our name and

on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of Our said Dominion, as may be lawfully constituted or appointed by Us.

IV. And We do further authorize and empower Our said Governor-General, so far as we lawfully may, upon sufficient cause to him appearing, to remove from his office, or to suspend from the exercise of the same, any person exercising any office within Our said Dominion, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us in Our name or under Our authority.

V. And We do further authorize and empower Our said Governor-General to exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving the Parliament of Our said Dominion.

VI. And whereas by "The British North America Act, 1867," it is amongst other things enacted, that it shall be lawful for Us, if We think fit, to authorize the Governor-General of Our Dominion of Canada to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part or parts of Our said Dominion, and in that capacity to exercise, during the pleasure of Our said Governor-General, such of the powers, authorities, and functions of Our said Governor-General as he may deem it necessary or expedient to assign to such Deputy or Deputies, subject to any limitations or directions from time to time expressed or given by Us: Now We do hereby authorize and empower Our said Governor-General, subject to such limitations and directions as aforesaid, to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part or parts of Our said Dominion of Canada, and in that capacity to exercise, during his pleasure, such of his powers, functions, and authorities as he may deem it necessary or expedient to assign to him or them: Provided always, that the appointment of such a Deputy or Deputies shall not affect the exercise of any such power, authority or function by Our said Governor-General in person.

VII. And We do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence of Our said Governor-General out of Our said Dominion, all and every the powers and authorities herein granted to him shall, until our further pleasure is signified therein, be vested in such person as may be appointed by Us under our Sign-Manual and Signet to be Our Lieutenant-Governor of Our said Dominion; or if there shall be no such Lieutenant-Governor in Our said Dominion, then in such person or persons as may be appointed

by Us under our Sign-Manual and Signet to administer the Government of the same; and in case there shall be no person or persons within Our said Dominion so appointed by Us, then in the Senior Officer for the time being in command of our regular troops in our said Dominion: Provided that no such powers or authorities shall vest in such Lieutenant-Governor, or such other person or persons, until he or they shall have taken the oaths appointed to be taken by the Governor-General of Our said Dominion, and in the manner provided by the Instructions accompanying these Our Letters-Patent.

VIII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of Our said Dominion, to be obedient, aiding and assisting unto our said Governor-General, or, in the event of his death, incapacity, or absence, to such person or persons as may, from time to time, under the provisions of these, Our Letters-Patent, administer the Government of Our said Dominion.

IX. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter or amend these Our Letters-Patent as to Us or them shall seem meet.

X. And We do further direct and enjoin that these Our Letters-Patent shall be read and proclaimed at such place or places as Our said Governor-General shall think fit within Our said Dominion of Canada.

In Witness whereof We have caused these our Letters to be made Patent. Witness Ourselves at Westminster, the Fifth day of October, in the Forty-second Year of Our Reign.

By Warrant under the Queen's Sign-Manual.

C. ROMILLY.

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13. DRAFT OF INSTRUCTIONS.

Passed under the Royal Sign-Manual and Signet to the Governor-General of the Dominion of Canada.

Dated 5th October, 1878.

VICTORIA R.

Instructions to Our Governor-General in and over Our Dominion of Canada, or, in his absence, to Our Lieutenant-Governor or the Officer for the time being administering the Government of Our said Dominion.

Given at our Court at Balmoral, this Fifth day of October, 1878, in the Forty-second year of Our Reign.

Whereas by certain Letters-Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor-General (hereinafter called Our said Governor-General) in and over Our Dominion of Canada (hereinafter called Our said Dominion), and We have thereby authorized and commanded Our said Governor-General to do and execute in due manner all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the said Letters-Patent, and of such Commission as may be issued to him under Our Sign-Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign-Manual and Signet, or by Order in Our Privy Council, or by Us through One of Our Principal Secretaries of State, and to such Laws as are or shall hereafter be in force in Our said Dominion:

Now, therefore, We do, by these, Our Instructions, under Our Sign-Manual and Signet, declare Our pleasure to be that Our said Governor-General for the time being shall, with all due solemnity, cause Our Commission, under Our Sign-Manual and Signet, appointing Our said Governor-General for the time being, to be read and published in the presence of the Chief Justice for the time being, or other Judge of the Supreme Court of Our said Dominion, and of the members of the Privy Council in Our said Dominion:

And We do further declare Our pleasure to be that Our said Governor-General, and every other Officer appointed to administer the Government of Our said Dominion, shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of Our Reign, intituled: "An Act to Amend the Law relating to Promissory Oaths"; and likewise that he or they shall take the usual Oath for the due execution of the Office of Our Governor-General in and over Our said Dominion, and for the due and impartial administration of justice; which Oaths the said Chief Justice for the time being, of Our said Dominion, or, in his absence, or in the event of his being otherwise incapacitated, any Judge of the Supreme Court of Our said Dominion shall, and he is hereby required to tender and administer unto him or them.

II. And We do authorize and require Our said Governor-General from time to time, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every persons or person as he shall think fit, who shall hold any office or place of trust or profit in Our said Dominion, the

said Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any Laws or Statutes in that behalf made and provided.

III. And we do require Our said Governor-General to communicate forthwith to the Privy Council for Our said Dominion these Our Instructions, and likewise all such others from time to time as he shall find convenient for Our service to be imparted to them.

IV. Our said Governor-General is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such Laws; and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of Our said Dominion, which he is to require from the clerks, or other proper officers in that behalf, of the said Parliament.

V. And We do further authorize and empower Our said Governor-General, as he shall see occasion, in Our name and on Our behalf, when any crime has been committed for which the offender may be tried within Our said Dominion, to grant a pardon to any accomplice not being the actual perpetrator of such crime, who shall give such information as shall lead to the conviction of the principal offender; and further, to grant to any offender convicted of any crime in any Court, or before any Judge, Justice, or Magistrate, within Our said Dominion, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our said Governor-General may seem fit, and to remit any fines, penalties, or forfeitures, which may become due and payable to Us. Provided always, that Our said Governor-General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from Our said Dominion. And We do hereby direct and enjoin that Our said Governor-General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of the Privy Council for Our said Dominion, and in other cases the advice of one, at least, of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of Our said Dominion, Our said Governor-General shall

before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

VI. And whereas great prejudice may happen to Our service and to the security of Our said Dominion by the absence of Our said Governor-General, he shall not, upon any pretence whatever, quit Our said Dominion without having first obtained leave from Us for so doing under Our Sign-Manual and Signet, or through one of Our Principal Secretaries of State.

V. R.

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14. QUEBEC CONFERENCE RESOLUTIONS, 1864.

1. The best interests and present and future prosperity of British North America will be promoted by a federal union, under the Crown of Great Britain, provided such union can be effected on principles just to the several Provinces.

2. In the federation of the British North American Provinces, the system of Government best adapted under existing circumstances to protect the diversified interests in the several Provinces, and secure efficiency, harmony and permanency in the working of the union, would be a general Government, charged with matters of common interest to the whole country; and Local Governments for each of the Canadas, and for the Provinces of Nova Scotia, New Brunswick, and Prince Edward Island, charged with the control of local matters in their respective sections; provision being made for the admission into the union, on equitable terms, of Newfoundland, the North-West Territory, British Columbia, and Vancouver.

3. In framing a constitution for the general Government, the Conference, with a view to the perpetuation of our connection with the mother country, and to the promotion of the best interests of the people of these Provinces, desire to follow the model of the British constitution so far as our circumstances will permit.

4. The Executive authority or government shall be vested in the Sovereign of the United Kingdom of Great Britain and Ireland, and be administered according to the well-understood principles of the British constitution, by the Sovereign personally, or by the representative of the Sovereign duly authorized.

5. The Sovereign or Representative of the Sovereign shall be Commander in Chief of the land and naval militia forces.

6. There shall be a General Legislature or Parliament for the federated Provinces, composed of a Legislative Council and a House of Commons.

7. For the purpose of forming the Legislative Council, the federated Provinces shall be considered as consisting of three divisions: 1st, Upper Canada, 2nd, Lower Canada, 3rd, Nova Scotia, New Brunswick, and Prince Edward Island; each division with an equal representation in the Legislative Council.

8. Upper Canada shall be represented in the Legislative Council by 24 members, Lower Canada by 24 members, and the three Maritime Provinces by 24 members, of which Nova Scotia shall have 10, New Brunswick 10, and Prince Edward Island 4 members.

9. The Colony of Newfoundland shall be entitled to enter the proposed union, with a representation in the Legislative Council of 4 members.

10. The North-West Territory, British Columbia and Vancouver shall be admitted into the union on such terms and conditions as the Parliament of the federated Provinces shall deem equitable, and as shall receive the assent of Her Majesty; and, in the case of the Province of British Columbia or Vancouver, as shall be agreed to by the Legislature of such Province.

11. The members of the Legislative Council shall be appointed by the Crown under the great seal of the general government, and shall hold office during life; if any Legislative Councillor shall, for two consecutive sessions of Parliament, fail to give his attendance in the said Council, his seat shall thereby become vacant.

12. The members of the Legislative Council shall be British subjects by birth or naturalization, of the full age of thirty years, shall possess a continuous real property qualification of four thousand dollars over and above all incumbrances, and shall be and continue worth that sum over and above their debts and liabilities, but in the case of Newfoundland and Prince Edward Island the property may be either real or personal.

13. If any question shall arise as to the qualification of a Legislative Councillor, the same shall be determined by the Council.

14. The first selection of the members of the Legislative Council shall be made, except as regards Prince Edward Island, from the Legislative Councils of the various Provinces, so far as a sufficient number be found qualified and willing to serve; such members shall be appointed by the Crown at the recommendation of the general executive Government, upon the nomination of the respective local Governments, and in such nomination due regard shall be had to the claims of the members of the Legislative Council of the opposition in each Province, so that

all political parties may as nearly as possible be fairly represented.

15. The Speaker of the Legislative Council (unless otherwise provided by Parliament) shall be appointed by the Crown from among the members of the Legislative Council, and shall hold office during pleasure, and shall only be entitled to a casting vote on an equality of votes.

16. Each of the twenty-four Legislative Councillors representing Lower Canada in the Legislative Council of the general Legislature, shall be appointed to represent one of the twenty-four electoral divisions mentioned in Schedule A of chapter first of the Consolidated Statutes of Canada, and such Councillor shall reside or possess his qualification in the division he is appointed to represent.

17. The basis of representation in the House of Commons shall be population, as determined by the official census every ten years; and the number of members at first shall be 194, distributed as follows:—

Upper Canada	82
Lower Canada	65
Nova Scotia	19
New Brunswick	15
Newfoundland	8
Prince Edward Island	5

18. Until the official census of 1871 has been made up, there shall be no change in the number of representatives from the several sections.

19. Immediately after the completion of the census of 1871, and immediately after every decennial census thereafter, the representation from each section in the House of Commons shall be readjusted on the basis of population.

20. For the purpose of such re-adjustments, Lower Canada shall always be assigned sixty-five members, and each of the other sections shall at each re-adjustment receive, for the ten years then next succeeding, the number of members to which it will be entitled on the same ratio or representation to population as Lower Canada will enjoy according to the census last taken by having sixty-five members.

21. No reduction shall be made in the number of members returned by any section, unless its population shall have decreased, relatively to the population of the whole Union, to the extent of five per centum.

22. In computing at each decennial period the number of members to which each section is entitled, no fractional parts

shall be considered, unless when exceeding one-half the number entitling to a member, in which case a member shall be given for each such fractional part.

23. The Legislature of each Province shall divide such Province into the proper number of constituencies, and define the boundaries of each of them.

24. The local Legislature of each Province may, from time to time, alter the electoral districts for the purposes of representation in such local Legislature, and distribute the representatives to which the Province is entitled in such local Legislature, in any manner such Legislature may see fit.

25. The number of members may at any time be increased by the general Parliament,—regard being had to the proportionate rights then existing.

26. Until provisions are made by the General Parliament, all the laws which, at the date of the proclamation constituting the Union, are in force in the Provinces respectively, relating to the qualification and disqualification of any person to be elected, or to sit or vote as a member of the Assembly in the said Provinces respectively; and relating to the qualification or disqualification of voters and to the oaths to be taken by voters, and to returning officers and their powers and duties,—and relating to the proceedings at elections, and to the period during which such elections may be continued,—and relating to the trial of controverted elections, and the proceedings incident thereto,—and relating to the vacating of seats of members, and to the issuing and execution of new writs, in case of any seat being vacated otherwise than by a dissolution,—shall respectively apply to elections of members to serve in the House of Commons, for places situate in those Provinces respectively.

27. Every House of Commons shall continue for five years from the day of the return of the writs choosing the same, and no longer; subject, nevertheless, to be sooner prorogued or dissolved by the Governor.

28. There shall be a session of the general Parliament once, at least, in every year, so that a period of twelve calendar months shall not intervene between the last sitting of the general Parliament in one session, and the first sitting thereof in the next session.

29. The general Parliament shall have power to make laws for the peace, welfare, and good government of the federated provinces (saving the sovereignty of England), and especially laws respecting the following subjects:—

(1) The public debt and property.

(2) The regulation of trade and commerce.

(3) The imposition or regulation of duties of customs on imports and exports,—except on exports of timber, logs, masts, spars, deals and sawn lumber from New Brunswick, and of coal and other minerals from Nova Scotia.

(4) The imposition or regulation of excise duties.

(5) The raising of money by all or any other modes or systems of taxation.

(6) The borrowing of money on the public credit.

(7) Postal service.

(8) Lines of steam or other ships, railways, canals and other works, connecting any two or more of the Provinces together or extending beyond the limits of any Province.

(9) Lines of steamships between the federated provinces and other countries.

(10) Telegraphic communication and the incorporation of telegraphic companies.

(11) All such works as shall, although lying wholly within any Province, be specially declared by the Acts authorizing them to be for the general advantage.

(12) The census.

(13) Militia—military and naval service and defence.

(14) Beacons, buoys and light houses.

(15) Navigation and shipping.

(16) Quarantine.

(17) Sea-coast and island fisheries.

(18) Ferries between any province and a foreign country, or between any two provinces.

(19) Currency and coinage.

(20) Banking—incorporation of banks, and the issue of paper money.

(21) Saving banks.

(22) Weights and measures.

(23) Bills of exchange and promissory notes.

(24) Interest.

(25) Legal tender.

(26) Bankruptcy and insolvency.

(27) Patents of invention and discovery.

(28) Copyrights.

(29) Indians and lands reserved for the Indians.

(30) Naturalization and aliens.

(31) Marriage and divorce.

(32) The criminal law, excepting the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.

(33) Rendering uniform all or any of the laws relative to property and civil rights in Upper Canada, Nova Scotia, New Brunswick, Newfoundland, and Prince Edward Island, and rendering uniform the procedure of all or any of the courts in these Provinces; but any statute for this purpose shall have no force or authority in any Province until sanctioned by the Legislature thereof.

(34) The establishment of a general Court of Appeal for the federated Provinces.

(35) Immigration.

(36) Agriculture.

(37) And generally respecting all matters of a general character, not specially and exclusively reserved for the local Governments and Legislatures.

30. The general Government and Parliament shall have all powers necessary or proper for performing the obligations of the federated Provinces, as part of the British Empire, to foreign countries arising under treaties between Great Britain and such countries.

31. The general Parliament may also, from time to time, establish additional courts, and the general Government may appoint judges and officers thereof, when the same shall appear necessary or for the public advantage, in order to the due execution of the laws of Parliament.

32. All courts, judges and officers of the several Provinces shall aid, assist and obey the general Government in the exercise of its rights and powers, and for such purposes shall be held to be courts, judges and officers of the general Government.

33. The general Government shall appoint and pay the judges of the Superior Courts in each Province, and of the County Courts in Upper Canada, and Parliament shall fix their salaries.

34. Until the consolidation of the laws of Upper Canada, New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island, the judges of these Provinces appointed by the general Government shall be selected from their respective bars.

35. The judges of the courts of Lower Canada shall be selected from the bar of Lower Canada.

36. The judges of the Court of Admiralty now receiving salaries shall be paid by the general Government.

37. The judges of the Superior Courts shall hold their offices during good behaviour, and shall be removable only on the address of both Houses of Parliament.

LOCAL GOVERNMENT.

38. For each of the Provinces there shall be an executive officer, styled the Lieutenant-Governor, who shall be appointed by the Governor-General in Council, under the Great Seal of the federated Provinces, during pleasure; such pleasure not to be exercised before the expiration of the first five years, except for cause; such cause to be communicated in writing to the Lieutenant-Governor immediately after the exercise of the pleasure as aforesaid, and also by message to both Houses of Parliament, within the first week of the first session afterwards.

39. The Lieutenant-Governor of each Province shall be paid by the general Government.

40. In undertaking to pay the salaries of the Lieutenant-Governors, the Conference does not desire to prejudice the claim of Prince Edward Island upon the Imperial Government for the amount now paid for the salary of the Lieutenant-Governor thereof.

41. The local Government and Legislature of each Province shall be constructed in such manner as the existing Legislature of such Province shall provide.

42. The local Legislatures shall have power to alter or amend their constitution from time to time.

43. The local Legislatures shall have power to make laws respecting the following subjects:—

(1) Direct taxation, and in New Brunswick the imposition of duties on the export of timber, logs, masts, spars, deals and sawn lumber; and in Nova Scotia, on coals and other minerals.

(2) Borrowing money on the credit of the Province.

(3) The establishment and tenure of local offices, and the appointment and payment of local officers.

(4) Agriculture.

(5) Immigration.

(6) Education; saving the rights and privileges which the Protestant or Catholic minority in both Canadas may possess as to their denominational schools, at the time when the union goes into operation.

(7) The sale and management of public lands excepting lands belonging to the general Government.

(8) Sea-coast and inland fisheries.

(9) The establishment, maintenance and management of penitentiaries, and of public and reformatory prisons.

(10) The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions.

(11) Municipal institutions.

(12) Shop, saloon, tavern, auctioneer and other licenses.

(13) Local works.

(14) The incorporation of private or local companies, except such as relate to matters assigned to the general Parliament.

(15) Property and civil rights, excepting those portions thereof assigned to the general Parliament.

(16) Inflicting punishment by fine, penalties, imprisonment or otherwise, for the breach of laws passed in relation to any subject within their jurisdiction.

(17) The administration of justice, including the constitution, maintenance and organization of the courts —both of civil and criminal jurisdiction, and including also the procedure in civil matters.

(18) And generally all matters of a private or local nature, not assigned to the general Parliament.

44. The power of respiting, reprieving, and pardoning prisoners convicted of crimes, and of commuting and remitting of sentences in whole or in part which belongs of right to the Crown, shall be administered by the Lieutenant-Governor of each Province in Council, subject to any instructions he may, from time to time, receive from the general Government, and subject to any provisions that may be made in this behalf by the general Parliament.

MISCELLANEOUS.

45. In regard to all subjects over which jurisdiction belongs to both the general and local Legislatures, the laws of the general Parliament shall control and supersede those made by the local Legislature, and the latter shall be void so far as they are repugnant to or inconsistent with, the former.

46. Both the English and French languages may be employed in the general Parliament and in its proceedings, and in the local Legislature of Lower Canada, and also in the Federal courts, and in the courts of Lower Canada.

47. No lands or property belonging to the general or local Governments shall be liable to taxation.

48. All bills for appropriating any part of the public revenue, or for imposing any new tax or impost, shall originate in the House of Commons or House of Assembly, as the case may be.

49. The House of Commons or House of Assembly shall not originate 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, not first recommended by message of the Governor-General or the Lieutenant-Governor, as the case may be, during the session in which such vote, resolution, address or bill is passed.

50. Any bill of the general Parliament may be reserved in the usual manner for Her Majesty's assent, and any bill of the local Legislatures may, in like manner, be reserved for the consideration of the Governor-General.

51. Any bill passed by the general Parliament shall be subject to disallowance by Her Majesty within two years, as in the case of bills passed by the Legislatures of the said Provinces hitherto; and, in like manner, any bill passed by a local Legislature shall be subject to disallowance by the Governor-General within one year after the passing thereof.

52. The seat of Government of the federated Provinces shall be Ottawa, subject to the Royal prerogative.

53. Subject to any future action of the respective local Governments, the seat of the local Government in Upper Canada shall be Toronto; of Lower Canada, Quebec; and the seats of the local Governments in the other Provinces shall be as at present.

PROPERTY AND LIABILITIES.

54. All stocks, cash, bankers' balances and securities for money belonging to each Province at the time of the Union, except as hereinafter mentioned, shall belong to the general Government.

55. The following public works and property of each Province shall belong to the general Government, to wit:—

(1) Canals.
(2) Public harbors.
(3) Light houses and piers.
(4) Steamboats, dredges and public vessels.
(5) River and lake improvements.
(6) Railway and railway stocks, mortgages and other debts due by railway companies.
(7) Military roads.
(8) Custom houses, post offices and other public buildings, except such as may be set aside by the general Government for the use of the local Legislatures and Governments.

(9) Property transferred by the Imperial Government and known as ordnance property.

(10) Armories, drill sheds, military clothing and munitions of war; and

(11) Lands set apart for public purposes.

56. All lands, mines, minerals and royalties vested in Her Majesty in the Provinces of Upper Canada, Lower Canada, Nova Scotia, New Brunswick and Prince Edward Island, for the use of such Provinces, shall belong to the local Government of the territory in which the same are so situate; subject to any trusts that may exist in respect to any of such lands or to any interest of other persons in respect of the same.

57. All sums due from purchasers or lessees of such lands, mines or minerals at the time of the Union, shall also belong to the local Governments.

58. All assets connected with such portions of the public debt of any Province as are assumed by the local Governments shall also belong to those Governments respectively.

59. The several Provinces shall retain all other public property therein, subject to the right of the general Government to assume any lands or public property required for fortifications or the defence of the country.

60. The general Government shall assume all the debts and liabilities of each Province.

61. The debt of Canada, not specially assumed by Upper and Lower Canada respectively, shall not exceed, at the time of the Union, $62,500,000; Nova Scotia shall enter the Union with a debt not exceeding $8,000,000; and New Brunswick with a debt not exceeding $7,000,000.

62. In case Nova Scotia or New Brunswick do not incur liabilities beyond those for which their Governments are now bound, and which shall make their debts at the date of union less than $8,000,000 and $7,000,000 respectively, they shall be entitled to interest at five per cent. on the amount not so incurred, in like manner as is hereinafter provided for Newfoundland and Prince Edward Island; the foregoing resolution being in no respect intended to limit the powers given to the respective Governments of those Provinces, by Legislative authority, but only to limit the maximum amount of charge to be assumed by the general Government; provided always, that the powers so conferred by the respective Legislatures shall be exercised within five years from this date, or the same shall then lapse.

63. Newfoundland and Prince Edward Island, not having incurred debts equal to those of the other Provinces, shall be entitled to receive, by half-yearly payments, in advance, from the

general Government, the interest at five per cent. on the difference between the actual amount of their respective debts at the time of the Union, and the average amount of indebtedness per head of the population of Canada, Nova Scotia and New Brunswick.

64. In consideration of the transfer to the general Parliament of the powers of taxation, an annual grant in aid of each Province shall be made, equal to eighty cents per head of the population, as established by the census of 1861; the population of Newfoundland being estimated at 130,000. Such aid shall be in full settlement of all future demands upon the general Government for local purposes, and shall be paid half-yearly in advance to each Province.

65. The position of New Brunswick being such as to entail large immediate charges upon her local revenues, it is agreed that for the period of ten years, from the time when the union takes effect, an additional allowance of $63,000 per annum shall be made to that Province. But that so long as the liability of that Province remains under $7,000,000, a deduction equal to the interest of such deficiency shall be made from the $63,000.

66. In consideration of the surrender to the general Government, by Newfoundland, of all its rights in mines and minerals, and of all the ungranted and unoccupied lands of the Crown, it is agreed that the sum of $150,000 shall each year be paid to that Province, by semi-annual payments; provided that that colony shall retain the right of opening, constructing and controlling roads and bridges through any of the said lands, subject to any laws which the general Parliament may pass in respect of the same.

67. All engagements that may, before the union, be entered into with the Imperial Government for the defence of the country, shall be assumed by the general Government.

68. The general Government shall secure, without delay, the completion of the Intercolonial Railway from Riviere du Loup, through New Brunswick, to Truro in Nova Scotia.

69. The communications with the North-Western Territory and the improvements required for the development of the trade of the great west with the seaboard, are regarded by this conference as subjects of the highest importance to the federated Provinces, and shall be prosecuted at the earliest possible period that the state of the finances will permit.

70. The sanction of the Imperial and local Parliaments shall be sought for the union of the Provinces, on the principles adopted by the Conference.

71. That Her Majesty the Queen be solicited to determine the rank and name of the federated Provinces.

72. The proceedings of the Conference shall be authenticated by the signatures of the delegates, and submitted by each delegation to its own Government; and the Chairman is authorized to submit a copy to the Governor-General for transmission to the Secretary of State for the Colonies.

B. IMPORTANT IMPERIAL STATUTES EXTENDING TO CANADA.

1. COLONIAL LAWS VALIDITY ACT, 1865.

28-29 VIC., CAP. 63, (IMP.).

An Act to remove Doubts as to the Validity of Colonial Laws.

[*June 29th, 1865.*]

Whereas doubts have been entertained respecting the validity of divers laws enacted, or purporting to be enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the powers of such Legislatures; and it is expedient that such doubts should be removed:

Be it hereby enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. The term "colony" shall in this Act include all of Her Majesty's Possessions abroad, in which there shall exist a legislature as hereinafter defined, except the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty, under or by virtue of any Act of Parliament for the government of India;

The terms "Legislature" and "Colonial Legislature" shall severally signify the authority (other than the Imperial Parliament of Her Majesty in Council), competent to make laws for any colony;

The term "Representative Legislature" shall signify any Colonial Legislature which shall comprise a legislative body of which one-half are elected by inhabitants of the colony;

The term "Colonial Law" shall include laws made for any colony, either by such Legislature as aforesaid or by Her Majesty in Council;

An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is

made applicable to such colony by the express words or necessary intendment of any Act of Parliament;

The term "Governor" shall mean the officer lawfully administering the Government of any colony;

The term "Letters Patent" shall mean letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland.

2. Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3. No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation, as aforesaid.

4. No colonial law, passed with the concurrence of or assented to by the Governor of any colony, or to be hereafter so passed or assented to, shall be, or be deemed to have been, void or inoperative by reason only of any instructions with reference to such law, or the subject thereof, which may have been given to such Governor, by or on behalf of Her Majesty, by any instrument authorizing such Governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent, or last-mentioned instrument.

5. Every colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and re-constitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative Legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required, by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the colony.

6. The certificate of the clerk or other proper officer of a legislative body in any colony to the effect that the document

to which it is attached is a true copy of any colonial law assented to by the Governor of such colony, or of any bill reserved for the signification of Her Majesty's pleasure by the said Governor, shall be *prima facie* evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the Governor; and any proclamation, purporting to be published by authority of the Governor, in any newspaper in the colony to which such law or bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved bill as aforesaid, shall be *prima facie* evidence of such disallowance or assent.

And whereas doubts are entertained respecting the validity of certain Acts enacted, or reputed to be enacted, by the Legislature of South Australia: Be it further enacted as follows:

7. All laws or reputed laws, enacted or purporting to have been enacted by the said Legislature, or by persons or bodies of persons for the time being acting as such Legislature, which have received the assent of Her Majesty in Council, or which have received the assent of the Governor of the said Colony in the name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the date of such assent for all purposes whatever; provided that nothing herein contained shall be deemed to give effect to any law or reputed law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful disallowance or repeal of any law.

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2. COLONIAL COURTS (ADMIRALTY JURISDICTION), 1849. 12-13 Vict. cap. 96 (Imp.).

An Act to provide for the Prosecution and Trial in Her Majesty's Colonies of Offences committed within the Jurisdiction of the Admiralty.

[*1st August, 1849.*]

"Whereas by an Act passed in the Eleventh Year of the Reign of King William the Third, intitutled *An Act for the more effectual Suppression of Piracy*, it is enacted, that all Piracies Felonies, and Robberies committed on the Sea, or in any Haven, River, Creek, or Place where the Admiral or Admirals have Power, Authority, or Jurisdiction, may be examined, inquired of, tried, heard, and determined, and adjudged, in any Place at Sea or upon the Land in any of His Majesty's Islands, Plantations, Colonies, Dominions, Forts, or

Factories, to be appointed for that Purpose by the King's Commission, in the Manner therein directed, and according to the Civil Law and the Methods and Rules of the Admiralty: And whereas by an Act passed in the Forty-sixth Year of the Reign of King *George* the Third, intituled *An Act for the speedy Trial of Offences committed in distant Parts upon the Sea*, it is enacted, that all Treasons, Piracies, Felonies, Robberies, Murders, Conspiracies, and other Offences, of what Nature of Kind soever, committed upon the Sea, or in any Haven, River, Creek, or Place where the Admiral or Admirals have Power, Authority, or Jurisdiction, may be inquired of, tried, heard, determined, and adjudged, according to the common Course of the Laws of this Realm used for Offences committed upon the Land within this Realm, and not otherwise, in any of His Majesty's Islands, Plantations, Colonies, Dominions, Forts, or Factories under and by virtue of the King's Commission or Commissions under the Great Seal of *Great Britain*, to be directed to Commissioners in the Manner and with the Powers and Authorities therein provided: And whereas it is expedient to make further and better Provision for the Apprehension, Custody, and Trial in Her Majesty's Islands, Plantations, Colonies, Dominions, Forts, and Factories of Persons charged with the Commission of such Offences on the Sea, or in any such Haven, River, Creek, or Place as aforesaid:" Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That if any Person within any Colony shall be charged with the Commission of any Treason, Piracy, Felony, Robbery, Murder, Conspiracy, or other Offence, of what Nature or Kind soever, committed upon the Sea, or in any Haven, River, Creek, or Place where the Admiral or Admirals have Power, Authority, or Jurisdiction, or if any Person charged with the Commission of any such Offence upon the Sea, or in any such Haven, River, Creek, or Place, shall be brought for Trial to any Colony, then and in every such Case all Magistrates, Justices of the Peace, public Prosecutors, Juries, Judges, Courts, public Officers, and other Persons in such Colony shall have and exercise the same Jurisdiction and Authorities for inquiring of, trying, hearing, determining, and adjudging such Offences, and they are hereby respectively authorized, empowered, and required to institute and carry on all such Proceedings for the bringing of such Person so charged as aforesaid to Trial, and for and auxiliary to and consequent upon the Trial of any such Person for any such Offence wherewith he may be charged as aforesaid, as by the Law of such Colony would and ought to have been had and

exercised or instituted and carried on by them respectively if such Offence had been committed, and such Person had been charged with having committed the same, upon any Waters situate within the Limits of any such Colony, and within the Limits of the local Jurisdiction of the Courts of Criminal Justice of such Colony.

II. Provided always, and be it enacted, That if any Person shall be convicted before any such Court of any such Offence, such Person so convicted shall be subject and liable to and shall suffer all such and the same Pains, Penalties, and Forfeitures as by any Law or Laws now in force Persons convicted of the same respectively would be subject and liable to in case such Offence had been committed, and were inquired of, tried, heard, determined, and adjudged, in *England*, any Law, Statute, or Usage to the contrary notwithstanding.

III. And be it enacted, That where any Person shall die in any Colony of any Stroke, Poisoning, or Hurt, such Person having been feloniously stricken, poisoned, or hurt upon the Sea, or in any Haven, River, Creek, or Place where the Admiral or Admirals have Power, Authority, or Jurisdiction, or at any Place out of such Colony, every Offence committed in respect of any such Case, whether the same shall amount to the Offence of Murder or of Manslaughter, or of being Accessory before the Fact to Murder, or after the Fact to Murder or Manslaughter, may be dealt with, inquired of, tried, determined, and punished in such Colony in the same Manner in all respects as if such Offence had been wholly committed in that Colony; and that if any Person in any Colony shall be charged with any such Offence as aforesaid in respect of the Death of any Person who having been feloniously stricken, poisoned, or otherwise hurt, shall have died of such Stroke, Poisoning, or Hurt upon the Sea, or in any Haven, River, Creek, or Place where the Admiral or Admirals have Power, Authority, or Jurisdiction, such Offence shall be held for the Purpose of this Act to have been wholly committed upon the Sea.

IV. Provided also, and be it enacted, That nothing in this Act contained shall in any way affect or abridge the Jurisdiction of the Supreme Courts of *New South Wales and Van Diemen's Land*, as established by an Act passed in the Ninth Year of the Reign of King George the Fourth, intituled *An Act to provide for the Administration of Justice in* New South Wales *and* Van Diemen's Land, *and for the more effectual Government thereof, and for other Purposes relating thereto.*

V. And be it enacted, That for the Purposes of this Act the Word "Colony" shall mean any Island, Plantation, Colony,

Dominion, Fort, or Factory of Her Majesty, except any Island within the United Kingdom, and the Islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, and *Sark*, and the Islands adjacent thereto respectively, and except also all such Parts and Places as are under the Government of the *East India* Company; and the Word "Governor" shall mean the Officer for the Time being administering the Government of any Colony.

VI. And be it enacted, That this Act may be amended or repealed by any Act to be passed during this present Session of Parliament.

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3. TERRITORIAL WATERS JURISDICTION ACT, 1878.

41-42 Vict. cap. 73 (Imp.).

Abstract of the Enactments.

1. Short title.
2. Amendment of the law as to the jurisdiction of the Admiral.
3. Restriction on institution of proceedings for punishment of offence.
4. Provisions as to procedure.
5. Saving as to jurisdiction.
6. Saving as to piracy.
7. Definitions. "Jurisdiction of the Admiral:" "United Kingdom:" "Territorial waters of Her Majesty's dominions:" "Governor:" "Offence:" "Ship:" "Foreign ship."

An Act to regulate the Law relating to the trial of offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions.

[*16th August, 1878.*]

Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions:

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Territorial Waters Jurisdiction Act, 1878.

2. An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

3. Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.

4. On the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or certificate of the Secretary of State or Governor as is required by this Act has been given, and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of Her Majesty's Principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of Her Majesty's dominions, and containing such consent and certificate, shall be sufficient evidence for all the purposes of this Act of the consent and certificate required by this Act.

Proceedings before a justice of the peace or other magistrate previous to the committal of an offender for trial or to the determination of the justice or magistrate that the offender is to be put upon his trial shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this Act.

5. Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice

any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

6. This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto; and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.

7. In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings hereinafter assigned to them; that is to say:

"The jurisdiction of the Admiral," as used in this Act, includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament; and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom, or any other part of Her Majesty's dominions, shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom, or other part of Her Majesty's dominions, to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate, or officer:

"United Kingdom," includes the Isle of Man, the Channel Islands, and other adjacent islands:

"The territorial waters of Her Majesty's dominions," in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions:

"Governor," as respects India, means the Governor-General or the Governor of any presidency; and where a British possession consists of several constituent colonies, means the Governor-General of the whole possession or the Governor of any of the constituent colonies; and as respects any other British possession, means the officer for the time being administering the government of such possession; also any person acting for or

in the capacity of Governor shall be included under the term "Governor:"

"Offence," as used in this Act, means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force:

"Ship" includes every description of ship, boat, or other floating craft:

"Foreign ship" means any ship which is not a British ship.

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4. COLONIAL COURTS OF ADMIRALTY ACT, 1890.

53-54 Vict. cap. 27 (Imp.).

An Act to amend the Law respecting the exercise of Admiralty Jurisdiction in Her Majesty's Dominions and elsewhere out of the United Kingdom.

[*25th July, 1890.*]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Colonial Courts of Admiralty Act, 1890.

2.—(1) Every court of law in a British possession, which is for the time being declared in pursuance of this Act to be a court of Admiralty, or which, if no such declaration is in force in the possession, has therein original unlimited civil jurisdiction, shall be a court of Admiralty, with the jurisdiction in this Act mentioned, and may, for the purpose of that jurisdiction, exercise all the powers which it possesses for the purpose of its other civil jurisdiction; and such court, in reference to the jurisdiction conferred by this Act, is in this Act referred to as a Colonial Court of Admiralty. Where in a British possession the Governor is the sole judical authority, the expression "court of law" for the purposes of this section includes such Governor.

(2) The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations.

(3) Subject to the provisions of this Act any enactment referring to a Vice-Admiralty Court, which is contained in an Act of the Imperial Parliament or in a Colonial law, shall apply to a Colonial Court of Admiralty, and be read as if the expression "Colonial Court of Admiralty' were therein substituted for "Vice-Admiralty Court" or for other expressions respectively referring to such Vice-Admiralty Courts or the judge thereof; and the Colonial Court of Admiralty shall have jurisdiction accordingly.

Provided as follows:—

(*a*) Any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales; and—

(*b*) A Colonial Court of Admiralty shall have, under the Naval Prize Act, 1864, and under the Slave Trade Act, 1873, and any enactment relating to prize or the slave trade, the jurisdiction thereby conferred on a Vice-Admiralty Court and not the jurisdiction thereby conferred exclusively on the High Court of Admiralty or the High Court of Justice; but, unless for the time being duly authorized, shall not, by virtue of this Act, exercise any jurisdiction under the Naval Prize Act, 1864, or otherwise in relation to prize; and—

(*c*) A Colonial Court of Admiralty shall not have jurisdiction under this Act to try or punish a person for an offence which, according to the law of England, is punishable on indictment; and—

(*d*) A Colonial Court of Admiralty shall not have any greater jurisdiction in relation to the laws and regulations relating to Her Majesty's Navy at sea, or under any Act providing for the discipline of Her Majesty's Navy, than may be, from time to time, conferred on such court by Order in Council.

(4) Where a Court in a British possession exercises in respect of matters arising outside the body of a county or other like part of a British possession any jurisdiction exercisable under this Act, that jurisdiction shall be deemed to be exercised under this Act and not otherwise.

3. The legislature of a British possession may, by any Colonial law,—

(*a*) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial

Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit territorially or otherwise, the extent of such jurisdiction; and—

(*b*) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction, under such regulations and with such appeal (if any), as may seem fit:

Provided that any such Colonial law shall not confer any jurisdiction which is not, by this Act, conferred upon a Colonial Court of Admiralty.

4. Every Colonial law, which is made in pursuance of this Act, or affects the jurisdiction of or practice or procedure in any court of such possession in respect of the jurisdiction conferred by this Act, or alters any such Colonial law as above in this section mentioned, which has been previously passed, shall, unless previously approved by Her Majesty through a Secretary of State, either be reserved for the signification of Her Majesty's pleasure thereon, or contain a suspending clause providing that such law shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

5. Subject to rules of court under this Act, judgments of a court in a British possession given or made in the exercise of the jurisdiction conferred on it by this Act, shall be subject to the like local appeal, if any, as judgments of the court in the exercise of its ordinary civil jurisdiction, and the court having cognisance of such appeal shall, for the purpose thereof, possess all the jurisdiction by this Act conferred upon a Colonial Court of Admiralty.

6.—(1) The appeal from a judgment of any court in a British possession in the exercise of the jurisdiction conferred by this Act, either where there is as of right no local appeal or after a decision on local appeal, lies to Her Majesty the Queen in Council.

(2) Save as may be otherwise specially allowed in a particular case by Her Majesty the Queen in Council, an appeal under this section shall not be allowed—

(*a*) from any judgment not having the effect of a definitive judgment unless the court appealed from has given leave for such appeal, nor—

(*b*) from any judgment unless the petition of appeal has been lodged within the time prescribed by rules, or if no time is prescribed within six months from the date of the judgment appealed against, or if leave to appeal has been given then from the date of such leave.

(3) For the purpose of appeals under this Act, Her Majesty the Queen in Council and the Judicial Committee of the Privy Council shall, subject to rules under this section, have all such powers for making and enforcing judgments, whether interlocutory or final, for punishing contempts, for requiring the payment of money into court, or for any other purpose, as may be necessary, or as were possessed by the High Court of Delegates before the passing of the Act transferring the powers of such court to Her Majesty in Council, or as are, for the time being, possessed by the High Court in England or by the court appealed from in relation to the like matters as those forming the subject of appeals under this Act.

(4) All Orders of the Queen in Council or the Judicial Committee of the Privy Council for the purposes aforesaid or otherwise in relation to appeals under this Act shall have full effect throughout Her Majesty's dominions, and in all places where Her Majesty has jurisdiction.

(5) This section shall be in addition to and not in derogation of the authority of Her Majesty in Council or the Judicial Committee of the Privy Council arising otherwise than under this Act, and all enactments relating to appeals to Her Majesty in Council or to the powers of Her Majesty in Council or the Judicial Committee of the Privy Council in relation to those appeals, whether for making rules and orders or otherwise, shall extend, save as otherwise directed by Her Majesty in Council, to appeals to Her Majesty in Council under this Act.

7.—(1) Rules of court for regulating the procedure and practice (including fees and costs) in a court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees and costs in the said court in the exercise of its ordinary civil jurisdiction respectively are made:

Provided that the rules under this section shall not, save as provided by this Act, extend to matters relating to the slave trade, and shall not (save as provided by this section) come into operation until they have been approved by Her Majesty in Council, but on coming into operation shall have full effect as if enacted in this Act; and any enactment inconsistent therewith shall, so far as it is so inconsistent, be repealed.

(2) It shall be lawful for Her Majesty in Council, in approving rules made under this section, to declare that the rules so made with respect to any matters which appear to Her Majesty

to be matters of detail or of local concern may be revoked, varied or added to, without the approval required by this section.

(3) Such rules may provide for the exercise of any jurisdiction conferred by this Act by the full court, or by any judge or judges thereof, and subject to any rules, where the ordinary civil jurisdiction of the court can, in any case, be exercised by a single judge, any jurisdiction conferred by this Act may, in the like case, be exercised by a single judge.

8.—(1) Subject to the provisions of this section nothing in this Act shall alter the application of any droits of Admiralty or droits of or forfeitures to the Crown in a British possession; and such droits and forfeitures, when condemned by a court of a British possession in the exercise of the jurisdiction conferred by this Act, shall, save as is otherwise provided by any other Act, be notified, accounted for and dealt with in such manner as the Treasury from time to time direct, and the officers of every Colonial Court of Admiralty and of every other court in a British possession exercising Admiralty jurisdiction shall obey such directions in respect of the said droits and forfeitures as may be, from time to time, given by the Treasury.

(2) It shall be lawful for Her Majesty the Queen in Council by Order to direct that, subject to any conditions, exceptions, reservations and regulations contained in the Order, the said droits and forfeitures condemned by a court in a British possession shall form part of the revenues of that possession, either for ever or for such limited term or subject to such revocation as may be specified in the Order.

(3) If and so long as any of such droits or forfeitures by virtue of this or any other Act form part of the revenues of the said possession, the same shall, subject to the provisions of any law for the time being applicable thereto, be notified, accounted for and dealt with in manner directed by the Government of the possession, and the Treasury shall not have any power in relation thereto.

9.—(1) It shall be lawful for Her Majesty, by commission, under the Great Seal, to empower the Admiralty to establish in a British possession any Vice-Admiralty Court or Courts.

(2) Upon the establishment of a Vice-Admiralty Court in a British possession, the Admiralty, by writing under their hands and the seal of the office of Admiralty, in such form as the Admiralty may direct, may appoint a judge, registrar, marshal and other officers of the court, and may cancel any such appointment; and in addition to any other jurisdiction of

such court, may (subject to the limits imposed by this Act or the said commission from Her Majesty) vest in such court the whole or any part of the jurisdiction by or by virtue of this Act conferred upon any courts of that British possession; and may vary or revoke such vesting, and while such vesting is in force the power of such last-mentioned courts to exercise the jurisdiction so vested shall be suspended.

Provided that—

(*a*) nothing in this section shall authorize a Vice-Admiralty Court so established in India or in any British possession having a representative legislature, to exercise any jurisdiction except for some purpose relating to prize, to Her Majesty's Navy, to the slave trade, to the matters dealt with by the Foreign Enlistment Act, 1870, or the Pacific Islanders Protection Acts, 1872 and 1875, or to matters in which questions arise relating to treaties or conventions with foreign countries, or to international law; and—

(*b*) in the event of a vacancy in the office of judge, registrar, marshal or other officer of any Vice-Admiralty Court in a British possession, the Governor of that possession may appoint a fit person to fill the vacancy until an appointment to the office is made by the Admiralty.

(3) The provisions of this Act with respect to appeals to Her Majesty in Council from courts in British possessions in the exercise of the jurisdiction conferred by this Act, shall apply to appeals from Vice-Admiralty Courts, but the rules and orders made in relation to appeals from Vice-Admiralty Courts may differ from the rules made in relation to appeals from the said courts in British possessions.

(4) If Her Majesty at any time by commission under the Great Seal so directs, the Admiralty shall, by writing under their hands and the seal of the office of Admiralty, abolish a Vice-Admiralty Court established in any British possession under this section, and upon such abolition the jurisdiction of any Colonial Court of Admiralty in that possession which was previously suspended shall be revived.

10. Nothing in this Act shall affect any power of appointing a vice-admiral in and for any British possession or any place therein, and whenever there is not a formally appointed vice-admiral in a British possession or any place therein, the Governor of the possession shall be *ex-officio* vice-admiral thereof.

11.—(1) The provisions of this Act with respect to Colonial Courts of Admiralty shall not apply to the Channel Islands.

(2) It shall be lawful for the Queen in Council by Order to declare, with respect to any British possession which has not a representative legislature, that the jurisdiction conferred by this Act on Colonial Courts of Admiralty shall not be vested in any court of such possession, or shall be vested only to the partial or limited extent specified in the Order.

12. It shall be lawful for Her Majesty the Queen in Council by Order to direct that this Act shall, subject to the conditions, exceptions and qualifications (if any) contained in the Order, apply to any Court established by Her Majesty for the exercise of jurisdiction in any place out of Her Majesty's dominions which is named in the Order as if that Court were a Colonial Court of Admiralty, and to provide for carrying into effect such application.

13.—(1) It shall be lawful for Her Majesty the Queen in Council by Order to make rules as to the practice and procedure (including fees and costs) to be observed in and the returns to be made from Colonial Courts of Admiralty and Vice-Admiralty Courts in the exercise of their jurisdiction in matters relating to the slave trade, and in and from East African Courts as defined by the Slave Trade (East African Courts) Acts, 1873 and 1879.

(2) Except when inconsistent with such Order in Council, the rules of court for the time being in force in a Colonial Court of Admiralty or Vice-Admiralty Court shall, so far as applicable, extend to proceedings in such court in matters relating to the slave trade.

(3) The provisions of this Act with respect to appeals to Her Majesty in Council, from courts in British possessions in the exercise of the jurisdiction conferred by this Act, shall apply, with the necessary modifications, to appeals from judgments of any East African court made or purporting to be made in exercise of the jurisdiction under the Slave Trade (East African Courts) Acts, 1873 and 1879.

14. It shall be lawful for Her Majesty in Council from time to time to make Orders for the purposes authorized by this Act, and to revoke and vary such Orders; and every such Order while in operation shall have effect as if it were part of this Act.

15. In the construction of this Act, unless the context otherwise requires,—

The expression "representative legislature" means, in relation to a British possession, a legislature comprising a legislative body of which at least one-half are elected by inhabitants of the British possession.

The expression "unlimited civil jurisdiction" means civil jurisdiction unlimited as to the value of the subject-matter at issue, or as to the amount that may be claimed or recovered.

The expression "judgment" includes a decree, order, and sentence.

The expression "appeal" means any appeal, rehearing, or review; and the expression "local appeal" means an appeal to any court inferior to Her Majesty in Council.

The expression "Colonial law" means any Act, ordinance or other law having the force of legislative enactment in a British possession and made by any authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for such possession.

16.—(1) This Act shall, save as otherwise in this Act provided, come into force in every British possession on the first day of July, one thousand eight hundred and ninety-one.

Provided that—

(*a*) This Act shall not come into force in any of the British possessions named in the First Schedule to this Act until Her Majesty so directs by Order in Council, and until the day named in that behalf in such Order; and—

(*b*) If before any day above mentioned rules of court for the Colonial Court of Admiralty in any British possession have been approved by Her Majesty in Council, this Act may be proclaimed in that possession by the Governor thereof, and on such proclamation shall come into force on the day named in the proclamation.

(2) The day upon which this Act comes into force in any British possession shall, as regards that British possession, be deemed to be the commencement of this Act.

(3) If, on the commencement of this Act in any British possession, rules of court have not been approved by Her Majesty in pursuance of this Act, the rules in force at such commencement under the Vice-Admiralty Courts Act, 1863, and in India the rules in force at such commencement regulating the respective Vice-Admiralty Courts or Courts of Admiralty in India, including any rules made with reference to proceedings instituted on behalf of Her Majesty's ships, shall, so far as applicable, have effect in the Colonial Court or Courts of Admiralty of such possession, and in any Vice-Admiralty Court established under this Act in that possession, as rules of court under this Act, and may be revoked and varied accordingly and all fees payable under such rules may be taken in such manner as the Colonial Court may direct, so however

that the amount of each such fee shall, so nearly as practicable, be paid to the same officer or person who but for the passing of this Act would have been entitled to receive the same in respect of like business. So far as any such rules are inapplicable or do not extend, the rules of court for the exercise by a court of its ordinary civil jurisdiction shall have effect as rules for the exercise by the same court of the jurisdiction conferred by this Act.

(4) At any time after the passing of this Act any Colonial law may be passed, and any Vice-Admiralty Court may be established and jurisdiction vested in such Court, but any such law, establishment, or vesting shall not come into effect until the commencement of this Act.

17. On the commencement of this Act in any British possession, but subject to the provisions of this Act, every Vice-Admiralty Court in that possession shall be abolished; subject as follows:—

(1) All judgments of such Vice-Admiralty Court shall be executed and may be appealed from in like manner as if this Act had not passed, and all appeals from any Vice-Admiralty Court pending at the commencement of this Act shall be heard and determined, and the judgment thereon executed as nearly as may be in like manner as if this Act had not passed:

(2) All proceedings pending in the Vice-Admiralty Court in any British possession at the commencement of this Act shall, notwithstanding the repeal of any enactment by this Act, be continued in a Colonial Court of Admiralty of the possession in manner directed by rules of court, and, so far as no such rule extends, in like manner, as nearly as may be, as if they had been originally begun in such court:

(3) Where any person holding an office, whether that of judge, registrar or marshal, or any other office in any such Vice-Admiralty Court in a British possession, suffers any pecuniary loss in consequence of the abolition of such court, the Government of the British possession, on complaint of such person, shall provide that such person shall receive reasonable compensation (by way of an increase of salary or a capital sum, or otherwise) in respect of his loss, subject nevertheless to the performance, if required by the said Government, of the like duties as before such abolition:

(4) All books, papers, documents, office furniture and other things at the commencement of this Act belonging or

appertaining to any Vice-Admiralty Court, shall be delivered over to the proper officer of the Colonial Court of Admiralty or be otherwise dealt with in such manner as, subject to any directions from Her Majesty, the Governor may direct:

(5) Where, at the commencement of this Act in a British possession, any person holds a commission to act as advocate in any Vice-Admiralty Court abolished by this Act, either for Her Majesty or for the Admiralty, such commission shall be of the same avail in every court of the same British possession exercising jurisdiction under this Act, as if such court were the court mentioned or referred to in such commission.

18. The Acts specified in the Second Schedule to this Act shall, to the extent mentioned in the third column of that schedule, be repealed as respects any British possession as from the commencement of this Act in that possession, and as respects any courts out of Her Majesty's dominions as from the date of any Order applying this Act:

Provided that—

(*a*) Any appeal against a judgment made before the commencement of this Act may be brought and any such appeal and any proceedings or appeals pending at the commencement of this Act may be carried on and completed and carried into effect as if such appeal had not been enacted; and—

(*b*) All enactments and rules at the passing of this Act in force touching the practice, procedure, fees, costs, and returns in matters relating to the slave trade in Vice-Admiralty Courts and in East African Courts shall have effect as rules made in pursuance of this Act, and shall apply to Colonial Courts of Admiralty, and may be altered and revoked accordingly.

SCHEDULES.

FIRST SCHEDULE.

British Possessions in which Operation of Act is Delayed.

New South Wales.	Victoria.
St. Helena.	British Honduras.

SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title of Act.	Extent of Repeal.
56 Geo. 3, c. 82 .	An Act to render valid the Judicial Acts of Surrogates of Vice-Admiralty Courts abroad, during vacancies in office of Judges of such courts.	The whole Act.
2 & 3 Will. 4, c. 51	An Act to regulate the practice and the fees in the Vice-Admiralty Courts abroad, and to obviate doubts as to their jurisdiction.	The whole Act.
3 & 4 Will. 4, c. 41	An Act for the better administration of justice in His Majesty's Privy Council.	Section two.
6 & 7 Vict., c. 38	An Act to make further regulations for facilitating the hearing appeals and other matters by the Judicial Committee of the Privy Council.	In section two, the words "or from any Admir- "alty or Vice-Admir- "alty Court," and the words "or the Lords "Commissioners of Ap- "peals in prize causes "or their surrogates." In section three, the words "and the High "Court of Admiralty "of England," and the words "and from any "Admiralty or Vice- "Admiralty Court." In section five, from the first "the High Court "of Admiralty" to the end of the section. In section seven, the words "and from Ad- "miralty or Vice-Ad- "miralty Courts." Sections nine and ten, so far as relates to maritime causes. In section twelve, the words "or maritime." In section fifteen, the words "and Admiralty "and Vice-Admiralty."

Session and Chapter.	Title of Act.	Extent of Repeal.
7 & 8 Vict., c. 69..	An Act for amending an Act passed in the fourth year of the reign of His late Majesty intituled: "An Act for "the better administration of justice "in His Majesty's "Privy Council," and to extend its jurisdiction and powers.	In section twelve, the words "and from Admiralty and Vice-Admiralty Courts," and so much of the rest of the section as relates to maritime causes.
26 Vict., c. 24	The Vice-Admiralty Courts Act, 1863.	The whole Act.
30 & 31 Vict., c. 45	The Vice-Admiralty Court Act Amendment Act, 1867.	The whole Act.
36 & 37 Vict., c. 59	The Slave Trade (East African Courts) Act, 1873.	Sections four and five.
36 & 37 Vict., c. 88	The Slave Trade Act, 1873.	Section twenty as far as relates to the taxation of any costs, charges, and expenses which can be taxed in pursuance of this Act. In section twenty-three, the words "under the "Vice-Admiralty "Courts Act, 1863."
38 & 39 Vict., c. 51	The Pacific Islanders Protection Act, 1875.	So much of section six as authorizes Her Majesty to confer Admiralty jurisdiction on any court.

5. FOREIGN TRIBUNALS EVIDENCE ACT,

19-20 Vict. cap. 113 (Imp.).

An Act to provide for taking Evidence in Her Majesty's Dominions in relation to Civil and Commercial Matters pending before Foreign Tribunals.

[*29th July, 1856.*]

"Whereas it is expedient that Facilities be afforded for taking Evidence in Her Majesty's Dominions in relation to Civil and Commercial Matters pending before Foreign Tribunals:" Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and

Commons, in this present Parliament assembled, and by the Authority of the same, as follows:—

I. Where, upon an Application for this Purpose, it is made to appear to any Court or Judge having Authority under this Act that any Court or Tribunal of competent Jurisdiction in a Foreign Country, before which any Civil or Commercial Matter is pending, is desirous of obtaining the Testimony in relation to such Matter of any Witness or Witnesses within the Jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the Examination upon Oath, upon Interrogatories or otherwise, before any Person or Persons named in such Order, of such Witness or Witnesses accordingly; and it shall be lawful for the said Court or Judge, by the same Order, or for such Court or Judge or any other Judge having Authority under this Act, by any subsequent Order, to command the Attendance of any Person to be named in such Order, for the Purpose of being examined, or the Production of any Writings or other Documents to be mentioned in such Order, and to give all such Directions as to the Time, Place, and Manner of such Examination, and all other Matters connected therewith, as may appear reasonable and just; and any such Order may be enforced in like Manner as an Order made by such Court or Judge in a Cause depending in such Court or before such Judge.

II. A Certificate under the Hand of the Ambassador, Minister, or other Diplomatic Agent of any Foreign Power, received as such by Her Majesty, or in case there be no such Diplomatic Agent, then of the Consul-General or Consul of any such Foreign Power at *London*, received and admitted as such by Her Majesty, that any Matter in relation to which an Application is made under this Act is a Civil or Commercial Matter pending before a Court or Tribunal in the Country of which he is the Diplomatic Agent or Consul having Jurisdiction in the Matter so pending, and that such Court or Tribunal is desirous of obtaining the Testimony of the Witness or Witnesses to whom the Application relates, shall be Evidence of the Matters so certified; but where no such Certificate is produced other Evidence to that Effect shall be admissible.

III. It shall be lawful for every Person authorized to take the Examination of Witnesses by any Order made in pursuance of this Act to take all such Examinations upon the Oath of the Witnesses, or Affirmation in Cases where Affirmation is allowed by Law instead of Oath, to be administered by the Person so authorized; and if upon such Oath or Affirmation any

Person making the same wilfully and corruptly give any false Evidence, every Person so offending shall be deemed and taken to be guilty of Perjury.

IV. Provided always, That every Person whose Attendance shall be so required shall be entitled to the like Conduct Money and Payment for Expenses and Loss of Time as upon Attendance at a Trial.

V. Provided also, That every Person examined under any Order made under this Act shall have the like Right to refuse to answer Questions tending to criminate himself and other Questions, which a Witness in any Cause pending in the Court by which or by a Judge whereof or before the Judge by whom the Order for Examination was made would be entitled to; and that no Person shall be compelled to produce under any such Order as aforesaid any Writing or other Document that he would not be compellable to produce at a Trial of such a Cause.

VI. Her Majesty's Superior Courts of Common Law at *Westminster* and in *Dublin* respectively, the Court of Session in *Scotland*, and any Supreme Court in any of Her Majesty's Colonies or Possessions abroad, and any Judge of any such Court, and every Judge in any such Colony or Possession who by any Order of Her Majesty in Council may be appointed for this Purpose, shall respectively be Courts and Judges having Authority under this Act: Provided, that the Lord Chancellor, with the Assistance of Two of the Judges of the Courts of Common Law at *Westminster*, shall frame such Rules and Orders as shall be necessary or proper for giving Effect to the Provisions of this Act, and regulating the Procedure under tre same.

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6. COLONIAL TRIBUNALS EVIDENCE ACT,

22 Vict. cap. 20 (Imp.).

An Act to provide for taking Evidence in Suits and Proceedings pending before Tribunals in Her Majesty's Dominions in Places out of the Jurisdiction of such Tribunals.

[*19th April, 1859.*]

Whereas it is expedient that facilities be afforded for taking evidence in or in relation to actions, suits, and proceedings pending before tribunals in Her Majesty's dominions in places in such dominions out of the jurisdiction of such tribunals: Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons,

in this present Parliament assembled, and by the authority of the same, as follows:—

1. Where upon an application for this purpose it is made to appear to any court or judge having authority under this Act that any court or tribunal of competent jurisdiction in Her Majesty's dominions has duly authorized, by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such court or tribunal of any witness or witnesses out of the jurisdiction of such court or tribunal, and within the jurisdiction of such first-mentioned court, or of the court to which such judge, or of such judge, it shall be lawful for such court or judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said court or judge by the same order, or for such court or judge, or any other judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such court or judge in a cause depending in such court or before such judge.

2. Every person examined as a witness under any such commission, order, or other process as aforesaid, who shall upon such examination wilfully and corruptly give any false evidence, shall be deemed and taken to be guilty of perjury.

3. Provided always, that every person whose attendance shall be so ordered shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial.

4. Provided also, that every person examined under any such commission, order, or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the court by which, or by a judge whereof, or before the judge by whom the order for examination was made, would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compellable to produce at a trial of such a cause.

5. Her Majesty's Superior Courts of Common Law at Westminster and in Dublin respectively, the Court of Session in Scotland, and any Supreme Court in any of Her Majesty's colonies or possessions abroad, and any judge of any such court, and every judge in any such colony or possession who, by any order of Her Majesty in Council, may be appointed for this purpose, shall respectively be courts and judges having authority under this Act.

6. It shall be lawful for the Lord Chancellor of Great Britain, with the assistance of two of the judges of the Courts of Common Law at Westminster, so far as relates to England, and for the Lord Chancellor of Ireland, with the assistance of two of the judges of the Courts of Common Law at Dublin, so far as relates to Ireland, and for two of the judges of the Court of Sessions, so far as relates to Scotland, and for the chief or only judge of the Supreme Court in any of Her Majesty's colonies or possessions abroad, so far as relates to such colony or possession, to frame such rules and orders as shall be necessary or proper for giving effect to the provisions of this Act, and regulating the procedure under the same.

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7. COLONIAL LAW ASCERTAINMENT ACT,

22 & 23 Vict. cap. 63 (Imp.).

An Act to afford Facilities for the more certain Ascertainment of the Law administered in one Part of Her Majesty's Dominions when pleaded in the Courts of another Part thereof.

[*13th August, 1859.*]

Whereas great improvements in the administration of the law would ensue if facilities were afforded for more certainly ascertaining the law administered in one part of Her Majesty's dominions when pleaded in the courts of another part thereof: Be it therefore enacted, by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. If in any action depending in any court within Her Majesty's dominions, it shall be the opinion of such court, that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions on any point on which the law of such other part of Her Majesty's dominions is different from that in which the court is situate, it shall be competent to the court in which such action

may depend to direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such court or a judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another court, and shall pronounce an order remitting the same, together with the case, to the court in such other part of Her Majesty's dominions, being one of the superior courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act; and it shall be competent to any of the parties to the action to present a petition to the court whose opinion is to be obtained, praying such last-mentioned court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this Act, or to pronounce their opinion without hearing parties or counsel; and the court to which such petition shall be presented shall, if they think fit, appoint an early day for hearing parties or their counsel on such case, and shall thereafter pronounce their opinion upon the questions of law as administered by them which are submitted to them by the court; and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper.

2. Upon such opinion being pronounced, a copy thereof, certified by an officer of such court, shall be given to each of the parties to the action by whom the same shall be required, and shall be deemed and held to contain a correct record of such opinion.

3. It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with an officer of the court in which the action may be depending, who may have the official charge thereof, together with a notice of motion, setting forth that the party will, on a certain day named in such notice, move the court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified; and the said court shall thereupon apply such opinion to such facts, in the same manner as if the same had been pronounced by such court itself upon a case reserved for opinion of the court, or upon special verdict of a jury; or the said last-mentioned court shall, if it think fit, when the said opinion has been obtained

before trial, order such opinion to be submitted to the jury with the other facts of the case as evidence, or conclusive evidence, as the court may think fit, of the foreign law therein stated; and the said opinion shall be so submitted to the jury.

4. In the event of an appeal to Her Majesty in Council or to the House of Lords in any such action, it shall be competent to bring under the review of Her Majesty in Council or of the House of Lords the opinion pronounced as aforesaid by any court whose judgments are reviewable by Her Majesty in Council or by the House of Lords; and Her Majesty in Council or that House may respectively adopt or reject such opinion of any court whose judgments are respectively reviewable by them, as the same shall appear to them to be well founded or not in law.

5. In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any court, civil, criminal, or ecclesiastical; and the words "Superior Court" shall include, in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls or any Vice-Chancellor, the Judge of the Court of Admiralty, the Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the Judge of the Court of Probate; in Scotland, the High Court of Justiciary, and the Court of Session acting by either of its divisions; in Ireland, the Superior Courts of Law at Dublin, the Master of the Rolls, and the Judge of the Admiralty Court; and in any other part of Her Majesty's dominions, the Superior Courts of Law or Equity therein.

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8. FOREIGN LAW ASCERTAINMENT ACT,

24 & 25 Vict. cap. 11 (Imp.).

An Act to afford Facilities for the better Ascertainment of the Law of Foreign Countries when pleaded in Courts within Her Majesty's Dominions.

[*17th May, 1861.*]

Whereas an Act was passed in the twenty-second and twenty-third years of Her Majesty's reign, intituled "An Act to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the courts of another part thereof":

And whereas it is expedient to afford the like facilities for the better ascertainment, in similar circumstances, of the law of any foreign country or state with the Government of which Her Majesty may be pleased to enter into a convention for the

purpose of mutually ascertaining the law of such foreign country or state when pleaded in actions depending in any courts within Her Majesty's dominions and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the courts of such foreign country or state:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows, viz.:

1. If, in any action depending in any of the Superior Courts within Her Majesty's dominions, it shall be the opinion of such court that it is necessary or expedient, for the disposal of such action, to ascertain the law applicable to the facts of the case as administered in any foreign state or country with the Government of which Her Majesty shall have entered into such convention as aforesaid, it shall be competent to the court in which such action may depend to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of jury or other mode competent, or as may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such court or a judge thereof, such court or judge shall settle the questions of law arising out of the same on which they desire to have the opinion of another court, and shall pronounce an order remitting the same, together with the case, to such superior court in such foreign state or country as shall be agreed upon in said convention, whose opinion is desired upon the law administered by such foreign court as applicable to the facts set forth in such case, and requesting them to pronounce their opinion on the questions submitted to them; and upon such opinion being pronounced, a copy thereof, certified by an officer of such court, shall be deemed and held to contain a correct record of such opinion.

2. It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with the officer of the court within Her Majesty's dominions in which the action may be depending who may have the official charge thereof, together with a notice of motion setting forth that the party will, on a certain day named in such notice, move the court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified; and the said court shall thereupon, if it shall see fit, apply such opinion to such facts, in the same manner as if the same had been pronounced by such court itself

upon a case reserved for opinion of the court, or upon special verdict of a jury; or the said last-mentioned court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the jury with the other facts of the case as conclusive evidence of the foreign law therein stated; and the said opinion shall be so submitted to the jury: Provided always, that if after having obtained such certified copy the court shall not be satisfied that the facts had been properly understood by the foreign court to which the case was remitted, or shall on any ground whatsoever be doubtful whether the opinion so certified does correctly represent the foreign law as regards the facts to which it is to be applied, it shall be lawful for such court to remit the said case, either with or without alterations or amendments, to the same or to any other such superior court in such foreign state as aforesaid, and so from time to time as may be necessary or expedient.

3. If in any action depending in any court of a foreign country or state with whose Government Her Majesty shall have entered into a convention as above set forth, such court shall deem it expedient to ascertain the law applicable to the facts of the case as administered in any part of Her Majesty's dominions, and if the foreign court in which such action may depend shall remit to the court in Her Majesty's dominions whose opinion is desired a case setting forth the facts and the questions of law arising out of the same on which they desire to have the opinion of a court within Her Majesty's dominions, it shall be competent to any of the parties to the action to present a petition to such last-mentioned court, whose opinion is to be obtained, praying such court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this Act, or to pronounce their opinion without hearing parties or counsel; and the court to which such petition shall be presented shall consider the same, and, if they think fit, shall appoint an early day for hearing parties or their counsel on such case, and shall pronounce their opinion upon the questions of law as administered by them which are submitted to them by the foreign court; and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper; and upon such opinion being pronounced a copy thereof, certified by an officer of such court, shall be given to each of the parties to the action by whom the same shall be required.

4. In the construction of this Act the word "action" shall include every judicial proceeding instituted in any court, civil, criminal, or ecclesiastical; and the words "Superior Courts"

shall include, in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls, or any Vice-Chancellor, the Judge of the Court of Admiralty, the judge ordinary of the Court for Divorce and Matrimonial Causes, and the judge of the Court of Probate; in Scotland, the High Court of Judiciary, and the Court of Sessions, acting by either of its divisions; in Ireland, the Superior Courts of Law at Dublin, the Master of the Rolls, and the judge of the Admiralty Court; and in any other part of Her Majesty's dominions, the Superior Courts of Law or Equity therein; and in a foreign country or state, any superior court or courts which shall be set forth in any such convention between Her Majesty and the Government of such foreign country or state.

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9. NATURALIZATION ACT, 1870.

33 Vict. cap. 14 (Imp.).

An Act to amend the Law relating to the legal condition of Aliens and British Subjects.

[*12th May, 1870.*]

Whereas it is expedient to amend the law relating to the legal condition of aliens and British subjects:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The Naturalization Act, 1870."

Status of Aliens in the United Kingdom.

2. Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject: Provided,—

(1) That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise:

(2) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him:

(3) That this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this Act, or in pursuance of any devolution by law on the death of any person dying before the passing of this Act.

3. Where Her Majesty has entered into a convention with any foreign state to the effect that the subjects or citizens of that state who have been naturalized as British subjects may divest themselves of their status as such subjects, it shall be lawful for Her Majesty, by Order in Council, to declare that such convention has been entered into by Her Majesty; and from and after the date of such Order in Council, any person being originally a subject or citizen of the state referred to in such Order, who has been naturalized as a British subject, may, within such limit of time as may be provided in the convention, make a declaration of alienage, and from and after the date of his so making such declaration such person shall be regarded as an alien, and as a subject of the state to which he originally belonged as aforesaid.

A declaration of alienage may be made as follows; that is to say,—If the declarant be in the United Kingdom in the presence of any justice of the peace, if elsewhere in Her Majesty's dominions in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorised by law in the place in which the declarant is to administer an oath for any judicial or other legal purpose. If out of Her Majesty's dominions in the presence of any officer in the diplomatic or consular service of Her Majesty.

4. Any person who by reason of his having been born within the dominions of Her Majesty is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such person shall cease to be a British subject. Any person who is born out of Her Majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject.

5. From and after the passing of this Act, an alien shall not be entitled to be tried by a jury de medietate linguæ, but shall be triable in the same manner as if he were a natural-born subject.

Expatriation.

6. Any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign state and not under any disability, voluntarily become naturalized in such state, shall from and after the time of his so having become naturalized in such foreign state, be deemed to have ceased to be a British subject and be regarded as an alien; Provided,—

(1) That where any British subject has before the passing of this Act voluntarily become naturalized in a foreign state and yet is desirous of remaining a British subject, he may, at any time within two years after the passing of this Act, make a declaration that he is desirous of remaining a British subject, and upon such declaration hereinafter referred to as a declaration of British nationality being made, and upon his taking the oath of allegiance, the declarant shall be deemed to be and to have been continually a British subject; with this qualification, that he shall not, when within the limits of the foreign state in which he has been naturalized, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect:

(2) A declaration of British nationality may be made, and the oath of allegiance be taken as follows; that is to say,—if the declarant be in the United Kingdom in the presence of a justice of the peace; if elsewhere in Her Majesty's dominions in the presence of any judge of any court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorised by law in the place in which the declarant is to administer an oath for any judicial or other legal purpose. If out of Her Majesty's dominions in the presence of any officer in the diplomatic or consular service of Her Majesty.

Naturalization and resumption of British Nationality.

7. An alien who, within such limited time before making the application hereinafter mentioned as may be allowed by

one of Her Majesty's Principal Secretaries of State, either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends, when naturalized, either to reside in the United Kingdom, or to serve under the Crown, may apply to one of Her Majesty's Principal Secretaries of State for a certificate of naturalization.

The applicant shall adduce in support of his application such evidence of his residence or service, and intention to reside or serve, as such Secretary of State may require. The said Secretary of State, if satisfied with the evidence adduced, shall take the case of the applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision, but such certificate shall not take effect until the applicant has taken the oath of allegiance.

An alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

The said Secretary of State may in manner aforesaid grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in such certificate that the grant thereof is made for the purpose of quieting doubts as to the right of such person to be a British subject, and the grant of such special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject.

An alien who has been naturalized previously to the passing of this Act may apply to the Secretary of State for a certificate of naturalization under this Act, and it shall be lawful for the said Secretary of State to grant such certificate to such naturalized alien upon the same terms and subject to the same conditions in and upon which such certificate might have been granted if such alien had not been previously naturalized in the United Kingdom.

8. A natural-born British subject who has become an alien in pursuance of this Act, and is in this Act referred to as a statutory alien, may, on performing the same conditions and adducing the same evidence as is required in the case of an alien applying for a certificate of nationality, apply to one of Her Majesty's Principal Secretaries of State for a certificate hereinafter referred to as a certificate of re-admission to British nationality, re-admitting him to the status of a British subject. The said Secretary of State shall have the same discretion as to the giving or withholding of the certificate as in the case of a certificate of naturalization, and an oath of allegiance shall in like manner be required previously to the issuing of the certificate.

A statutory alien to whom a certificate of re-admission to British nationality has been granted shall, from the date of the certificate of re-admission, but not in respect of any previous transaction, resume his position as a British subject; with this qualification, that within the limits of the foreign state of which he became a subject he shall not be deemed to be a British subject unless he has ceased to be a subject of that foreign state according to the laws thereof, or in pursuance of a treaty to that effect.

The jurisdiction by this Act conferred on the Secretary of State in the United Kingdom in respect of the grant of a certificate or re-admission to British nationality, in the case of any statutory alien being in any British possession, may be exercised by the governor of such possession; and residence in such possession shall, in the case of such person, be deemed equivalent to residence in the United Kingdom.

9. The oath in this Act referred to as the oath of allegiance shall be in the form following; that is to say,

"I do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors, according to law. So help me GOD."

National status of married women and infant children.

10. The following enactments shall be made with respect to the national status of women and children:

(1) A married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject:

(2) A widow being a natural-born British subject, who has become an alien by or in consequence of her marriage, shall be deemed to be a statutory alien.

and may as such at any time during widowhood obtain a certificate of re-admission to British nationality in manner provided by this Act:

(3) Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, shall be deemed to be a subject of the state of which the father or mother has become a subject, and not a British subject:

(4) Where the father, or the mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother, shall be deemed to have resumed the position of a British subject to all intents:

(5) Where the father, or mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject.

Supplemental Provisions.

11. One of Her Majesty's Principal Secretaries of State may by regulation provide for the following matters:—

(1) The form and registration of declarations of British nationality:

(2) The form and registration of certificates of naturalization in the United Kingdom:

(3) The form and registration of certificates of re-admission to British nationality:

(4) The form and registration of declarations of alienage:

(5) The registration by officers in the diplomatic or consular service of Her Majesty of the births and deaths of British subjects who may be born or die out of Her Majesty's dominions, and of the marriages of persons married at any of Her Majesty's embassies or legations:

(6) The transmission to the United Kingdom for the purpose of registration or safe keeping, or of being produced as evidence of any declarations or certificates made in pursuance of this Act out of the United Kingdom, or of any copies of such declarations or certificates, also of copies of entries contained in any register kept out of the United Kingdom in pursuance of or for the purpose of carrying into effect the provisions of this Act:

(7) With the consent of the Treasury the imposition and application of fees in respect of any registration authorised to be made by this Act, and in respect of the making any declaration or the grant of any certificate authorised to be made or granted by this Act.

The said Secretary of State, by a further regulation, may repeal, alter, or add to any regulation previously made by him in pursuance of this section.

Any regulation made by the said Secretary of State in pursuance of this section shall be deemed to be within the powers conferred by this Act, and shall be of the same force as if it had been enacted in this Act, but shall not go far as respects the imposition of fees be in force in any British possession, and shall not, so far as respects any other matter, be in force in any British possession in which any Act or ordinance to the contrary of or inconsistent with any such direction may for the time being be in force.

12. The following regulations shall be made with respect to evidence under this Act:—

(1) Any declaration authorised to be made under this Act may be proved in any legal proceeding by the production of the original declaration, or of any copy thereof certified to be a true copy of one of Her Majesty's Principal Secretaries of State, or by any person authorised by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such declaration, and the production of such declaration or copy shall be evidence of the person therein named as declarant having made the same at the date in the said declaration mentioned:

(2) A certificate of naturalization may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorised by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such certificate:

(3) A certificate of re-admission to British nationality may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorised by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such certificate:

(4) Entries in any register authorised to be made in pursuance of this Act shall be proved by such copies and certified in such manner as may be directed by one of Her Majesty's Principal Secretaries of State, and the copies of such entries shall be evidence of any matters by this Act or by any regulation of the said Secretary of State authorised to be inserted in the register:

(5) The Documentary Evidence Act, 1868, shall apply to any regulation made by a Secretary of State, in pursuance of or for the purpose of carrying into effect any of the provisions of this Act.

Miscellaneous.

13. Nothing in this Act contained shall affect the grant of letters of denization by Her Majesty.

14. Nothing in this Act contained shall qualify an alien to be the owner of a British ship.

15. Where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien.

16. All laws, statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges, or any of the privileges, of naturalization, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law, but shall be subject to be confirmed or disallowed by Her Majesty in the same manner, and subject to the same rules in and subject to which Her Majesty has power to confirm or disallow any other laws, statutes, or ordinances in that possession.

17. In this Act, if not inconsistent with the context or subject-matter thereof,—

"Disability" shall mean the status of being an infant, lunatic, idiot, or married woman:

"British possession" shall mean any colony, plantation, island, territory, or settlement within Her Majesty's

dominions, and not within the United Kingdom, and all territories and places under one legislature are deemed to be one British possession for the purposes of this Act:

"The Governor of any British possession" shall include any person exercising the chief authority in such possession:

"Officer in the Diplomatic Service of Her Majesty" shall mean any Ambassador, Minister or Chargé d'Affaires, or Secretary of Legation, or any person appointed by such Ambassador, Minister, Chargé d'Affaires, or Secretary of Legation to execute any duties imposed by this Act on an officer in the Diplomatic Service of Her Majesty:

"Officer in the Consular Service of Her Majesty" shall mean and include Consul-General, Consul, Vice-Consul, and Consular Agent, and any person for the time being discharging the duties of Consul-General, Consul, Vice-Consul, and Consular Agent.

SCHEDULE.

NOTE.—Reference is made to the repeal of the "whole Act" where portions have been repealed before, in order to preclude henceforth the necessity of looking back to previous Acts.

This Schedule, so far as respects Acts prior to the reign of George the Second, other than Acts of the Irish Parliament, refers to the edition prepared under the direction of the Record Commission, intituled "The Statutes of the Realm; printed "by Command of His Majesty King George the Third, in pur- "suance of an Address of the House of Commons of Great "Britain. From original Records and authentic Manu- "scripts."

PART I.

ACTS WHOLLY REPEALED, OTHER THAN ACTS OF THE IRISH PARLIAMENT.

Date.	Title.
7 Jas. 1, c. 2.....	An Act that all such as are to be naturalized or restored in blood shall first receive the sacrament of the Lord's Supper, and the oath of allegiance, and the oath of supremacy.
11 Will. 3, c. 6 (*a*)...	An Act to enable His Majesty's natural-born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens.
13 Geo. 2, c. 7.....	An Act for naturalizing such foreign Protestants and others therein mentioned, as are settled or shall settle in any of His Majesty's colonies in America.

Date.	Title.
20 Geo. 2, c. 44.....	An Act to extend the provisions of an Act made in the thirteenth year of His present Majesty's reign, intituled "An Act for naturalizing "foreign Protestants and others therein mentioned, as are settled or shall settle in any "of His Majesty's colonies in America, to "other foreign Protestants who conscientiously scruple the taking of an oath."
13 Geo. 3, c. 25.....	An Act to explain two Acts of Parliament, one of the thirteenth year of the reign of His late Majesty, "for naturalizing such foreign "Protestants and others as are settled or "shall settle in any of His Majesty's colonies "in America," and the other of the second year of the reign of His present Majesty, "for naturalizing such foreign Protestants as "have served or shall serve as officers or "soldiers in His Majesty's Royal American "regiment, or as engineers in America."
14 Geo. 3, c. 84.....	An Act to prevent certain inconveniences that may happen by bills of naturalization.
16 Geo. 3, c. 52.....	An Act to declare His Majesty's natural-born subjects inheritable to the estates of their ancestors, whether lineal or collateral, in that part of Great Britain called Scotland, notwithstanding their father or mother were aliens.
6 Geo. 4, c. 67.....	An Act to alter and amend an Act passed in the seventh year of the reign of His Majesty King James the First, intituled "An Act that "all such as are to be naturalized or restored in blood shall first receive the sacrament of the Lord's Supper and the oath of "allegiance and the oath of supremacy."
7 & 8 Vict. c. 66....	An Act to amend the laws relating to aliens.
10 & 11 Vict. c. 83.....	An Act for the naturalization of aliens.

(*a*) 11 & 12 Wm. 3 (Ruff.).

PART II.

ACTS OF THE IRISH PARLIAMENT WHOLLY REPEALED.

Date.	Title.
14 & 15 Chas. 2, c. 13..	An Act for encouraging Protestant strangers and other to inhabit and plant in the Kingdom of Ireland.
2 Anne, c. 14.....	An Act for naturalizing of all Protestant strangers in this kingdom.
19 & 20 Geo. 3, c. 29...	An Act for naturalizing such foreign merchants, traders, artificers, artizans, manufacturers, workmen, seamen, farmers, and others as shall settle in this kingdom.
23 & 24 Geo. 3, c. 38...	An Act for extending the provisions of an Act passed in this kingdom in the nineteenth and twentieth years of His Majesty's reign, intituled "An Act for naturalizing such foreign "merchants, traders, artificers, artizans, manufacturers, workmen, seamen, farmers, and "others as shall settle in this kingdom."
36 Geo. 3, c. 48.....	An Act to explain and amend an Act, intituled "An Act for naturalizing such foreign merchants, traders, artificers, artizans, manufacturers, workmen, seamen, farmers, and "others who shall settle in this kingdom."

PART III.

ACTS PARTIALLY REPEALED.

		Extent of repeal.
4 Geo. 1, c. 9..... (Act of Irish Parliament.)	An Act for reviving, continuing, and amending several statutes made in this kingdom heretofore temporary.	So far as it makes perpetual the Act of 2 Anne, c. 14.
6 Geo. 4, c. 50.....	An Act for consolidating and amending the laws relative to Jurors and Juries.	The whole of sect. 47.
3 & 4 Will. 4, c. 91....	An Act consolidating and amending the laws relating to Jurors and Juries in Ireland.	The whole of sect. 37.

Repeal of Acts mentioned in Schedule.

18. The several Acts set forth in the first and second parts of the schedule annexed hereto shall be wholly repealed, and the Acts set forth in the third part of the said schedule shall be repealed to the extent therein mentioned; provided that the repeal enacted in this Act shall not affect:—

(1) Any right acquired or thing done before the passing of this Act:

(2) Any liability accruing before the passing of this Act:

(3) Any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before the passing of this Act:

(4) The institution of any investigation or legal proceeding or any other remedy for ascertaining or enforcing any such liability, penalty, forfeiture, or punishment as aforesaid.

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10. BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914.

4 & 5 Geo. V. cap. 17 (Imp.).

An Act to consolidate and amend the Enactments relating to British Nationality and the Status of Aliens.

[*7th August, 1914.*]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

Natural-born British Subjects.

1.—(1) The following persons shall be deemed to be natural-born British subjects, namely:—

(*a*) Any person born within His Majesty's dominions and allegiance; and

(*b*) Any person born out of His Majesty's dominions, whose father was a British subject at the time of that person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalization had been granted; and

(*c*) Any person born on board a British ship whether in foreign territorial waters or not:

Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects.

(2) A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth.

(3) Nothing in this section shall, except as otherwise expressly provided, affect the status of any person born before the commencement of this Act.

PART II.

Naturalization of Aliens.

2.—(1) The Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose, and satisfies the Secretary of State:—

(*a*) that he has either resided in His Majesty's dominions for a period of not less than five years in the manner required by this section, or been in the service of the Crown for not less than five years within the last eight years before the application; and

(*b*) that he is of good character and has an adequate knowledge of the English language; and

(*c*) that he intends if his application is granted either to reside in His Majesty's dominions or to enter or continue in the service of the Crown.

(2) The residence required by this section is residence in the United Kingdom for not less than one year immediately preceding the application, and previous residence, either in the

United Kingdom or in some other part of His Majesty's dominions, for a period of four years within the last eight years before the application.

(3) The grant of a certificate of naturalization to any such alien shall be in the absolute discretion of the Secretary of State, and he may, with or without assigning any reason, give or withhold the certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision.

(4) A certificate of naturalization shall not take effect until the applicant has taken the oath of allegiance.

(5) In the case of a woman who was a British subject previously to her marriage to an alien, and whose husband has died or whose marriage has been dissolved, the requirements of this section as to residence shall not apply and the Secretary of State may in any other special case, if he thinks fit, grant a certificate of naturalization, although the four years' residence or five years' service has not been within the last eight years before the application.

3.—(1) A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of this Act, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and, as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject.

(2) Section three of the Act of Settlement (which disqualifies naturalized aliens from holding certain offices) shall have effect as if the words "naturalized or" were omitted therefrom.

4. The Secretary of State may in his absolute discretion, in such cases as he thinks fit, grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in the certificate that the grant thereof is made for the purpose of quieting doubts as to the right of the person to be a British subject, and the grant of such a special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject.

5.—(1) Where an alien obtains a certificate of naturalization, the Secretary of State may, if he thinks fit, on the application of that alien, include in the certificate the name of any child of the alien born before the date of the certificate and being a minor, and that child shall thereupon, if not already a British subject, become a British subject; but any such child may, within one year after attaining his majority, make a

declaration of alienage, and shall thereupon cease to be a British subject.

(2) The Secretary of State may, in his absolute discretion in any special case in which he thinks fit, grant a certificate of naturalization to any minor, although the conditions required by this Act have not been complied with.

(3) Except as provided by this section, a certificate of naturalization shall not be granted to any person under disability.

6. An alien who has been naturalized before the passing of this Act may apply to the Secretary of State for a certificate of naturalization under this Act, and the Secretary of State may grant to him a certificate on such terms and conditions as he may think fit.

7.—(1) Where it appears to the Secretary of State that a certificate of naturalization granted by him has been obtained by false representations or fraud, the Secretary of State may by order revoke the certificate, and the order of revocation shall have effect from such date as the Secretary of State may direct.

(2) Where the Secretary of State revokes a certificate of naturalization, he may order the certificate to be given up and cancelled, and any person refusing or neglecting to give up the certificate shall be liable on summary conviction to a fine not exceeding one hundred pounds.

8.—(1) The Government of any British Possession shall have the same power to grant a certificate of naturalization as the Secretary of State has under this Act, and the provisions of this Act as to the grant and revocation of such a certificate shall apply accordingly, with the substitution of the Government of the Possession for the Secretary of State, and the Possession for the United Kingdom, and also, in a Possession where any language is recognised as on an equality with the English language, with the substitution of the English langnage or that language for the English langnage:

Provided that, in any British Possession other than British India and a Dominion specified in the First Schedule to this Act, the powers of the Government of the Possession under this section shall be exercised by the Governor or a person acting under his authority, but shall be subject in each case to the approval of the Secretary of State, and any certificate proposed to be granted shall be submitted to him for his approval.

(2) Any certificate of naturalization granted under this section shall have the same effect as a certificate of naturalization granted by the Secretary of State under this Act.

9.—(1) This Part of this Act shall not, nor shall any certificate of naturalization granted thereunder, have effect within any of the Dominions specified in the First Schedule to this Act, unless the Legislature of that Dominion adopts this Part of this Act.

(2) Where the Legislature of any such Dominion has adopted this Part of this Act, the Government of the Dominion shall have the like powers to make regulations with respect to certificates of naturalization and to oaths of allegiance as are conferred by this Act on the Secretary of State.

(3) The Legislature of any such Dominion which adopts this Part of this Act may provide how and by what Department of the Government the powers conferred by this Part of this Act on the Government of a British Possession are to be exercised.

(4) The Legislature of any such Dominion may at any time rescind the adoption of this Part of this Act, provided that no such rescission shall prejudicially affect any legal rights existing at the time of such rescission.

PART III.

GENERAL.

National Status of Married Women and Infant Children.

10. The wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien: Provided that where a man ceases during the continuance of his marriage to be a British subject it shall be lawful for his wife to make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to remain a British subject.

11. A woman who, having been a British subject, has by, or in consequence of, her marriage become an alien, shall not, by reason only of the death of her husband, or the dissolution of her marriage, cease to be an alien, and a woman who, having been an alien, has by, or in consequence of, her marriage become a British subject, shall not, by reason only of the death of her husband or the dissolution of her marriage, cease to be a British subject.

12.—(1) Where a person being a British subject ceases to be a British subject, whether by declaration of alienage or otherwise, every child of that person, being a minor, shall thereupon cease to be a British subject, unless such child, on that person ceasing to be a British subject, does not become by the law of any otner country naturalized in that country:

Provided that, where a widow who is a British subject marries an alien, any child of hers by her former husband shall not, by reason only of her marriage, cease to be a British subject, whether he is residing outside His Majesty's dominions or not.

(2) Any child who has so ceased to be a British subject may, within one year after attaining his majority, make a declaration that he wishes to resume British nationality, and shall thereupon again become a British subject.

Loss of British Nationality.

13. A British subject who, when in any foreign state and not under disability, by obtaining a certificate of naturalization, or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject.

14.—(1) Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign state a subject also of that state, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject.

(2) Any person who though born out of His Majesty's dominions is a natural-born British subject may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject.

15. Where His Majesty has entered into a convention with any foreign state to the effect that the subjects or citizens of that state to whom certificates of naturalization have been granted may divest themselves of their status as such subjects, it shall be lawful for His Majesty, by Order in Council, to declare that the convention has been entered into by His Majesty; and from and after the date of the Order any person having been originally a subject or citizen of the state therein referred to, who has been naturalized as a British subject, may, within the limit of time provided in the convention, make a declaration of alienage, and on his making the declaration he shall be regarded as an alien and as a subject of the state to which he originally belonged as aforesaid.

16. Where any British subject ceases to be a British subject, he shall not thereby be discharged from any obligation, duty or liability in respect of any act done before he ceased to be a British subject.

Status of Aliens.

17. Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to a natural-born British subject:

Provided that this section shall not operate so as to—

(1) Confer any right on an alien to hold real property situate out of the United Kingdom; or

(2) Qualify an alien for any office or for any municipal, parliamentary, or other franchise; or

(3) Qualify an alien to be the owner of a British ship; or

(4) Entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him; or

(5) Affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the twelfth day of May eighteen hundred and seventy, or in pursuance of any devolution by law on the death of any person dying before that day.

18. An alien shall be triable in the same manner as if he were a natural-born British subject.

Procedure and Evidence.

19.—(1) The Secretary of State may make regulations generally for carrying into effect the objects of this Act, and in particular with respect to the following matters:—

(*a*) The form and registration of certificates of naturalization granted by the Secretary of State:

(*b*) The form and registration of declarations of alienage and declarations of resumption or retention of British nationality:

(*c*) The registration by officers in the diplomatic or consular service of His Majesty of the births and deaths of British subjects born or dying out of His Majesty's dominions:

(*d*) The time within which the oath of allegiance is to be taken after the grant of a certificate of naturalization:

(*e*) The persons by whom the oath of allegiance may be administered, and the persons before whom declarations of alienage and declarations of resumption of British nationality may be made:

(*f*) Whether or not oaths of allegiance are to be subscribed as well as taken, and the form in which the taking and subscription are to be attested:

(*g*) The registration of oaths of allegiance:

(*h*) The persons by whom certified copies of oaths of allegiance may be given; and the proof in any legal proceeding of any such oaths:

(*i*) The transmission to the United Kingdom, for the purpose of registration or safe keeping or of being produced as evidence, of any declarations, certificates or oaths, made, granted or taken out of the United Kingdom in pursuance of this Act or of any Act hereby repealed, or of any copies thereof, also of copies of entries contained in any register kept out of the United Kingdom in pursuance of this Act or any Act hereby repealed:

(*j*) With the consent of the Treasury, the imposition and application of fees in respect of any registration authorised to be made by this Act or any Act hereby repealed, and in respect of the making of any declaration or the grant of any certificate authorised to be made or granted by this Act or any Act hereby repealed, and in respect of the administration or registration of any oath: Provided that in the case of a woman who was a British subject previously to her marriage to an alien, and whose husband has died or whose marriage has been dissolved, the fee for the grant of a certificate shall not exceed five shillings.

(2) Any regulation made by the Secretary of State in pursuance of this Act shall be of the same force as if it had been enacted therein, but shall not, so far as respects the imposition of fees, be in force in any British Possession, and shall not, so far as respects any other matter, be in force in any British Possession in which any Act or ordinance, or, in the case of a Dominion specified in the First Schedule to this Act, any regulation made by the Government of the Dominion under Part II. of this Act, to the contrary of, or inconsistent with, any such regulation may for the time being be in force.

(3) Any regulations made by the Secretary of State under any Act hereby repealed shall continue in force and be deemed to have been made under this Act.

20. Any declaration made under this Act or under any Act hereby repealed may be proved in any legal proceeding by the production of the original declaration or of any copy thereof certified to be a true copy by the Secretary of State, or by any person authorised by him in that behalf, and the production of the declaration or copy shall be evidence of the person therein named as declarant having made the declaration at the date therein mentioned.

21. A certificate of naturalization may be proved in any legal proceeding by the production of the original certificate or of any copy thereof certified to be a true copy of the Secretary of State, or by any person authorised by him in that behalf.

22. Entries in any register made in pursuance of this Act or under any Act hereby repealed may be proved by such copies and certified in such manner as may be directed by the Secretary of State, and the copies of any such entries shall be evidence of any matters, by this Act or by any Act hereby repealed or by any regulation of the Secretary of State, authorised to be inserted in the register.

23. If any person for any of the purposes of this Act knowingly makes any false representation or any statement false in a material particular, he shall, in the United Kingdom, be liable on summary conviction in respect of each offence to imprisonment with or without hard labour for any term not exceeding three months.

24. The oath of allegiance shall be in the form set out in the Second Schedule to this Act.

Supplemental.

25. Nothing in this Act shall affect the grant of letters of denization by His Majesty.

26.—(1) Nothing in this Act shall take away or abridge any power vested in, or exercisable by, the Legislature or Government of any British Possession, or affect the operation of any law at present in force which has been passed in exercise of such a power, or prevent any such Legislature or Government from treating differently different classes of British subjects.

(2) All laws, statutes and ordinances made by the Legislature of a British Possession for imparting to any person any of the privileges of naturalization to be enjoyed by him within the limits of that Possession shall, within those limits, have the authority of law.

(3) Where any parts of His Majesty's Dominions are under both a central and a local legislature, the expression "British Possession" shall, for the purposes of this section, include both

all parts under the central legislature and each part under a local legislature: Provided that nothing in this provision shall be construed as validating any law, statute or ordinance with respect to naturalization made by any such local legislature in any case where the central legislature possesses exclusive legislative authority with respect to naturalization.

27.—(1) In this Act, unless the context otherwise requires,—

The expression "British subject" means a person who is a natural-born British subject, or a person to whom a certificate of naturalization has been granted:

The expression "alien" means a person who is not a British subject:

The expression "certificate of naturalization" means a certificate of naturalization granted under this Act or under any Act repealed by this or any other Act:

The expression "disability" means the status of being a married woman, or a minor, lunatic, or idiot:

The expression "territorial waters" includes any port, harbour, or dock.

(2) Where in pursuance of this Act the name of a child is included in a certificate of naturalization granted to his parent, such child shall, for the purposes of this Act, be deemed to be a person to whom a certificate of naturalization has been granted.

28.—(1) The enactments mentioned in the Third Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule.

(2) This Act may be cited as the British Nationality and Status of Aliens Act, 1914.

(3) This Act shall come into operation on the first day of January nineteen hundred and fifteen.

SCHEDULES.

FIRST SCHEDULE.

LIST OF DOMINIONS.

The Dominion of Canada.

The Commonwealth of Australia (including for the purposes of this Act the territory of Papua and Norfolk Island).

The Dominion of New Zealand.

The Union of South Africa.

Newfoundland.

SECOND SCHEDULE.

Oath of Allegiance.

"I, *A.B.*, swear by Almighty God that I will be faithful and bear true allegiance to His Majesty, King George the Fifth, his Heirs and Successors, according to law.

THIRD SCHEDULE.

Enactments Repealed.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
25 Edw. 3, stat. 1.	Statute for those who are born in parts beyond the seas.	From "and in the right of other children" to the end of the statute.
42 Edw. 3, c. 10.	A statute made at Westminster on the first day of May in the forty-second year of King Edward III.	The whole chapter.
12 & 13 Will. 3, c. 2.	The Act of Settlement	In section three the words "naturalized or."
7 Anne, c. 5.	The Foreign Protestants (Naturalization) Act, 1708.	The whole Act.
4 Geo. 2, c. 21	The British Nationality Act, 1730.	The whole Act.
13 Geo. 3, c. 21	The British Nationality Act, 1772.	The whole Act.
33 & 34 Vict. c. 14.	The Naturalization Act, 1870.	The whole Act.
33 & 34 Vict. c. 102.	The Naturalization Oath Act, 1870.	The whole Act.
58 & 59 Vict. c. 43.	The Naturalization Act, 1895.	The whole Act.

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11. THE EXTRADITION ACT, 1870.

33-34 Vict. cap. 52 (Imp.).

An Act for amending the Law relating to the Extradition of Criminals.

[*9th August, 1870.*]

Whereas it is expedient to amend the law relating to the surrender to foreign states of persons accused or convicted of the commission of certain crimes within the jurisdiction of such

states, and to the trial of criminals surrendered by foreign states to this country:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as "The Extradition Act, 1870."

2. Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state.

Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

Every such order shall recite or embody the terms of the arrangement, and shall not remain in force for any longer period than the arrangement.

Every such order shall be laid before both Houses of Parliament within six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the London Gazette.

3. The following restrictions shall be observed with respect to the surrender of fugitive criminals:—

(1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character:

(2) A fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his

surrender other than the extradition crime proved by the facts on which the surrender is grounded:

(3) A fugitive criminal who has been accused of some offence within English jurisdiction not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise:

(4) A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.

4. An Order in Council for applying this Act in the case of any foreign state shall not be made unless the arrangement—

(1) provides for the determination of it by either party to it after the expiration of a notice not exceeding one year; and

(2) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act.

5. When an order applying this Act in the case of any foreign state has been published in the London Gazette this Act (after the date specified in the order, or if no date is specified, after the date of the publication), shall, so long as the order remains in force, but subject to the limitations, restrictions, conditions, exceptions, and qualifications, if any, contained in the order, apply in the case of such foreign state. An Order in Council shall be conclusive evidence that the arrangement therein referred to complies with the requisitions of this Act, and that this Act applies in the case of the foreign state mentioned in the order, and the validity of such order shall not be questioned in any legal proceedings whatever.

6. Where this Act applies in the case of any foreign state, every fugitive criminal of that state who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime.

7. A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person

recognized by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.

8. A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued—

1. by a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would, in his opinion, justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and
2. by a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint and such evidence or after such proceedings as would, in the opinion of the person issuing the warrant, justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercises jurisdiction.

Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to a Secretary of State, who may, if he think fit, order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged.

A fugitive criminal, when apprehended on a warrant issued without the order of a Secretary of State, shall be brought before some person having power to issue a warrant under this section, who shall by warrant order him to be brought and the prisoner shall accordingly be brought before a police magistrate.

A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as, with reference to the circumstances of the case, he may fix, receives from a Secretary of State an order signifying that a requisition has been made for the surrender of such criminal.

9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.

The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit.

11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of Habeas corpus.

Upon the expiration of the said fifteen days, or, if a writ of Habeas corpus is issued, after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may, in his opinion, be duly authorised to receive the fugitive criminal by the foreign state from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

It shall be lawful for any person to whom such warrant is directed and for the person so authorised as aforesaid to receive, hold in custody, and convey within the jurisdiction of such foreign state the criminal mentioned in the warrant; and if the criminal escapes out of any custody to which he may be delivered on or in pursuance of such warrant, it shall be lawful to retake him in the same manner as any person accused of any crime against the laws of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

12. If the fugitive criminal who has been committed to prison is not surrendered and conveyed out of the United Kingdom within two months after such committal, or, if a writ of Habeas corpus is issued, after the decision of the court upon the return to the writ, it shall be lawful for any judge of one of Her Majesty's Superior Courts at Westminster, upon application made to him by or on behalf of the criminal, and upon proof that reasonable notice of the intention to make such application has been given to a Secretary of State, to order the criminal to be discharged out of custody, unless sufficient cause is shown to the contrary.

13. The warrant of the police magistrate issued in pursuance of this Act may be executed in any part of the United Kingdom in the same manner as if the same had been originally issued or subsequently indorsed by a justice of the peace having jurisdiction in the place where the same is executed.

14. Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act.

15. Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act, if authenticated in manner provided for the time being by law or authenticated as follows:

(1) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued;

(2) If the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require; and

(3) If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and

if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice, or some other minister of state: And all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

Crimes Committed at Sea.

16. Where the crime in respect of which the surrender of a fugitive criminal is sought was committed on board any vessel on the high seas which comes into any port of the United Kingdom, the following provisions shall have effect:

1. This Act shall be construed as if any stipendiary magistrate in England or Ireland, and any sheriff or sheriff substitute in Scotland, were substituted for the police magistrate throughout this Act, except the part relating to the execution of the warrant of the police magistrate:
2. The criminal may be committed to any prison to which the person committing him has power to commit persons accused of the like crime:
3. If the fugitive criminal is apprehended on a warrant issued without the order of a Secretary of State, he shall be brought before the stipendiary magistrate, sheriff, or sheriff substitute who issued the warrant, or who has jurisdiction in the port where the vessel lies, or in the place nearest to that port.

Fugitive Criminals in British Possessions.

17. This Act, when applied by Order in Council, shall, unless it is otherwise provided by such order, extend to every British possession in the same manner as if throughout this Act the British possession were substituted for the United Kingdom or England, as the case may require, but with the following modifications; namely,

(1) The requisition for the surrender of a fugitive criminal who is in or suspected of being in a British possession may be made to the governor of that British possession by any person recognised by that governor as a consul-general, consul, or vice-consul, or (if the fugitive criminal has escaped from a

colony or dependency of the foreign state on behalf of which the requisition is made) as the governor of such colony or dependency:

(2) No warrant of a Secretary of State shall be required, and all powers vested in or acts authorised or required to be done under this Act by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone:

(3) Any prison in the British possession may be substituted for a prison in Middlesex:

(4) A judge of any court exercising in the British possession the like powers as to the Court of Queen's Bench exercises in England may exercise the power of discharging a criminal when not conveyed within two months out of such British possession.

18. If by any law or ordinance, made before or after the passing of this Act by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this Act in the case of any foreign state, or by any subsequent order, either

suspend the operation within any such British possession of this Act, or of any part thereof, so far as it relates to such foreign state, and so long as such law or ordinance continues in force there, and no longer;

or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act.

General Provisions.

19. Where, in pursuance of any arrangement with a foreign state, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this Act, is surrendered by that foreign state, such person shall not, until he has been restored or had an opportunity of returning to such foreign state, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded.

20. The forms set forth in the second schedule to this Act, or forms as near thereto as circumstances admit, may be used

in all matters to which such forms refer, and in the case of a British possession may be so used, mutatis mutandis, and when used shall be deemed to be valid and sufficient in law.

21. Her Majesty may, by Order in Council, revoke or alter, subject to the restrictions of this Act, any Order in Council made in pursuance of this Act, and all the provisions of this Act with respect to the original order shall (so far as applicable) apply, mutatis mutandis, to any such new order.

22. This Act (except so far as relates to the execution of warrants in the Channel Islands) shall extend to the Channel Islands and Isle of Man in the same manner as if they were part of the United Kingdom; and the royal courts of the Channel Islands are hereby respectively authorised and required to register this Act.

23. Nothing in this Act shall affect the lawful powers of Her Majesty or of the Governor-General of India in Council to make treaties for the extradition of criminals with Indian native states, or with other Asiatic states conterminous with British India, or to carry into execution the provisions of any such treaties made either before or after the passing of this Act.

24. The testimony of any witness may be obtained in relation to any criminal matter pending in any court or tribunal in a foreign state in like manner as it may be obtained in relation to any civil matter under the Act of the session of the nineteenth and twentieth years of the reign of Her present Majesty, chapter one hundred and thirteen, intituled "An Act to provide for taking evidence in Her Majesty's Dominions in relation to civil and commercial matters pending before foreign tribunals;" and all the provisions of that Act shall be construed as if the term civil matter included a criminal matter, and the term cause included a proceeding against a criminal: Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

25. For the purposes of this Act, every colony, dependency, and constituent part of a foreign state, and every vessel of that state, shall (except where expressly mentioned as distinct in this Act) be deemed to be within the jurisdiction of and to be part of such foreign state.

26. In this Act, unless the context otherwise requires,—

The term "British possession" means any colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within the United Kingdom, the Channel Islands, and Isle of Man; and all colonies, plantations, islands, territories, and settlements under one legislature, as hereinafter defined, are deemed to be one British possession:

The term "legislature" means any person or persons who can exercise legislative authority in a British possession, and where there are local legislatures as well as a central legislature, means the central legislature only:

The term "governor" means any person or persons administering the government of a British possession, and includes the governor of any part of India:

The term "extradition crime" means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act:

The terms "conviction" and "convicted" do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term "accused person" includes a person so convicted for contumacy:

The term "fugitive criminal" means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of Her Majesty's dominions; and the terms "fugitive criminal of a foreign state" means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that state:

The term "Secretary of State" means one of Her Majesty's Principal Secretaries of State:

The term "police magistrate" means a chief magistrate of the metropolitan police courts, or one of the other magistrates of the metropolitan police court in Bow Street:

The term "justice of the peace" includes in Scotland any sheriff, sheriff's substitute, or magistrate:

The term "warrant," in the case of any foreign state, includes any judicial document authorising the arrest of a person accused or convicted of crime.

Repeal of Acts.

27. The Acts specified in the third schedule to this Act are hereby repealed as to the whole of Her Majesty's dominions; and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act), in the case of the foreign states with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and as if such order had

directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act.

Provided that if any proceedings for or in relation to the surrender of a fugitive criminal have been commenced under the said Acts previously to the repeal thereof, such proceedings may be completed, and the fugitive surrendered, in the same manner as if this Act had not passed.

SCHEDULES.

FIRST SCHEDULES.

List of Crimes.

The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statutes made before or after the passing of this Act:

Murder, and attempt and conspiracy to murder.

Manslaughter.

Counterfeiting and altering money and uttering counterfeit or altered money.

Forgery, counterfeiting, and altering, and uttering what is forged or counterfeited or altered.

Embezzlement and larceny.

Obtaining money or goods by false pretences.

Crimes by bankrupts against bankruptcy law.

Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force.

Rape.

Abduction.

Child stealing.

Burglary and housebreaking.

Arson.

Robbery with violence.

Threats by letter or otherwise with intent to extort.

Piracy by law of nations.

Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

SECOND SCHEDULE.

Form of Order of Secretary of State to the Police Magistrate.

To the chief magistrate of the metropolitan police courts *or* other magistrate of the metropolitan police court in Bow Street [*or* the stipendiary magistrate at].

Whereas, in pursuance of an arrangement with , referred to in an Order of Her Majesty in Council, dated the day of , a requisition has been made to me, , one of Her Majesty's Principal Secretaries of State, by , the diplomatic representative of , for the surrender of , late of , accused [*or* convicted] of the commission of the crime of within the jurisdiction of : Now I hereby, by this my order under my hand and seal, signify to you that such requisition has been made, and require you to issue your warrant for the apprehension of such fugitive, provided that the conditions of The Extradition Act, 1870, relating to the issue of such warrant, are in your judgment complied with.

Given under the hand and seal of the undersigned, one of Her Majesty's Principal Secretaries of State, this day of , 18 .

Form of Warrant of Apprehension by Order of Secretary of State.

Metropolitan police district, [*or* county *or* borough of] to wit. } To all and each of the constables of the metropolitan police force [*or* the county *or* borough of].

Whereas the Right Honorable one of Her Majesty's Principal Secretaries of State, by order under his hand and seal, hath signified to me that requisition hath been duly made to him for the surrender of , late of , accused [*or* convicted] of the commission of the crime of within the jurisdiction of : This is, therefore, to command you in Her Majesty's name forthwith to apprehend the said pursuant to The Extradition Act, 1870, wherever he may be found in the United Kingdom or Isle of Man, and bring him before me or some other [*magistrate sitting in this court], to show cause why he should not be surrendered in pursuance of the said Extradition Act, for which this shall be your warrant.

Given under my hand and seal [*Bow Street, one of the police courts of the metropolis] this day of , 18 .

J. P.

* Note.—Alter as required.

Metropolitan police district, [*or* county *or* borough of] to wit. } To all and each of the constables of the metropolitan police force [*or* of the county *or* borough of].

Whereas it has been shown to the undersigned, one of Her Majesty's justices of the peace in and for the metropolitan police district [*or* the said county *or* borough of] that late of is accused [*or* convicted] of the commission of the crime of within the jurisdiction of : This is, therefore, to command you in Her Majesty's name forthwith to apprehend the said and to bring him before me or some other magistrate sitting at this court [*or* one of Her Majesty's justices of the peace in and for the county [*or* borough] of] to be further dealt with according to law, for which this shall be your warrant.

Given under my hand and seal at Bow Street, one of the police courts of the metropolis, [*or* in the county *or* borough aforesaid] this day of , 18 .

J. P.

Form of Warrant for bringing Prisoner before the Police Magistrate.

County [*or* borough] of to wit. } To , constable of the police force of , and to all other peace officers in the said county [*or* borough] of .

Whereas , late of , accused [*or* alleged to be convicted of] the commission of the crime of within the jurisdiction of , has been apprehended and brought before the undersigned, one of Her Majesty's justices of the peace in and for the said county [*or* borough] of : And whereas by The Extradition Act, 1870, he is required to be brought before the chief magistrate of the metropolitan police court, or one of the police magistrates of the metropolis sitting at Bow Street, within the metropolitan police district [*or* the stipendiary magistrate for]: This is, therefore, to command you, the said constable in Her Majesty's name forthwith to take and convey the said to the metropolitan police district [*or* the said and there carry him before the said chief magistrate or one of the police magistrates of the metropolis sitting at Bow Street within the said district [*or* before a stipendiary magistrate sitting in the said] to show cause why he should not be

surrendered in pursuance of The Extradition Act, 1870, and otherwise to be dealt with in accordance with law, for which this shall be your warrant.

Given under my hand and seal at in the county [*or* borough] aforesaid, this day of , 18 .

J. P.

Form of Warrant of Committal.

Metropolitan police district, [*or* county *or* borough of] to wit. } To , one of the constables of the metropolitan police force, [*or* of the police force of the county *or* borough of], and to the keeper of the .

Be it remembered, that on this day of , in the year of our Lord , late of , is brought before me , , the chief magistrate of the metropolitan police courts [*or* one of the police magistrates of the metropolis] sitting at the police court in Bow Street, within the metropolitan police district, [*or* a stipendiary magistrate for ,] to show cause why he should not be surrendered in pursuance of The Extradition Act, 1870, on the ground of his being accused [*or* convicted] of the commission of the crime of within the jurisdiction of , and forasmuch as no sufficient cause has been shown to me why he should not be surrendered in pursuance of the said Act:

This is, therefore, to command you the said constable in Her Majesty's name forthwith to convey and deliver the body of the said into the custody of the said keeper of the at , and you the said keeper to receive the said into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Extradition Act, for which this shall be your warrant.

Given under my hand and seal at Bow Street, one of the police courts of the metropolis, [*or* at the said] this day of , 18 .

J. P.

Form of Warrant of Secretary of State for Surrender of Fugitive.

To the keeper of and to .

Whereas , late of , accused [*or* convicted] of the commission of the crime of within

the jurisdiction of , was delivered into the custody of you, , the keeper of , by warrant dated pursuant to the Extradition Act, 1870:

Now I do hereby, in pursuance of the said Act, order you the said keeper to deliver the body of the said into the custody of the said , and I command you the said to receive the said into your custody, and to convey him within the jurisdiction of the said , and there place him in the custody of any person or persons appointed by the said to receive him, for which this shall be your warrant.

Given under the hand and seal of the undersigned, one of Her Majesty's Principal Secretaries of State, this day of .

THIRD SCHEDULE.

Year and Chapter.	Title.
6 & 7 Vict. c. 75.	An Act for giving effect to a convention between Her Majesty and the King of the French for the apprehension of certain offenders.
6 & 7 Vict. c. 76.	An Act for giving effect to a treaty between Her Majesty and the United States of America for the apprehension of certain offenders.
8 & 9 Vict. c. 120.	An Act for facilitating execution of the treaties with France and the United States of America for the apprehension of certain offenders.
25 & 26 Vict. c. 70	An Act for giving effect to a convention between Her Majesty and the King of Denmark for the mutual surrender of criminals.
29 & 30 Vict. c. 121.	An Act for the amendment of the law relating to treaties of extradition.

12. THE FUGITIVE OFFENDERS ACT, 1881.

44-45 Vict. cap. 69 (Imp.).

An Act to amend the Law with respect to Fugitive Offenders in Her Majesty's Dominions, and for other Purposes connected with the Trial of Offenders.

[*27th August, 1881.*]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; (that is to say,)

1. This Act may be cited as the Fugitive Offenders Act, 1881.

PART I.

RETURN OF FUGITIVES.

2. Where a person accused of having committed an offence (to which this part of this Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive.

A fugitive may be so apprehended under an endorsed warrant or a provisional warrant.

3. Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive is or is suspected to be; (that is to say,)

(1) A judge of a superior court in such part; and

(2) In the United Kingdom a Secretary of State and one of the magistrates of the metropolitan police court in Bow Street; and

(3) In a British possession the governor of that possession,

if satisfied that the warrant was issued by some person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend the fugitive in the part of Her Majesty's dominions in which it is endorsed, and bring him before a magistrate.

4. A magistrate of any part of Her Majesty's dominions may issue a provisional warrant for the apprehension of a fugitive who is or is suspected of being in or on his way to that part on such information, and under such circumstances, as would, in his opinion, justify the issue of a warrant if the offence of which the fugitive is accused had been committed within his jurisdiction, and such warrant may be backed and executed accordingly.

A magistrate issuing a provisional warrant shall forthwith send a report of the issue, together with the information or a certified copy thereof, if he is in the United Kingdom, to a Secretary of State, and if in a British possession, to the governor of that possession, and the Secretary of State or governor may, if he think fit, discharge the person apprehended under such warrant.

5. A fugitive when apprehended shall be brought before a magistrate, who (subject to the provisions of this Act) shall hear the case in the same manner and have the same jurisdiction and

powers, as near as may be (including the power to remand and admit to bail), as if the fugitive were charged with an offence committed within his jurisdiction.

If the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of this Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case as he may think fit, if in the United Kingdom to a Secretary of State, and if in a British possession, to the governor of that possession.

Where the magistrate commits the fugitive to prison, he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus, or other like process.

A fugitive apprehended on a provisional warrant may be from time to time remanded for such reasonable time not exceeding seven days at any one time as under the circumstances seems requisite for the production of an endorsed warrant.

6. Upon the expiration of fifteen days after a fugitive has been committed to prison to await his return, or if a writ of habeas corpus or other like process is issued with reference to such fugitive by a superior court, after the final decision of the court in the case,

(1) if the fugitive is so committed in the United Kingdom, a Secretary of State; and

(2) if the fugitive is so committed in a British possession, the governor of that possession,

may, if he thinks it just, by warrant under his hand order that fugitive to be returned to the part of Her Majesty's dominions from which he is a fugitive, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or some one or more of them, and to be held in custody, and conveyed by sea or otherwise to the said part of Her Majesty's dominions, to be dealt with there in due course of law as if he had been there apprehended, and such warrant shall be forthwith executed according to the tenor thereof.

The governor or other chief officer of any prison, on request of any person having the custody of a fugitive under any such warrant, and on payment or tender of a reasonable amount for expenses, shall receive such fugitive and detain him for such

reasonable time as may be requested by the said person for the purpose of the proper execution of the warrant.

7. If a fugitive who, in pursuance of this part of this Act, has been committed to prison in any part of Her Majesty's dominions to await his return, is not conveyed out of that part within one month after such committal, a superior court, upon application by or on behalf of the fugitive, and upon proof that reasonable notice of the intention to make such application has been given, if the said part is the United Kingdom to a Secretary of State, and if the said part is a British possession to the governor of the possession, may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody.

8. Where a person accused of an offence and returned in pursuance of this part of this Act to any part of Her Majesty's dominions, either is not prosecuted for the said offence within six months after his arrival in that part, or is acquitted of the said offence, then if that part is the United Kingdom a Secretary of State, and if that part is a British possession the governor of that possession, may, if he think fit, on the request of such person, cause him to be sent back free of cost and with as little delay as possible to the part of Her Majesty's dominions in or on his way to which he was apprehended.

9. This part of this Act shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanour, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment; and for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour.

This part of this Act shall apply to an offence notwithstanding that by the law of the part of Her Majesty's dominions in or on his way to which the fugitive is or is suspected of being it is not an offence, or not an offence to which this part of this Act applies; and all the provisions of this part of this Act, including those relating to a provisional warrant, and to a committal to prison, shall be construed as if the offence were in such last-mentioned part of Her Majesty's dominions an offence to which this part of this Act applies.

10. Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith

in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period name in the order, or may make such other order in the premises as to the court seems just.

11. In Ireland, the Lord Lieutenant or Lords Justices or other chief governor or governors of Ireland, also the chief secretary of such Lord Lieutenant, may, as well as a Secretary of State, execute any portion of the powers by this part of this Act vested in a Secretary of State.

PART II.

Intercolonial Backing of Warrants, and Offences.

Application of Part of Act.

12. This part of this Act shall apply only to those groups of British possessions to which, by reason of either contiguity or otherwise, it may seem expedient to Her Majesty to apply the same.

It shall be lawful for Her Majesty from time to time by Order in Council to direct that this part of this Act shall apply to the group of British possessions mentioned in the Order, and by the same or any subsequent Order to except certain offences from the application of this part of this Act, and to limit the application of this part of this Act by such conditions, exceptions, and qualifications as may be deemed expedient.

Backing of Warrant.

13. Where in a British possession of a group to which this part of this Act applies, a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that possession, and such person is or is suspected of being in or on the way to another British possession of the same group, a magistrate in the last-mentioned possession, if satisfied that the warrant was issued by a person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend, within the jurisdiction of the endorsing magistrate, the person named in the warrant, and bring him before the endorsing magistrate or some other magistrate in the same British possession.

14. The magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenticated as directed by this Act and was issued by a person having lawful authority to issue the same, and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant, may order such prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or any one or more of them, and to be held in custody and conveyed by sea or otherwise into the British possession in which the warrant was issued, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by warrant under the hand of the magistrate making it, and may be executed according to the tenor thereof.

A magistrate shall, so far as is requisite for the exercise of the powers of this section, have the same power, including the power to remand and admit to bail a prisoner, as he has in the case of a person apprehended under a warrant issued by him.

15. Where a person required to give evidence on behalf of the prosecutor or defendant on a charge for an offence punishable by law in a British possession of a group to which this part of this Act applies, is or is suspected of being in or on his way to any other British possession of the same group, a judge, magistrate, or other officer who would have lawful authority to issue a summons requiring the attendance of such witness, if the witness were within his jurisdiction, may issue a summons for the attendance of such witness, and a magistrate in any other British possession of the same group, if satisfied that the summons was issued by some judge, magistrate, or officer having lawful authority as aforesaid, may endorse the summons with his name; and the witness, on service in that possession of the summons, so endorsed, and on payment or tender of a reasonable amount for his expenses, shall obey the summons, and in default shall be liable to be tried and punished either in the possession in which he is served or in the possession in which the summons was issued, and shall be liable to the punishment imposed by the law of the possession in which he is tried for the failure of a witness to obey such a summons. The expression "summons" in this section includes any subpœna or other process for requiring the attendance of a witness.

16. A magistrate in a British possession of a group to which this part of this Act applies, before the endorsement in pursuance of this part of this Act of a warrant for the apprehension of any person, may issue a provisional warrant for the apprehension of

that person, on such information and under such circumstances as would, in his opinion, justify the issue of a warrant if the offence of which such person is accused were an offence punishable by the law of the said possession, and had been committed within his jurisdiction, and such warrant may be backed and executed accordingly; provided that a person arrested under such provisional warrant shall be discharged unless the original warrant is produced and endorsed within such reasonable time as may under the circumstances seem requisite.

17. If a prisoner in a British possession whose return is authorised in pursuance of this part of this Act is not conveyed out of that possession within one month after the date of the warrant ordering his return, a magistrate or a superior court, upon application by or on behalf of the prisoner, and upon proof that reasonable notice of the intention to make such application has been given to the person holding the warrant and to the chief officer of the police of such possession or of the province or town where the prisoner is in custody, may, unless sufficient cause is shown to the contrary, order such prisoner to be discharged out of custody.

Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to appeal to a superior court.

18. Where a prisoner accused of an offence is returned in pursuance of this part of this Act to a British possession, and either is not prosecuted for the said offence within six months after his arrival in that possession or is acquitted of the said offence, the governor of that possession, if he thinks fit, may, on the requisition of such person, cause him to be sent back, free of cost, and with as little delay as possible, to the British possession in or on his way to which he was apprehended.

19. Where the return of a prisoner is sought or ordered under this part of this Act, and it is made to appear to a magistrate or to a superior court that by reason of the trivial nature of the case or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period, the court or magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the magistrate or court seems just.

Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to an appeal to a superior court.

PART III.

Trial, etc., of Offences.

20. Where two British possessions adjoin, a person accused of an offence committed on or within the distance of five hundred yards from the common boundary of such possessions may be apprehended, tried, and punished in either of such possessions.

21. Where an offence is committed on any person or in respect of any property in or upon any carriage, cart, or vehicle whatsoever employed in a journey, or on board any vessel whatsoever employed in a navigable river, lake, canal, or inland navigation, the person accused of such offence may be tried in any British possession through a part of which such carriage, cart, vehicle, or vessel passed in the course of the journey or voyage during which the offence was committed; and where the side, bank, centre, or other part of the road, river, lake, canal, or inland navigation along which the carriage, cart, vehicle, or vessel passed in the course of such journey or voyage is the boundary of any British possession, a person may be tried for such offence in any British possession of which it is the boundary:

Provided that nothing in this section shall authorise the trial for such offence of a person who is not a British subject, where it is not shown that the offence was committed in a British possession.

22. A person accused of the offence (under whatever name it is known) of swearing or making any false deposition, or of giving or fabricating any false evidence, for the purposes of this Act, may be tried either in the part of Her Majesty's dominions in which such deposition or evidence is used, or in the part in which the same was sworn, made, given, or fabricated, as the justice of the case may require.

23. Where any part of this Act provides for the place of trial of a person accused of an offence, that offence shall, for all purposes of and incidental to the apprehension, trial, and punishment of such person, and of and incidental to any proceedings and matters preliminary, incidental to, or consequential thereon, and of and incidental to the jurisdiction of any court, constable, or officer with reference to such offence, and to any person accused of such offence, be deemed to have been committed in any place in which the person accused of the offence can be

tried for it; and such person may be punished in accordance with the Courts (Colonial) Jurisdiction Act, 1874.

24. Where a warrant for the apprehension of a person accused of an offence has been endorsed in pursuance of any part of this Act in any part of Her Majesty's dominions, or where any part of the Act provides for the place of trial of a person accused of an offence, every court and magistrate of the part in which the warrant is endorsed or the person accused of the offence can be tried shall have the same power of issuing a warrant to search for any property alleged to be stolen or to be otherwise unlawfully taken or obtained by such person, or otherwise to be the subject of such offence, as that court or magistrate would have if the property had been stolen or otherwise unlawfully taken or obtained, or the offence had been committed wholly within the jurisdiction of such court or magistrate.

25. Where a person is in legal custody in a British possession either in pursuance of this Act or otherwise, and such person is required to be removed in custody to another place in or belonging to the same British possession, such person, if removed by sea in a vessel belonging to Her Majesty or any of Her Majesty's subjects, shall be deemed to continue in legal custody until he reaches the place to which he is required to be removed; and the provisions of this Act with respect to the retaking of a prisoner who has escaped, and with respect to the trial and punishment of a person guilty of the offence of escaping or attempting to escape, or aiding or attempting to aid a prisoner to escape, shall apply to the case of a prisoner escaping while being lawfully removed as aforesaid, in like manner as if he were being removed in pursuance of a warrant endorsed in pursuance of this Act.

PART IV.

SUPPLEMENTAL.

Warrant and Escape.

26. An endorsement of a warrant in pursuance of this Act shall be signed by the authority endorsing the same, and shall authorise all or any of the persons named in the endorsement, and of the persons to whom the warrant was originally directed, and also every constable, to execute the warrant within the part of Her Majesty's dominions or place within which such endorsement is by this Act made a sufficient authority, by apprehending the person named in it, and bringing him before some magistrate in the said part or place, whether the magistrate named in the endorsement or some other.

For the purposes of this Act every warrant, summons, subpœna, and process, and every endorsement made in pursuance of this Act thereon, shall remain in force, notwithstanding that the person signing the warrant or such endorsement dies or ceases to hold office.

27. Where a fugitive or prisoner is authorised to be returned to any part of Her Majesty's dominions in pursuance of Part One or Part Two of this Act, such fugitive or prisoner may be sent thither in any ship belonging to Her Majesty or to any of her subjects.

For the purpose aforesaid, the authority signing the warrant for the return may order the master of any ship belonging to any subject of Her Majesty bound to the said part of Her Majesty's dominions to receive and afford a passage and subsistence during the voyage to such fugitive or prisoner, and to the person having him in custody, and to the witnesses, so that such master be not required to receive more than one fugitive or prisoner for every hundred tons of his ship's registered tonnage, or more than one witness for every fifty tons of such tonnage.

The said authority shall endorse or cause to be endorsed upon the agreement of the ship such particulars with respect to any fugitive prisoner or witness sent in her as the Board of Trade from time to time require.

Every such master shall, on his ship's arrival in the said part of Her Majesty's dominions, cause such fugitive or prisoner, if he is not in the custody of any person, to be given into the custody of some constable, there to be dealt with according to law.

Every master who fails on payment or tender of a reasonable amount for expenses to comply with an order made in pursuance of this section, or to cause a fugitive or prisoner committed to his charge to be given into custody as required by this section, shall be liable on summary conviction to a fine not exceeding fifty pounds, which may be recovered in any part of Her Majesty's dominions in like manner as a penalty of the same amount under the Merchant Shipping Act, 1854, and the Acts amending the same.

28. If a prisoner escape, by breach of prison or otherwise, out of the custody of a person acting under a warrant issued or endorsed in pursuance of this Act, he may be retaken in the same manner as a person accused of a crime against the law of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

A person guilty of the offence of escaping or of attempting to escape, or of aiding or attempting to aid a prisoner to escape, by breach of prison or otherwise, from custody under any warrant

issued or endorsed in pursuance of this Act, may be tried in any of the following parts of Her Majesty's dominions, namely, the part to which and the part from which the prisoner is being removed, and the part in which the prisoner escapes and the part in which the offender is found.

Evidence.

29. A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him.

Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act.

Provided that nothing in this Act shall authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence.

Warrants and depositions, and copies thereof, and official certificates of or judicial documents stating facts, shall be deemed duly authenticated for the purposes of this Act if they are authenticated in manner provided for the time being by law, or if they purport to be signed by or authenticated by the signature of a judge, magistrate, or officer of the part of Her Majesty's dominions in which the same are issued, taken, or made, and are authenticated either by the oath of some witness, or by being sealed with the official seal of a Secretary of State, or with the public seal of a British possession, or with the official seal of a governor of a British possession, or of a colonial secretary, or of some secretary or minister administering a department of the government of a British possession.

And all courts and magistrates shall take judicial notice of every such seal as is in this section mentioned, and shall admit in evidence without further proof the documents authenticated by it.

Miscellaneous.

30. The jurisdiction under Part One of this Act to hear a case and commit a fugitive to prison to await his return shall be exercised,—

(1) In England, by a chief magistrate of the metropolitan police courts or one of the other magistrates of the metropolitan police court at Bow Street; and

(2) In Scotland, by the sheriff or sheriff substitute of the county of Edinburgh; and

(3) In Ireland, by one of the police magistrates of the Dublin metropolitan police district; and

(4) In a British possession, by any judge, justice of the peace, or other officer having the like jurisdiction as one of the magistrates of the metropolitan police court in Bow Street, or by such other court, judge, or magistrate as may be from time to time provided by an Act or ordinance passed by the legislature of that possession.

If a fugitive is apprehended and brought before a magistrate who has no power to exercise the jurisdiction under this Act in respect of that fugitive, that magistrate shall order the fugitive to be brought before some magistrate having that jurisdiction, and such order shall be obeyed

31. It shall be lawful for Her Majesty in Council from time to time to make Orders for the purposes of this Act, and to revoke and vary any Order so made, and every Order so made shall, while it is in force, have the same effect as if it were enacted in this Act.

An Order in Council made for the purposes of this Act shall be laid before Parliament as soon as may be after it is made if Parliament is then in session, or if not, as soon as may be after the commencement of the then next session of Parliament.

32. If the legislature of a British possession pass any Act or ordinance—

(1) For defining the offences committed in that possession to which this Act or any part thereof is to apply; or

(2) For determining the court, judge, magistrate, officer, or person by whom and the manner in which any jurisdiction or power under this Act is to be exercised; or

(3) For payment of the costs incurred in returning a fugitive or a prisoner, or in sending him back if not prosecuted or if acquired, or otherwise in the execution of this Act; or

(4) In any manner for the carrying of this Act or any part thereof into effect in that possession,

it shall be lawful for Her Majesty by Order in Council to direct, if it seems to Her Majesty in Council necessary or proper for carrying into effect the objects of this Act, that such Act or ordinance, or any part thereof, shall with or without modification or alteration be recognised and given effect to throughout Her Majesty's dominions and on the high seas as if it were part of this Act.

Application of Act.

33. Where a person accused of an offence can, by reason of the nature of the offence, or of the place in which it was committed,

or otherwise, be, under this Act or otherwise, tried for or in respect of the offence in more than one part of Her Majesty's dominions, a warrant for the apprehension of such person may be issued in any part of Her Majesty's dominions in which he can, if he happens to be there, be tried; and each part of this Act shall apply as if the offence had been committed in the part of Her Majesty's dominions where such warrant is issued, and such person may be apprehended and returned in pursuance of this Act, notwithstanding that in the place in which he is apprehended a court has jurisdiction to try him:

Provided that if such person is apprehended in the United Kingdom, a Secretary of State, and if he is apprehended in a British possession, the Governor of such possession may, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, order such person to be tried in the part of Her Majesty's dominions in which he is apprehended, and in such case any warrant previously issued for his return shall not be executed.

34. Where a person convicted by a court in any part of Her Majesty's dominions of an offence committed either in Her Majesty's dominions or elsewhere, is unlawfully at large before the expiration of his sentence, each part of this Act shall apply to such person, so far as is consistent with the tenor thereof, in like manner as it applies to a person accused of the like offence committed in the part of Her Majesty's dominions in which such person was convicted.

35. Where a person accused of an offence is in custody in some part of Her Majesty's dominions, and the offence is one for or in respect of which, by reason of the nature thereof or of the place in which it was committed or otherwise, a person may under this Act or otherwise be tried in some other part of Her Majesty's dominions, in such case a superior court, and also if such person is in the United Kingdom a Secretary of State, and if he is in a British possession the governor of that possession, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, may by warrant direct the removal of such offender to some other part of her Majesty's dominions in which he can be tried, and the offender may be returned, and, if not prosecuted or acquitted, sent back free of cost in like manner as if he were a fugitive returned in pursuance of Part One of this Act, and the warrant were a warrant for the return of such fugitive, and the provisions of this Act shall apply accordingly.

36. It shall be lawful for Her Majesty from time to time by Order in Council to direct that this Act shall apply as if, subject to the conditions, exceptions, and qualifications (if any) contained in the Order, any place out of Her Majesty's dominions in which Her Majesty has jurisdiction, and which is named in the Order, were a British possession, and to provide for carrying into effect such application.

37. This Act shall extend to the Channel Islands and the Isle of Man as if they were part of England and of the United Kingdom, and the United Kingdom and those islands shall be deemed for the purpose of this Act to be one part of Her Majesty's dominions; and a warrant endorsed in pursuance of Part One of this Act may be executed in every place in the United Kingdom and the said islands accordingly.

38. This Act shall apply where an offence is committed before the commencement of this Act, or, in the case of Part Two of this Act, before the application of that part to a British possession or to the offence, in like manner as if such offence had been committed after such commencement or application.

Definitions and Repeal.

39. In this Act, unless the context otherwise requires,—

The expression "Secretary of State" means one of Her Majesty's Principal Secretaries of State:

The expression "British possession" means any part of Her Majesty's dominions, exclusive of the United Kingdom, the Channel Islands, and Isle of Man; all territories and places within Her Majesty's dominions which are under one legislature shall be deemed to be one British possession and one part of Her Majesty's dominions:

The expression "legislature," where there are local legislatures as well as a central legislature, means the central legislature only:

The expression "governor" means any person or persons administering the government of a British possession, and includes the governor and lieutenant-governor of any part of India:

The expression "constable" means, out of England, any policeman or officer having the like powers and duties as a constable in England:

The expression "magistrate" means, except in Scotland, any justice of the peace, and in Scotland means a sheriff or sheriff substitute, and in the Channel Islands,

Isle of Man, and a British possession means any person having authority to issue a warrant for the apprehension of persons accused of offences and to commit such persons for trial:

The expression "offence punishable on indictment" means, as regards India, an offence punishable on a charge or otherwise:

The expression "oath" includes affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swearing, and the expression "swear" and other words relating to an oath or swearing shall be construed accordingly:

The expression "deposition" includes any affidavit, affirmation, or statement made upon oath as above defined:

The expression "superior court" means:

(1) In England, Her Majesty's Court of Appeal and High Court of Justice; and

(2) In Scotland, the High Court of Justiciary; and

(3) In Ireland, Her Majesty's Court of Appeal and Her Majesty's High Court of Justice at Dublin; and

(4) In a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court of Justice in England, or such court or judge as may be determined by any Act or ordinance of that possession.

40. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-two, which date is in this Act referred to as the commencement of this Act.

(41) The Act specified in the Schedule to this Act is hereby repealed as from the commencement of this Act:

Provided that this repeal shall not affect—

(*a*) Any warrant duly endorsed or issued, nor anything duly done or suffered before the commencement of this Act; nor

(*b*) Any obligation or liability incurred under an enactment hereby repealed; nor

(*c*) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; nor

(*d*) Any legal proceeding or remedy in respect of any such warrant, obligation, liability, penalty, forfeiture, or punishment as aforesaid; and any such warrant may be endorsed and executed, and any such legal proceeding and remedy may be carried on, as if this Act had not passed.

SCHEDULE.

Year and Chapter.	Title.
6 & 7 Vict. c. 34....	An Act for the better apprehension of certain offenders.

13. COLONIAL NAVAL DEFENCE ACT, 1865.

28-29 Vict. cap. 14 (Imp.).

An Act to make better Provision for the Naval Defence of the Colonies.

[*7th April, 1865.*]

Whereas it is expedient to enable the several colonial possessions of Her Majesty the Queen to make better provision for naval defence, and to that end to provide and man vessels of war, and also to raise a volunteer force, to form part of the Royal Naval Reserve established under the Act of Parliament of 1859, "for the establishment of a Reserve Volunteer Force of Seamen, and for the government of the same." (hereafter in this Act called the Act of 1859), and according[1]y to be available for general service in the Royal Navy in emergency:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as The Colonial Naval Defence Act, 1865.

2. In this Act—

The term "colony" includes any plantation, island, or other possession within Her Majesty's dominions, exclusive of the United Kingdom of Great Britain and Ireland, and of the islands being immediate dependencies thereof, and exclusive of India as defined by the Act of Parliament of 1858, "for the better government of India:"

The term "the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral.

3. In any colony it shall be lawful for the proper legislative authority, with the approval of Her Majesty in Council, from time to time to make provision for effecting at the expense of the colony all or any of the purposes following:

(1) For providing, maintaining, and using a vessel or vessels of war, subject to such conditions and for such purposes as Her Majesty in Council from time to time approves:

(2) For raising and maintaining seamen and others entered on the terms of being bound to serve as ordered in any such vessel:

(3) For raising and maintaining a body of volunteers entered on the terms of being bound to general service in the Royal Navy in emergency, and, if in any case the proper legislative authority so directs, on the further terms of being bound to serve as ordered in any such vessel as aforesaid:

(4) For appointing commissioned, warrant, and other officers to train and command or serve as officers with any such men, ashore or afloat, on such terms and subject to such regulations as Her Majesty in Council from time to time approves:

(5) For obtaining from the Admiralty the services of commissioned, warrant, and other officers and of men of the Royal Navy for the last-mentioned purposes:

(6) For enforcing good order and discipline among the men and officers aforesaid, while ashore or afloat within the limits of the colony:

(7) For making the men and officers aforesaid, while ashore or afloat within the limits of the colony or elsewhere, subject to all enactments and regulations for the time being in force for the discipline of the Royal Navy.

4. Volunteers raised as aforesaid in any colony shall form part of the Royal Naval Reserve, in addition to the volunteers who may be raised under the Act of 1859, but, except as in this Act expressly provided, shall be subject exclusively to the provisions made as aforesaid by the proper legislative authority of the colony.

5. It shall be lawful for Her Majesty in Council from time to time as occasion requires, and on such conditions as seem fit, to authorise the Admiralty to issue to any officer of the Royal Navy volunteering for the purpose a special commission for service in accordance with the provisions of this Act.

6. It shall be lawful for Her Majesty in Council from time to time as occasion requires, and on such conditions as seem fit, to authorise the Admiralty to accept any offer for the time being made or to be made by the Government of a colony to place at

Her Majesty's disposal any vessel of war provided by that Government, and the men and officers from time to time serving therein; and while any vessel accepted by the Admiralty under such authority is at the disposal of Her Majesty, such vessel shall be deemed to all intents a vessel of war of the Royal Navy, and the men and officers from time to time serving in such vessel shall be deemed to all intents men and officers of the Royal Navy, and shall accordingly be subject to all enactments and regulations for the time being in force for the discipline of the Royal Navy.

7. It shall be lawful for Her Majesty in Council from time to time as occasion requires, and on such conditions as seem fit, to authorise the Admiralty to accept any offer for the time being made or to be made by the Government of a colony to place at Her Majesty's disposal for general service in the Royal Navy the whole or any part of the body of volunteers, with all or any of the officers, raised and appointed by that Government in accordance with the provisions of this Act; and when any such offer is accepted, such of the provisions of the Act of 1859 as relate to men of the Royal Naval Reserve raised in the United Kingdom when in actual service shall extend and apply to the volunteers whose services are so accepted.

8. The Admiralty may, if they think fit, from time to time by warrant authorise any officer of Her Majesty's Navy of the rank of captain or of a higher rank to exercise, in the name and on the behalf of the Admiralty, in relation to any colony, for such time and subject to such limitations, if any, as the Admiralty think fit, any power exercisable by the Admiralty under this Act.

9. Nothing done under this Act by Order in Council, or by the Admiralty, or otherwise, shall impose any charge on the revenues of the United Kingdom, without express provision made by Parliament for meeting the same.

10. Nothing in this Act shall take away or abridge any power vested in or exercisable by the Legislature or Government of any colony.

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14. NAVAL DISCIPLINE (DOMINION FORCES) ACT, 1911. 1-2 Geo. V. cap. 47 (Imp.).

An Act to declare the effect of the Naval Discipline Acts when applied by the legislatures of self-governing Dominions to the Naval Forces raised by such Dominions.

[*16th December, 1911.*]

Be it enacted by the King's most Excellent Majesty, by and with the advice of the Lords Spiritual and Temporal, and Com-

mons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) Where in any self-governing dominion provision has been made (either before or after the passing of this Act) for the application to the naval forces raised by the dominion of the Naval Discipline Act, 1866, as amended by any subsequent enactment, that Act, as so amended, shall have effect as if references therein to His Majesty's Navy and His Majesty's ships included the forces and ships raised and provided by the dominion, subject, however—

(*a*) in the application of the said Act to the forces and ships raised and provided by the dominion, and the trial by court-martial of officers and men belonging to those forces, to such modifications and adaptations (if any) as may have been or may be made by the law of the dominion to adapt the Act to the circumstances of the dominion, including such adaptations as may be so made for the purpose of authorising or requiring anything, which under the said Act is to be done by or to the Admiralty or the Secretary of the Admiralty, to be done by or to the Governor-General or by or to such person as may be vested with the authority by the Governor-General in Council; and

(*b*) in the application of the said Act to the forces and ships of His Majesty's Navy not raised and provided by a self-governing dominion, to such modifications and adaptations as may be made by His Majesty in Council for the purpose of regulating the relations of the last-mentioned forces and ships to the forces and ships raised and provided by the self-governing dominions or any of them:

Provided that, where any forces and ships so raised and provided by a self-governing dominion have been placed at the disposal of the Admiralty, the said Act shall apply without any such modifications or adaptations as aforesaid.

(2) This Act shall not come into operation in relation to the forces or ships raised and provided by any self-governing dominion, unless or until provision to that effect has been made in the dominion.

(3) For the purposes of this Act, the expression "self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

2. This Act may be cited as the Naval Discipline (Dominion Naval Forces) Act, 1911.

15. ARMY (ANNUAL) ACT, 1913.
3 Geo. V. cap. 2 (Imp.).

An Act to provide, during Twelve Months, for the Discipline and Regulation of the Army.

[*25th April, 1913.*]

Whereas the raising or keeping of a standing army within the United Kingdom of Great Britain and Ireland in time of peace, unless it be with the consent of Parliament, is against law:

And whereas it is adjudged necessary by His Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom and the defence of the possessions of His Majesty's Crown, and that the whole number of such forces should consist of one hundred and eighty-five thousand six hundred including those to be employed at the depots in the United Kingdom of Great Britain and Ireland for the training of recruits for service at home and abroad, but exclusive of the numbers actually serving within His Majesty's Indian possessions:

And whereas it is also adjudged necessary for the safety of the United Kingdom, and the defence of the possessions of this realm, that a body of Royal Marine forces should be employed in His Majesty's fleet and naval service, under the direction of the Lord High Admiral of the United Kingdom or the Commissioners for executing the office of Lord High Admiral aforesaid:

And whereas the said marine forces may frequently be quartered or be on shore, or sent to do duty or be on board transport ships or vessels, merchant ships or vessels, or other ships or vessels, or they may be under other circumstances in which they will not be subject to the laws relating to the government of His Majesty's forces by sea:

And whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm; yet, nevertheless, it being requisite, for the retaining all the before-mentioned forces, and other persons subject to military law, in their duty, that an exact discipline be observed, and that persons belonging to the said forces who mutiny or stir up sedition, or desert His Majesty's service, or are guilty of crimes and offences to the prejudice of good order and military discipline, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow:

And whereas the Army Act will expire in the year one thousand nine hundred and thirteen on the following days:—

(*a*) In the United Kingdom, the Channel Islands, and the Isle of Man, on the thirtieth day of April; and

(*b*) Elsewhere, whether within or without His Majesty's dominions, on the thirty-first day of July:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Army (Annual) Act, 1913.

2.—(1) The Army Act shall be and remain in force during the periods hereinafter mentioned, and no longer, unless otherwise provided by Parliament (that is to say):—

(*a*) Within the United Kingdom, the Channel Islands, and the Isle of Man, from the thirtieth day of April, one thousand nine hundred and thirteen to the thirtieth day of April one thousand nine hundred and fourteen, both inclusive; and

(*b*) Elsewhere, whether within or without His Majesty's dominions, from the thirty-first day of July one thousand nine hundred and thirteen to the thirty-first day of July one thousand nine hundred and fourteen, both inclusive.

(2) The Army Act, while in force, shall apply to persons subject to military law, whether within or without His Majesty's dominions.

(3) A person subject to military law shall not be exempted from the provisions of the Army Act by reason only that the number of the forces for the time being in the service of His Majesty, exclusive of the marine forces, is either greater or less than the number hereinbefore mentioned.

3. There shall be paid to the keeper of a victualling house for the accommodation provided by him in pursuance of the Army Act the prices specified in the First Schedule to this Act.

AMENDMENTS OF THE ARMY ACT.

4. The officers who may be authorised to issue a billeting requisition under section one hundred and eight A of the Army Act shall include general or field officers commanding any part of His Majesty's forces in any military district or place in the United Kingdom, and accordingly in sub-section (1) of that section, for the words "any general or field officer commanding His Majesty's regular forces," there shall be substituted the words "any general or field officer commanding any part of His Majesty's forces."

5. The power of requisitioning carriages, horses, and vessels in case of emergency conferred by the Army Act shall extend so as to include a power of requisitioning aircraft of all descriptions and accordingly at the end of sub-section (2) of section one hundred and fifteen of the Army Act there shall be inserted the words "and also of aircraft of every description;" and the consequential amendments specified in the second column of the Second Schedule to this Act shall be made in the enactments mentioned in the first column of that schedule.

6. In section one hundred and forty-five of the Army Act (which relates to the liability of a soldier to maintain his wife and children) after the words "order a portion" there shall be inserted the words "not exceeding in respect of a wife and children one shilling and sixpence, and in respect of a bastard child one shilling, of the daily pay of a warrant officer not holding an honorary commission."

7. In section one hundred and sixty-four of the Army Act (which relates to the evidence of civil conviction and acquittals) after the word "judgment" there shall be inserted the words "or order;" for the words "if he was convicted, and the acquittal if he was acquitted" there shall be substituted the words "or if he was acquitted the acquittal;" and after the word "sentence" there shall be inserted the words "or of the order of the court."

SCHEDULES.

FIRST SCHEDULE.

Accommodation to be provided.	Maximum Price.
Lodging and attendance for soldier where meals furnished.	Sixpence per night.
Breakfast as specified in Part I. of the second Schedule to the Army Act.	Fivepence each.
Dinner as so specified	One shilling and one penny each.
Supper as so specified	Threepence each.
Where no meals furnished, lodging and attendance, and candles, vinegar, salt, and the use of fire, and the necessary utensils for dressing and eating his meat.	Sixpence per day.
Stable room and ten pounds of oats, twelve pounds of hay, and eight pounds of straw per day for each horse.	One shilling and ninepence per day.
Stable room without forage	Sixpence per day.
Lodging and attendance for officer.....	Two shillings per night.

SECOND SCHEDULE.

AMENDMENTS CONSEQUENTIAL ON AMENDMENT TO SECTION 115.

Provision of Army Act to be modified.	Modification to be made.
Section 31 (1), (4), (5), (7), (8).	For the words "or vessels" wherever they occur there shall be substituted the words "vessels or aircraft." For the words "or vessel" wherever they occur there shall be substituted the words "vessel or aircraft."
Section 115 (3), (4), (6), (7), (8), (9).	For the words "and vessels" wherever they occur there shall be substituted the words "vessels and aircraft." For the word "vessels" where it secondly and thirdly occurs in sub-section (3) there shall be substituted the words "vessels and aircraft." For the words "or vessel" wherever they occur there shall be substituted the words "vessel or aircraft." For the words "or vessels" there shall be substituted the words "vessel or aircraft."
Sections 116, 117, 119, and 121.	For the words "or vessels" wherever they occur there shall be substituted the words "vessels or aircraft." For the words "or vessel" wherever they occur there shall be substituted the words "vessel or aircraft."

C. ENGLISH LAW INTRODUCTION.

(See Chap. XIV.)

TABLE OF BRITISH STATUTES,

The Operation of which in the Colonies has been in question in the Courts.

Magna Charta: Enforced in NOVA SCOTIA (*Meisner* v. *Fanning*, 2 Thomp. 97; *The Dart*, Stewart, 44). Printed with R. S. British Columbia (1897) p. xvii.

Hen. III. (Charters of): Enforced NOVA SCOTIA (*Meisner* v. *Fanning*, 2 Thomp. 97).

13 Ed. I. c. 18 (Elegit): In force in NOVA SCOTIA (*Caldwell* v. *Kinsman*, James, 398).

18 Ed. I. (st. 1) c. 1 (*quia emptores*): Printed in R. S. B. C. (1897) p. xliii.

27 Ed. III., c. 17 (Stat. of Staples): Enforced in NOVA SCOTIA (*The Dart*, Stewart).

28 Ed. III., c. 13 (Aliens): Not in force in NOVA SCOTIA (*Reg.* v. *Burdell*, 1 Old. 126).

1 Richard II., c. 12 (escape): In force in NOVA SCOTIA; not in force in NEW BRUNSWICK (*Wilson* v. *Jones*, 1 Allen 658; and see *James* v. *McLean*, 3 Allen 164, and *Doe d. Allen* v. *Murray*, 2 Kerr 359).

2 Hen. IV., c. 7 (nonsuit): In force in NOVA SCOTIA (*Grant* v. *Protection Ins. Co.*, 1 Thomp. 12, 2nd ed.).

8 Hen. VI., c. 29 (aliens): Not in force in NOVA SCOTIA (*Reg.* v. *Burdell*, 1 Old. 126).

7 Hen. VIII., c. 4 (damages, replevin): In force in NOVA SCOTIA (*Freeman* v. *Harrington*, 1 Old. 358).

8 Hen. VIII., c. 16 (forfeiture): In force in NOVA SCOTIA (*ante*, p. 278).

18 Hen. VIII., c. 16 (forfeiture): In force in NOVA SCOTIA (*ante*, p. 278).

25 Hen. VIII., c. 22 (marriage): In force in ONTARIO (*Hodgins* v. *McNeil*, 9 Grant, 309).

27 Hen. VIII., c. 10 (uses): In force in NOVA SCOTIA (*Shey* v. *Chisholm*, James, 52); in NEW BRUNSWICK (*Doe d. Hanington* v. *McFadden*, Berton, 153); in ONTARIO (see *ante*, p. 286); printed in R. S. B. C. (1897) p. xlv.

27 Hen. VIII., c. 10 (enrolment): Not in force in NOVA SCOTIA (*Berry* v. *Berry*, 4 R. & G. 66); in force in NEW BRUNSWICK (*Doe d. Hanington* v. *McFadden*, Berton, 153).

28 Hen. VIII., c. 7 (marriage): In force in ONTARIO (*Hodgins* v. *McNeil*, 9 Grant 309).

28 Hen. VIII., c. 16 (marriage): In force in ONTARIO (*Hodgins* v. *McNeil*, 9 Grant 309).

31 Hen. VIII., c. 1 (partition): In force in NOVA SCOTIA (*Doane* v. *McKenny*, James, 328; *ante*, p. 280).

32 Hen. VIII., c. 32 (partition): In force in NOVA SCOTIA (*Doane* v. *McKenny*, James, 328; *ante*, p. 280).

32 Hen. VIII., c. 9 (pretended titles): In force in NOVA SCOTIA (*ante*, p. 280); (*Beasley* v. *Cahill*, 2 U. C. Q. B. 320).

32 Hen. VIII., c. 34 (leases): Printed in R. S. B. C. (1897) p. li.

32 Hen. VIII., c. 38 (marriage): In force in ONTARIO (*Hodgins* v. *McNeil*, 9 Grant 309).

32 Hen. VIII., c. 39 (relief to Crown debtors): In force in NEW BRUNSWICK (*Reg.* v. *Appleby*, Bert. 397).

33 Hen. VIII., c. 39 (lien for Crown debts): Not in force in NOVA SCOTIA (*Uniacke* v. *Dickson*, James, 287); in force in NEW BRUNSWICK (*Rex* v. *McLaughlin*, Steven's Dig. N. B.).

5 & 6 Ed. VI., c. 16 (sale of offices): In force in ONTARIO (*Reg.* v. *Mercer*, 17 U. C. Q. B. 602; and see *Foote* v. *Bullock*, 4 U. C. Q. B. 480; *Reg.* v. *Moodie*, 20 U. C. Q. B. 389).

1 & 2 Philip & Mary, c. 13 (*habeas corpus*): Printed in R. S. B. C. (1897) p. xxxvi.

5 Eliz., c. 4 (apprentices): Not in force in ONTARIO (*Fish* v. *Doyle*, Drap. 328; *Dillingham* v. *Wilson*, 6 U. C. Q. B. (O. S.) 85; *Shea* v. *Choat*, 2 U. C. Q. B. 211).

13 Eliz., c. 4 (lien for Crown debts): Not in force in NOVA SCOTIA (*Uniacke* v. *Dickson*, James, 287).

13 Eliz., c. 5 (fraudulent conveyances): In force in NOVA SCOTIA (*ante*, p. 280).

18 Eliz., c. 5 (*Qui tam* actions): In force in ONTARIO (*Garrett* v. *Roberts*, 10 Ont. App. 650).

29 Eliz., c. 4 (sheriff's costs): Not in force in NEW BRUNSWICK (*Kavanagh* v. *Phelon*, 1 Kerr, 472).

43 Eliz., c. 6 (costs): In force in NEW BRUNSWICK (*Kelly* v. *Jones*, 2 Allen, 473).

21 Jac. 1, c. 14 (forfeiture): In force in NOVA SCOTIA (*Smyth* v. *McDonald*, 1 Old. 274).

1 Car. 1, c. 1 (Lord's Day): See R. S. B. C. (1897), c. 177.

3 Car. 1, c. 1 (Lord's Day): See R. S. B. C. (1897), c. 177.

16 Car. 1, c. 10 (Star Chamber): Not in force in ONTARIO (*Stark* v. *Ford*, 11 U. C. Q. B. 363).

13 Car. II., c. 2 (costs): In force in NEW BRUNSWICK (*Gilbert* v. *Sayre*, 2 Allen, 512).

29 Car. II., c. 3 (Statute of Frauds): Printed as c. 85 of R. S. B. C. 1897; in force in ONTARIO (see *ante*, p. 286): Not introduced into MANITOBA originally (see *ante*, p. 295).

29 Car. II., c. 7 (Lord's Day): See R. S. B. C. (1897) c. 177.

31 Car. II., c. 2 (*habeas corpus*): Printed with R. S. B. C. (1897) p. xxix.

1 Wm. & Mary, c. 18 (disturbing religious meeting): In force in ONTARIO (*Reid* v. *Inglis*, 12 U. C. C. P. 191).

9 & 10 Wm. III., c. 15 (awards): In force in BRITISH COLUMBIA (*In re Ward & Victoria Waterworks*, 1 B. C. (pt. 1) 114).

1 Anne (st. 2), c. 6 (escape): Not in force in ONTARIO (*Hesketh* v. *Ward*, 17 U. C. C. P. 667).

4 Anne, c. 16 (bail bonds): In force in NEW BRUNSWICK (see *Doe d. Hanington* v. *McFadden*, Berton, 153).

5 Anne, c. 9 (escape): Not in force in ONTARIO (*ante*, p. 290).

7 Geo. II., c. 20 (foreclosure): Printed as c. 141, R. S. B. C. 1897.

9 Geo. II., c. 5 (fortune telling): In force in ONTARIO (*Reg.* v. *Milford*, 20 O. R. 306).

9 Geo. II., c. 36 (mortmain): Not in force in NEW BRUNSWICK (*Doe d. Hagen* v. *Rector of St. James*, 2 P. & B. 479);

in force in ONTARIO (*ante*, p. 287); not in force in GRENADA (*Atty.-Genl.* v. *Stewart*, 2 Mer. 142), nor in N. S. WALES (*Whicker* v. *Hume*, 7 H. L. Cas. 124; 28 L. J. Chy. 396); nor in VICTORIA (*Mayor of Canterbury* v. *Wyburn* (1895) A. C. 89; 64 L. J. P. C. 36); nor in HONDURAS (*Jex* v. *McKinney*, 14 App. Cas. 77; 57 L. J. P. C. 67).

13 Geo. II., c. 18 (*certiorari*): Not in force in NOVA SCOTIA (*ante*, p. 279); nor in NEW BRUNSWICK (*ante*, p. 282-3, note); in force in BRITISH COLUMBIA (see R. S. B. C. (1897) c. 42); and in ONTARIO (see *ante*, p. 279, note).

14 Geo. II., c. 17 (nonsuit): In force in NEW BRUNSWICK (see *Doe d. Hanington* v. *McFadden*, Berton, 153).

19 Geo. II., c. 37 (marine insurance): Printed as c. 105 R. S. B. C. 1897.

20 Geo. II., c. 19 (apprentices): Not in force in ONTARIO (see 5 Eliz., c. 4, *supra*). See R. S. B. C. (1897) c. 8.

22 Geo. II., c. 40 (sale of liquor): Not in force in ONTARIO (*Leith* v. *Willis*, 5 U. C. Q. B. (O. S.) 101; *Heartley* v. *Hearns*, 6 U. C. Q. B. (O. S.) 452).

22 Geo. II., c. 46 (attorneys): In force (in part) in ONTARIO (*Dunn* v. *O'Reilly*, 11 U. C. C. P. 404).

26 Geo. II., c. 33 (marriage): In force in ONTARIO (see *ante*, p. 288); not in force in N. W. T. *quoad* Indians (*Reg.* v. *Nan-e-quis-a Ke*, 1 T. L. R. 211).

9 Geo. III., c. 16 (*Nullum Tempus Act*): In force in ONTARIO (*Reg.* v. *McCormick*, 18 U. C. Q. B. 131); in N. S. WALES (*Atty.-Gen'l* v. *Love* (1898) A. C. 679; 67 L. J. P. C. 84).

14 Geo. III., c. 48 (life insurance): Printed as c. 203 of R. S. B. C. 1897.

14 Geo. III., c. 78 (fire spreading): In force in ONTARIO (*C. S. Ry.* v. *Phelps*, 14 S. C. R. 132); in BRITISH COLUMBIA (*Laidlaw* v. *Crow's Nest, &c., Ry.*, 14 B. C. 169; 42 S. C. R. 169.

19 Geo. III., c. 70 (*certiorari*): In force in ONTARIO (*Baldwin* v. *Roddy*, 3 U. C. Q. B. (O.S.) 166; and see *Gregory* v. Flanagan, 2 U. C. Q. B. (O.S.) 552).

21 Geo. III., c. 49 (Lord's Day): In force in ONTARIO (*Reg.* v. *Barnes*, 45 U. C. Q. B. 276).

26 Geo. III., c. 86 (fire on ships): In force in ONTARIO (*Torrance* v. *Smith*, 3 U. C. C. P. 411; *Hearle* v. *Ross*, 15 U. C. Q. B. 259).

28 Geo. III., c. 49 (magistrates): Not in force in ONTARIO (*Reg.* v. *Rowe*, 14 U. C. C. P. 307).

28 Geo. III., c. 56 (marine insurance): printed as c. 105 R. S. B. C. 1897.

39-40 Geo. III., c. 98 (Thellusson Act): Printed as c. 2 R. S. B. C. 1897.

43 Geo. III., c. 140 (*habeas corpus*): Printed with R. S. B. C. (1897) p. xxxvi.

44 Geo. III., c. 102 (*habeas corpus*): Printed with R. S. B. C. (1897) p. xxxvii.

56 Geo. III., c. 100 (*habeas corpus*): Printed with R. S. B. C. (1897) p. xxxviii.

1 & 2 Vic. c. 45 (*habeas corpus*): Printed with R. S. B. C. (1897) p. xli.

11 Geo. IV & 1 Wm. IV., c. 68 (stage coaches): Printed as c. 37 of R. S. B. C. (1897).

1 & 2 Wm. IV., c. 32 (Lord's Day): See R. S. B. C. (1897) c. 177.

3 & 4 Wm. IV., c. 105 (dower): In force in BRITISH COLUMBIA (see R. S. B. C. (1897) c. 63).

1 & 2 Vic. c. 110 (int. on Judgments): In force in BRITISH COLUMBIA (*Foley* v. *Webster*, 3 B. C. 30).

8 & 9 Vic. c. 106 (real property): Printed in R. S. B. C. (1897) p. liii.

11 & 12 Vic. c. 49 (Lord's Day): See R. S. B. C. (1897) c. 177.

13 & 14 Vic. c. 23 (Lord's Day): See R. S. B. C. (1897) c. 177.

17 & 18 Vic. c. 113 (Administration): Printed as c. 140, R. S. B. C. 1897.

20-21 Vic. c. 43 (appeal from summary conviction): In force in BRITISH COLUMBIA (*Reg.* v. *Ah-Pow* 1 B. C. (pt. 1) 147).

20-21 Vic. c. 85 (divorce): In force in BRITISH COLUMBIA (see R. S. B. C. 1897 c. 62.

21-22 Vic. c. 108 (divorce): In force in BRITISH COLUMBIA (see R. S. B. C. 1897 c. 62.

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